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OF THE RED CROSS

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INTERNATIONAL REVIEW
OF THE RED CROSS

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Because of the large amount of material concerning the *prohibitions and restrictions on the use of certain weapons*, the articles under the headings “Miscellaneous” and “Books and reviews” will appear in one of the coming issues of the *Review*.

**THE INTERNATIONAL REVIEW OF THE RED CROSS
IN 1994**

- Special prominence will be given to the follow-up to the **Final Declaration of the International Conference for the Protection of War Victims** (Geneva, August-September 1993):
 - **Comments** on the action to be taken on the Final Declaration of the Conference and **information** on follow-up activities
 - Promotion of **universal acceptance** of international humanitarian law (IHL)
 - **Implementation of IHL** — measures that States can take to meet their obligation to ensure respect for IHL
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- Looking ahead to the **Review Conference of the 1980 United Nations Convention on prohibitions or restrictions on the use of certain conventional weapons**:
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- To mark the 75th anniversary of the International Federation of Red Cross and Red Crescent Societies — **the Red Cross, the Red Crescent and vulnerable communities**.
- October 1869-October 1994: **the 125th anniversary of the *International Review of the Red Cross***.
- **History of humanitarian ideas**: The historical origins of humanitarian endeavour.

ARTICLES SUBMITTED FOR PUBLICATION
IN THE INTERNATIONAL REVIEW OF THE RED CROSS

The *International Review of the Red Cross* invites readers to submit articles relating to the various humanitarian concerns of the International Red Cross and Red Crescent Movement. These will be considered for publication on the basis of merit and relevance to the topics to be covered during the year.

● Manuscripts will be accepted in *English, French, Spanish, Arabic or German*.

Texts should be typed, double-spaced, and no longer than 20 pages (or 4 000 words). Please send diskettes if possible (*Word-perfect 5.1 preferred*).

● Footnotes (*no more than 30*) should be numbered superscript in the main text. They should be typed, double-spaced, and grouped at the end of the article.

● Bibliographical references should include at least the following details: (a) for books, the author's initials and surname (in that order), book title (underlined), place of publications, publishers and year of publication (in that order), and page number(s) referred to (p. or pp.); (b) for articles, the author's initials and surname, article title in inverted commas, title of periodical (underlined), place of publication, periodical date, volume and issue number, and page number(s) referred to (p. or pp.). The titles of articles, books and periodicals should be given in the original language of publication.

● Unpublished manuscripts will not be returned.

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● Manuscripts, correspondence and requests for permission to reproduce texts appearing in the *Review* should be addressed to the editor.

Articles, studies, and other signed texts from non-ICRC sources published in the *Review* reflect the views of the author alone and not necessarily those of the ICRC.

EDITORIAL

**PROHIBITIONS AND RESTRICTIONS
ON THE USE OF CERTAIN WEAPONS**
THREE KEY QUESTIONS

This issue of the *International Review of the Red Cross* is devoted to various aspects of prohibiting and restricting the use of certain weapons.

Whenever this type of topic is discussed, it naturally raises fundamental questions among the general public as to the meaning of the work being carried out in this area.

It appears necessary to anticipate this debate and to reply straight away to three key questions, even if they may seem obvious to experts:

- Should we not seek to eliminate war itself, rather than to regulate it?
- Are there such things as “clean” weapons and “useful” or “necessary” suffering?
- Is it the role of the Red Cross to deal with the weapons issue?

Abolish war or regulate it?

This question has been asked ever since the Red Cross and international humanitarian law came into being.

The answer lies in one word: complementarity. War is today no longer an accepted means of settling disputes and the campaign to establish an international community that refuses to accept it is perfectly legitimate, as is, moreover, the revolt against the folly and atrocities of war.

The fact remains, however, that the international community has not been able to set up some sort of system whereby justice and peace could be imposed, and that it has yet to reach a consensus on the notion of an

equitable society, which is prerequisite for defining the parameters of a peace accepted by all.

There is much work still to be done in this respect and it is more vital than ever before: the development of technology and man's invention of means capable of exterminating humankind make it imperative for the international community to lay down fundamental and procedural rules without delay for a world without war, lest it be destroyed itself.

But war is a reality now more than ever. Every effort must therefore be made to attenuate its effects, especially by educating those who must engage in warfare.

International humanitarian law sets basic standards, the observance of which distinguishes the soldier from the criminal and the violation of which perverts the most honourable of causes. Despite the horror of war, it must not be forgotten that humanitarian law has spared millions of lives and immeasurable suffering.

Such work, which is not a contradiction of, but a complement to the efforts undertaken to build a world without war, therefore merits full appreciation.

Are there such things as “clean” weapons and “necessary” suffering?

The expression “superfluous injury and unnecessary suffering”, the meaning of which is analysed in depth in this issue of the *Review*, is unfortunate. It inevitably elicits ironic reactions from the public, for it is difficult to understand how “useful” injury or “necessary” suffering can exist. This expression, however, is rooted in the fundamental idea that war is not an end in itself and does not permit more than is necessary for victory. And indeed, the essential purpose of international humanitarian law may be to eliminate “unnecessary” suffering, — unnecessary in terms of war of course, which is inherent in the application of international humanitarian law — and not all suffering: the “utility” or “non-utility” of war itself is not at issue here.

It would be wrong to belittle this purpose, especially since wars generate a type of violence which very quickly gets out of hand, and that often the original reasons for making war are forgotten and all “meaning” lost: murders of civilians or prisoners, rape or torture which are just examples of this trend, are, alas, far too common.

The terminology used in the 1980 Convention — “weapons deemed to be excessively injurious” or “having indiscriminate effects” — is more

explicit. Weapons must not have effects that are excessive in relation to their military purpose and, especially, should be sufficiently precise to avoid causing incidental injury among civilians. These expressions remain, however, highly esoteric. In actual fact, the intention is to prohibit means of war which are excessively cruel or, to put it clearly, barbaric weapons, i.e. weapons which discredit those who use them, just as certain heinous acts bring discredit to those who commit them, however worthwhile the cause they may be defending.

Heading the list of these weapons are of course the so-called weapons of mass destruction. The use of biological and chemical weapons is banned today. The conventions relating to these weapons also cover their manufacture, possession or sale. Extremely complex monitoring procedures are provided for by the Chemical Weapons Convention, since the use of chemical agents is also necessary for peaceful purposes. This global approach to the problem is indispensable, because governments could never consent to place themselves at a disadvantage before an adversary capable of wielding — if it alone possesses such weapons — a terrible instrument of blackmail.

Clearly, nuclear weapons should be the subject of a similar convention, but there has been a delay in tackling the problem for psychological or strategic reasons which would certainly merit serious re-examination in the light of today's international context.

The absence of clear regulations on these weapons and the prevailing uncertainty resulting therefrom greatly detract from the overall credibility of efforts made in the field of disarmament, for no one can guarantee that the whole world will not go up in flames if a first strike occurs.

It should be noted, however, that the strategic nature of weapons of mass destruction has justified negotiations which did not deal solely with their use. Such negotiations have extended beyond the scope of international humanitarian law alone and, for the reasons stated above, have covered all aspects of the problem, including the possession of such weapons.

As for the 1980 Convention, its ambitions are more down to earth and it relates to weapons which *a priori* have no strategic importance. Yet it is equally important because it deals with weapons which are actually used in present-day conflicts: incendiary weapons, whose use sparked cries of outrage during the Vietnam war, and especially mines, which are today scattered all over the globe and cause tremendous suffering and immeasurable social, ecological and economic damage.

In short, weapons which are particularly cruel or barbaric do exist, and it is perfectly justifiable to discuss them. If there is no consensus on

the identification of these weapons, no dialogue among political, military and humanitarian figures, no international conventions, it is simply impossible to envisage curbing the development and use of such weapons.

Is it the role of the Red Cross to deal with the weapons issue?

Weapons of mass destruction have been a long-standing concern of the International Committee of the Red Cross. In particular it took an active part in drafting the Geneva Protocol of 1925 on chemical weapons and reacted vigorously to the nuclear bombings of Hiroshima and Nagasaki. The International Red Cross and Red Crescent Movement as a whole has, moreover, adopted various resolutions dealing with this issue both during its internal meetings and jointly with governments at International Conferences of the Red Cross and Red Crescent.

Taking a general stance on an issue is one thing, however, but studying specific bans in closer detail is another.

In engaging in such work, the ICRC has acted in accordance with the mandate conferred upon it by the international community to work for the faithful application of international humanitarian law and to prepare any development thereof. As the Protocols of 1977 additional to the Geneva Conventions have reaffirmed and developed the principles and rules relating to the conduct of hostilities, it is incumbent upon the ICRC to study the incorporation of those principles and rules, and indeed all others within the scope of international humanitarian law, in other legal instruments.

The Convention of 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons is undeniably part of international humanitarian law and implements, by means of specific prohibitions and restrictions, principles and rules laid down by Protocol I of 1977. It was drafted in response to a resolution adopted by the Diplomatic Conference which had hammered out the 1977 Protocols, and on the basis of work carried out by an *ad hoc* commission set up by the Conference.

It was at this point that the ICRC realized it could best render service to the international community in this domain by bringing together experts from all specialized fields to examine every feature of weapons whose use could be prohibited or restricted. The objective is to obtain a clear definition of the technical characteristics of a weapon, its military utility and any possible substitutes for it, as well as the "human cost" its use would incur in terms of physical or psychological suffering, or adverse

effects on society or the environment. The weapon's precision, its possible neutralization after use, its cruelty or the irreversible nature of its effects are also factors for consideration.

A tough job, some might think.

True, it is difficult work, very wearing at times, but certainly worthwhile, and that is the only thing that counts. It is never easy to confront the reality of war. But the ICRC cannot close its eyes and refuse to cooperate in the development of humanitarian norms, while its delegates are deeply involved, day in and day out, in the tragic reality of war. The ICRC can make a direct contribution to certain aspects of this analysis by the experience it has acquired in conflicts, particularly in the area of war surgery.

For the most part, however, its task is to seek the most qualified experts to shed light on various aspects of a problem, to set up and conduct their meetings by pinpointing with them the issues to be examined and the conclusions which may be drawn — in short, to act primarily as a catalyst. This in-depth preparatory work enables reports to be drafted as objectively as possible, on the basis of which it is then up to the States, and to them alone, to adopt specific rules.

All modesty aside, reports drawn up by the ICRC on the basis of the work of experts on anti-personnel mines and blinding weapons are good examples of the contribution the ICRC can make. By serving as a forum for reflection on these issues, the *International Review of the Red Cross* can unquestionably increase understanding of their importance.

But this "educational" purpose of the *Review* clearly depends on the quality of the thoughts received and on this occasion we shall not resist the temptation to render a glowing tribute to Henry Meyrowitz.

At over 80 years of age, Henry Meyrowitz once again provides us in this issue with a pertinent, in-depth analysis of an important aspect of the problem under consideration here.

May his outstanding commitment and perseverance serve as an example to all those who, far or near, are called upon to address it, for the humanitarian stakes are high indeed.

Yves Sandoz

*Director for Principles,
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THE PRINCIPLE OF SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING

*From the Declaration of St. Petersburg of 1868
to Additional Protocol I of 1977*

by Henri Meyrowitz

On the 100th anniversary of the Declaration of St. Petersburg, the *International Review of the Red Cross* devoted to this important first document of the law of war an article examining the relation between the notion of the “legitimate object” of war as defined in the Declaration and the means of warfare used, whose lawfulness was declared to be limited by their conformance to that legitimate object and by their necessity. Since 1868 the law of international armed conflicts has been supplemented by Protocol I additional to the Geneva Conventions of 1949, which enlarged on the central point of the Preamble to the Declaration of 1868 — i.e. the concept of “*maux superflus*” (“superfluous injury or unnecessary suffering”); although it was not formulated as such until 1899 in Article 23 *e*) of the Regulations respecting the Laws and Customs of War on Land, it may, as we shall demonstrate, be traced back to the Declaration’s Preamble.¹ Protocol I broadened the concept’s scope of application to include methods of warfare, but it also and above all introduced a new rule of considerable import by narrowing the definition of military objectives that may lawfully be attacked.

¹ In the English translation of the Regulations of 1899 “*maux superflus*” was translated by “superfluous injury”; in the 1907 revised version this was replaced by the term “unnecessary suffering”. Since 1977, however, “superfluous injury or unnecessary suffering” has been generally adopted as a more adequate translation and it has been used throughout this article except where quoted documents provide a different translation or where otherwise specified. (For the author’s discussion of the difficulty of translating “*maux superflus*” into English see below, section I, B.) — Translator’s note.

In this article we propose to examine the development of this general concept, properly termed the principle of superfluous injury or unnecessary suffering.

I. THE ORIGIN AND DEVELOPMENT OF THE PRINCIPLE OF SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING

It is commonly acknowledged that the importance of the Declaration of St. Petersburg lies not in its provisions, which stipulate that Contracting Parties shall “renounce (...) the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances” and are now considered out of date, but in its preambular paragraphs, which have lost none of their value:

“On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St. Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the Undersigned are authorized by the orders of their Governments to declare as follows:

Considering:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity”.

It must first be observed that the notion of unnecessary suffering, to which certain governments and the majority of writers wish to reduce the Declaration’s scope, renders only half of the intended meaning of the fourth preambular paragraph since it does not convey the clearly ex-

pressed idea of unnecessary deaths. Likewise, the expression “calamities of war” in the first preambular paragraph goes beyond the notion of unnecessary suffering. Finally, it should be noted that the memorandum of the Russian Imperial War Minister read by the Chairman of the Conference and annexed to Protocol I of the military conferences held in St. Petersburg contains the following two sentences:

*“The parties at war may tolerate only those calamities which are imperatively necessitated by war. Any suffering or damage that would not have the sole result of weakening the enemy is unjustified and must in no way be permitted”.*²

The first sentence makes it clear that the notion of the necessities of war is to be understood as the essential condition for acts of violence to be considered lawful, a meaning which is only implicit in the Preamble of 1868.³ The second sentence broadens the notion of unnecessary suffering to include that of damage.

In many respects the Brussels Conference of 1874, which was also convened by the Russian government, must be seen as a follow-up to the Conference of 1868. The proceedings of this conference, which resulted in a Project of a Declaration encompassing all the rules pertaining to the law of war on land, indicate that certain expressions appearing in the Preamble of 1868 may, and even must, be interpreted as they were six years later by men who shared similar ideas. It is remarkable to note that these two documents were not the work of a diplomatic conference but of a Military Commission.⁴ It would therefore be difficult to term them “idealistic”.

A quarter of a century later, that 1874 Project of an International Declaration concerning the Laws and Customs of War provided the basis

² “Les parties belligérantes ne doivent tolérer que les calamités qui sont impérieusement nécessitées par la guerre. Toute souffrance et tout dommage qui n’auraient pas pour seul résultat d’affaiblir l’ennemi n’ont aucune raison d’être et ne doivent être admis d’aucune manière.” (Annexe au Protocole I des Conférences militaires tenues à Saint-Petersbourg, “Mémoire sur la suppression de l’emploi des balles explosives en temps de guerre”, *Nouveau Recueil général des traités...*, Vol. XVIII, Göttingen, 1873, p. 460.)

³ Concerning this point see below, part II, C, a.

⁴ Noting that “among the 32 members of the Conference, 18 were military men, 10 were diplomats and 4 were legal experts and senior officials with no connection to the military and diplomatic professions”, G. Rolin-Jaequemyns acknowledged that the results of the Conference had allayed the fears that such unequal proportions between the various professions had initially caused him. “Chronique du droit international 1871-1878”, *Revue de droit international et de législation comparée*, VII, 1875, pp. 90-91.

for the Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention of 1899; their basic provisions were repeated in the Regulations annexed to the Convention of 1907 and have acquired the status of customary law. Article 13 *e*) of the Project expressly forbids “the employment of arms, projectiles or material calculated to cause unnecessary suffering, as well as the use of projectiles prohibited by the Declaration of St. Petersburg of 1868”.⁵ In the French version, although not in the English one, this paragraph thus replaced, or rather corrected, the notion of unnecessary suffering by using the term “*maux superflus*”, which conveys the further notion of superfluous deaths expressed in the fourth preambular paragraph of the Declaration of 1868. At the same time the drafters of the Project were wrong to suggest that the Declaration of St. Petersburg could be reduced to its provisions. The error was inconsequential, however, since it was corrected in Article 23 *e*) of the Regulations of 1899 and 1907, which gave to the fourth preambular paragraph of the Declaration of 1868 the form in which it entered positive law and obtained the status of a principle of customary law.

Although not directly related to our topic, another idea recorded in the Acts of the Brussels Conference deserves, we believe, to be mentioned. In the instructions which Baron Jomini, the Chairman of the Military Commission, had received from the Russian government and which specified the aim and scope of the Project of a Declaration, the two basic ideas of the law of war are referred to: the necessities of war and “the joint interests of humanity” (“*les intérêts solidaires de l’humanité*”), an admirable expression recalling the “imprescriptible rights of humanity” (“*droits imprescriptibles de l’humanité*”) used by Baron Jomini in another document.⁶ In our opinion, it may legitimately be asked whether such formulations do not express the true foundation of the law of war more accurately than can be done by citing the notion of human rights, since it is well known that this notion has in recent years been the object of not completely unjustified criticism.

⁵ “(...) l’emploi d’armes, de projectiles ou de matières propres à causer des maux superflus, ainsi que l’usage de projectiles prohibés par la Déclaration de St. Pétersbourg de 1868”.

⁶ *Actes de la Conférence de Bruxelles de 1874 sur le Projet d’une convention internationale concernant la guerre*, Paris, Ministère des Affaires étrangères, Documents diplomatiques, 1874, pp. 4 and 48 respectively.

II. ARTICLES 23 (e) OF THE HAGUE REGULATIONS AND 35 (2) OF ADDITIONAL PROTOCOL I

The prohibition on inflicting superfluous injury or unnecessary suffering, the principle of which is contained in the Preamble to the Declaration of St. Petersburg and clearly set forth in the 1874 Brussels Project of a Declaration, entered positive law through Article 23 *e*) of the Regulations Respecting the Laws and Customs of War on Land annexed to the 1899 Hague Convention No. II, whose wording was largely adopted in Article 23 *e*) of the Regulations annexed to the Fourth Hague Convention of 1907:

*“In addition to the prohibitions provided by special Conventions, it is especially forbidden (...) e) To employ arms, projectiles, or material calculated to cause unnecessary suffering”.*⁷

From its original form as a preambular paragraph in the Declaration of 1868, the principle thus became a rule ranking equally with the other prohibitions stated in Article 23 *e*), all of which, however, are specific in nature. From both a theoretical and a formal point of view, this flaw was corrected in Article 35 (2) of 1977 Additional Protocol I, which conferred an independent status on the principle expressed in 1899 and 1907 by designating it as a “basic rule”, by adding the words “methods of warfare” to the text of Article 23 *e*) and by replacing the expression “calculated to” by “of a nature to” — although in French the corresponding expressions (“*propres à*” and “*de nature à*”) have exactly the same meaning.

To interpret this basic rule, it must thus be determined what methods or means of warfare are involved, what the text means by “injury or suffering” and what is to be understood by the qualifying terms “unnecessary” and “superfluous”.

A. “Methods and means of warfare”

In the first place it should be noted that Article 23 *e*) of the Hague Regulations and Article 35 (2) of Additional Protocol I prohibit the use of methods or means of warfare whose use is not prohibited by other rules

⁷ “Outre les prohibitions établies par des conventions spéciales, il est notamment interdit (...) e) D’employer des armes, des projectiles ou des matières propres à causer des maux superflus”.

of the law of war, all of which are concerned with military objectives as defined in Article 52 (2) to be examined below.⁸

The means referred to in the rule are limited neither to weapons in the technical sense nor to "material". On this particular point the Protocol's wording is not rigorously consistent or exact. Although Article 35 (1) and (3) refers to "methods or means of warfare" and Article 36 to "means or method of warfare", Article 51 (4) *b*) and *c*) uses the expression "method or means of combat". The general term "means" is better suited to encompass the meaning of the words "arms, projectiles and material" used in HR, Article 23 *e*), and PI, Article 35 (2), since it may be understood to refer to any device, whatever it may be, capable of inflicting superfluous injury or unnecessary suffering. By its very nature, such a rule needs to be interpreted with future developments in mind. In this regard PI, Article 36, pertaining to "the study, development, acquisition or adoption of a new weapon, means or method of warfare" is particularly relevant.

Although the status of HR, Article 23 *e*), as a rule of customary law is well established, the use of the term "methods of warfare" in PI, Article 35 (2), introduces a new element which at present has only the status of a treaty rule. While this rule derives from the principle expressed in HR, Article 23 *e*), international legislation was required to make it a rule of positive law. The same observation applies to all the rules which, whether or not they are explicitly based on the principle stated in Article 23 *e*), prohibit the use of certain means of warfare considered to be of a nature to cause superfluous injury or unnecessary suffering.

In PI, Article 35 (2), "methods of warfare" is to be understood as the mode of use of means of warfare in accordance with a certain military concept or tactic. The new prohibition relates to this concept or tactic as such, and not to the use of the particular means by which the method of warfare is applied, unless those means themselves are forbidden. PI, Article 54 (1), prohibits "starvation of civilians as a method of warfare". This new rule constitutes an application neither of the principle formulated in HR, Article 23 *e*), nor, despite the use of the expression "method of warfare", of PI, Article 35 (2), but of the principle of the immunity of civilian populations. It is clear from this example, however, that the notion of "method of warfare" is independent of the lawful or unlawful nature of the means by which the method is put into effect. Concerning "methods of warfare", the rule is directed not only at military strategists but at political leaders as well.

⁸ The Hague Regulations of 1899 and 1907 and Additional Protocol I will henceforth be abbreviated HR and PI respectively.

B. “Injury or suffering”

The above preliminary observation on the means referred to in HR, Articles 23 *e*), and PI, Article 35 (2), applies to “injury or suffering” as well: excluded from the former — or rather included, although their inclusion was needlessly repetitive — are the means specified in other rules based on the principle of the immunity of the civilian population, civilians and civilian objects, and on this principle’s two corollaries: the principles of discrimination and proportionality.

The debate on the question of what is to be understood by “superfluous injury or unnecessary suffering” has been distorted from the outset, and continues to be so, by the way the term “*maux*” has been translated in the English and German versions of the authentic French text. Whereas as early as 1874, in Article 13 *e*) of the Brussels Project of a Declaration, the expression “*souffrances inutiles*” used in the fourth preambular paragraph of the Declaration of St. Petersburg was, as we have pointed out, replaced by the concept “*maux superflus*”, the English and German translations of the Brussels Project and of Article 23 *e*) of the Hague Regulations of 1899 and 1907 use such various terms as “unnecessary suffering” (1874), “superfluous injury”, “*unnötigerweise Leiden*” (1899), “unnecessary suffering”, “*unnötig Leiden*” (1907). Although the said texts are not the authentic version, these mistaken translations of the term “*maux*” in Article 23 *e*) — a term which conveys the meaning of the notion expressed in the Preamble to the Declaration of 1868 and in Article 13 (e) of the 1874 Project of a Declaration — have had a dominant influence on the doctrinal interpretation of Article 23 *e*) by English- and German-speaking writers. The difficulty of translating the term “*maux*” into English and German may explain but in no way justify the inexactitude of the translations quoted, which retain only the meaning of suffering conveyed by the term “*maux*”, thus failing to render the additional meanings of superfluous deaths, on the one hand, and material damage on the other.

In the English version of Protocol I, which is not a translation, this mistake was corrected as far as the language allowed by using the term “superfluous injury or unnecessary suffering” to convey the meaning of “*maux superflus*”. However, the official German — or more precisely German, Austrian and Swiss — translation worsened the error of 1899 and 1907 by translating the expression used in the English document by “*überflüssige Verletzungen oder unnötige Leiden*”. The notion of material damage which the word “injury” conveys is thus absent from the German translation of PI, Article 35 (2), and it is likewise doubtful whether the expression “*überflüssige Verletzungen*” may be understood to encompass

the idea of superfluous deaths. Finally, the German expression may prove to be difficult to apply to the specific effects of new means of warfare resulting from advances in science and technology. German-speaking countries, all of which have ratified Protocol I, are of course bound not by the translation but by the authentic text of the document to which their signatures are affixed.⁹

Without taking the qualifying word “*superflus*” into account, the variously rendered term of “*maux*” used in HR, Article 23 *e*), and PI, Article 35 (2), must be understood as referring first of all to any assault on the life or physical and mental integrity of persons who, according to the customary rules of the law of war and Additional Protocol I, may lawfully be the object of acts of violence if such acts are lawful in themselves. In the second place, the same term may be applied to damage caused to physical objects. As we have already seen, the notion of damage, as applied to that of “*maux superflus*”, was discussed in the debates that led to the adoption of the Declaration of St. Petersburg. Neither the text of PI, Article 35, nor that of Article 36 pertaining to “new weapons” imply that the rules set forth in the two articles, including Article 35 (2), refer solely to methods and means of warfare directed against combatants. Finally, the rule of Protocol I representing by far the most important application of the principle formulated in Article 35 (2), i.e. the second sentence of Article 52 (2), prohibits attacks against objects which constitute genuine military objectives but do not answer to the definition of lawfully attackable military objectives (see below, part III).

C. The notion of “superfluous injury or unnecessary suffering”

a) The qualifying terms “superfluous” and “unnecessary”, added to “injury” and “suffering”, indicate both the characteristic which renders

⁹ The only rule explicitly based on PI, Article 35 (2), is the prohibition of the use of “any booby-trap which is designed to cause superfluous injury or unnecessary suffering”, a provision set forth in Article 6 (2) of Protocol II annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980. In the French version of this document the expressions “*blessures inutiles*” and “*souffrances superflues*” are appropriately used, as is the expression “designed to” instead of “of a nature to”. The third preambular paragraph of the Convention, whose text is based on that of PI, Article 35 (2), refers to the rule stated therein as a “principle”. Although it makes no allusion to this rule, the single article constituting Protocol I annexed to the Convention and stating that “it is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays” may also be considered to be based on PI, Article 35 (2).

use of the methods and means of warfare referred to in HR, Article 23 e), and PI, Article 35 (2) unlawful, and the *ratio* of the prohibition. These terms immediately give rise to the following question: superfluous or unnecessary in relation to what? The question provides its own answer: in relation to what is necessary. But such an answer again raises the question: necessary to or for what? To establish the meaning of the expression “superfluous injury or unnecessary suffering” and thus define the scope of this basic rule, it is thus essential on the one hand to understand the meaning of the word “necessary” that is implicit in it, and on the other hand to attempt to define the criterion whereby the lawfulness or unlawfulness of the methods and means of warfare referred to HR, Article 23 e), and PI, Article 35 (2), are assessed.

To answer these questions it is necessary to refer to the Preamble to the Declaration of St. Petersburg and to the 1974 Brussels Project of a Declaration, or, more specifically, to the preliminary debates on the latter document. The draft presented by Russia to the Conference of 1874 includes a sentence that precisely conveys the meaning of the concept of “military necessity” as expressed in the Preamble to the Declaration of St. Petersburg and is the best formulation of the notion - or rather the principle - of necessity in the law of war. In the section entitled “General principles”, the Russian draft defines the role of military necessity in the following terms:

“3. — *To achieve the object of war, every means and method conforming to the laws and customs of war and justified by the necessities of war are allowed*”.¹⁰

The expression “object of war” (in French “*but de la guerre*”) recalls the same term to be found in the second preambular paragraph of the French text of the Declaration of 1868. On this particular point, the development of the law of war has not followed the terminology used in the Declaration of St. Petersburg or in the quoted paragraph from the Russian draft of 1874. The notion of “object of war” (expressed thus or in similar terms) has been abandoned in international law because the fact that its meaning may be indefinitely extended makes it an entirely unsuitable point of reference for what belligerents and third-party States

¹⁰ “3. — Pour atteindre le but de la guerre, tous les moyens et toutes les mesures, conformes aux lois et coutumes de la guerre, et justifiés par les nécessités de la guerre, sont permis.” A. Mechelynck, *La Convention de la Haye concernant les lois et coutumes de la guerre sur terre d'après les Actes et Documents des Conférences de Bruxelles de 1874 et La Haye de 1899 et 1907*, Ghent, 1915, p. 24.

must consider as lawful or unlawful in the conduct of war. Just like the related idea of “cause”, the notion of “object” is therefore irrelevant to the law of armed conflicts.¹¹ The same observation applies to values, a notion often associated with that of “cause” and which, as a point of reference, is by definition discriminatory and essentially incompatible with the basic principle of the equality of belligerents before the law of war.

The merit of the quoted paragraph from the Russian draft lies in the fact that it highlights the normative role of the notion or principle of “military necessity”, a term which in legal doctrine has replaced the expression “necessities of war” while retaining the same meaning. The paragraph states that for means and actions to be lawful, it is not enough for them to be in accordance with the rules of the law of war; their choice and the use made of them must also be justified by military necessity. By virtue of PI, Article 52 (2), this stipulation also applies to military objectives. The principle of military necessity thus serves as a further compulsory limitation, in addition to that of the rules of the law of war themselves.

It is instructive not merely from an historical point of view to compare the above paragraph from the Russian draft of 1874 with the article on the same subject in the Instructions for the Government of Armies of the United States in the Field, prepared in 1863 by the jurist Francis Lieber after the beginning of the American Civil War.

“Art. 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”.

The difference between the two texts is quite clear. The American formulation implies, indeed prescribes a line of thought in complete reverse to that on which the Russian draft is based. In Lieber’s text the reasoning proceeds as follows: 1) Is a certain specific means or measure indispensable — or, to be more precise, considered as such by the military leaders in charge — for securing the ends (object) of war (disregarding all considerations pertaining to the question of the lawfulness of these ends in themselves, an issue which was not as important then as it is

¹¹ Cf. the last preambular paragraph of Protocol I: “*Reaffirming* further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict (...)”.

today)? 2) If the answer is yes, then it must be determined whether that means or measure is allowed by the relevant rules of the law of war.

The positive law of armed conflicts recognizes the concept of military necessity only in a special sense that is quite different from that of a restrictive principle, i.e. military necessity allowing derogation from a rule. Using various expressions meant to convey different degrees of gravity, such as “necessity”, “absolute necessity”, “imperative necessity”, “military necessity”, “important” or “inescapable military necessity”, some treaty rules allow for situations in which a belligerent may, exceptionally and only within the limits of what the invoked situation of necessity requires, refrain from observing the prohibition or prescription that otherwise applies. This possibility, which is strictly confined to those provisions that explicitly allow for it, is obviously excluded as regards all the specific rules based on the principle expressed in HR, Article 23 *e*), and PI, Article 35 (2). Military necessity understood in this sense raises no problem either in theory or in practice.

In the commentary on its draft articles on “State responsibility”, the International Law Commission, discussing Article 33 (“State of necessity”) of the provisional text, devoted two paragraphs to a third acceptance of the concept of necessity, one not recognized in international law. “In relation to [the rules of the law of war] (...)”, states the Commission, “what is involved is certainly not the effect of ‘necessity’ as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather the effect of ‘non-necessity’ as a circumstance precluding the lawfulness of conduct which that rule normally allows. It is only when this ‘necessity of war’, the recognition of which is the basis of the rule and its applicability, is seen to be absent in the case in point, that this rule of the special law of war and neutrality must not apply and the general rule of the law of peace prohibiting certain actions again prevails. (...) The Commission does not believe that the existence of a situation of necessity of the kind indicated [i.e. “the object of which is to safeguard the vital interest of the success of military operations against the enemy and, in the last resort, of victory over the enemy”] can permit a State to disobey one of the above-mentioned rules of humanitarian law [applicable to armed conflicts]. (...) even in regard to obligations of humanitarian law which are not obligations of *jus cogens*, it must be borne in mind that to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a

principle which is in absolute contradiction with the purposes of the legal instruments drawn up".¹²

However closely connected they may be, the principle of superfluous injury or unnecessary suffering and the notion, or principle, of military necessity in the sense of an additional limitation are not identical. Besides the fact that the notion of superfluous injury or unnecessary suffering has been part of the codified law of war for almost a century, whereas no instrument explicitly mentions the notion or principle of military necessity in the sense of a limitation, the two notions are also different in the following respect: whereas a specific rule based on HR, Article 23 *e*), or on PI, Article 35 (2), must be applied automatically and to the letter in every case to which it pertains, the principle of military necessity may be applied according to circumstances. In other words, the principle of superfluous injury or unnecessary suffering was established, once and for all, when it was adopted as a law, and the relevant rule must be applied even in those cases where use of the means to which it refers would obviously not cause superfluous injury or unnecessary suffering. The notion or principle of military necessity, on the other hand, is applied by specific acts and decisions taking the particular circumstances of actual situations into account.

For the same reason, it would be wrong to think that the basic rule stated in PI, Article 35 (2), is related to the principle of proportionality. Such an interpretation is also wrong for two other reasons. In the first place, the term "principle of proportionality" is generally reserved for evaluating whether the proportional relationship between the indirect losses and damages suffered by civilians ("collateral damage", in military terminology) and "the direct and concrete military advantage anticipated" is lawful with respect to a given attack — or, according to the interpretations given to PI, Article 51 (5), by certain Western States, with respect to "an attack considered as a whole, and not only isolated or particular parts of the attack". This proportional relationship is a lawful one and the attack does not come under the provisions prohibiting indiscriminate attacks (Article 51 [4] only when "the incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof" would not be "excessive in relation to the concrete and direct military advantage anticipated". Secondly, in the case of HR, Article 23 *e*), and PI, Art-

¹² *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2: Report of the International Law Commission to the General Assembly on the work of its thirty-second session (A/CN.4/SER.A/1980/Add. 1 (Part 2)), p. 46, paras. 27 and 28.

icle 35 (2), which apply to suffering or injury inflicted on combatants and damage to material military objectives, the very idea of proportionality is irrelevant: the rule adopted by international law-making bodies that the suffering, injury or damage likely to result from a certain means or method of warfare is “unnecessary” and “superfluous” absolutely prohibits any recourse to that means or method, and hence excludes any evaluation of the proportional relationship between the suffering, injury or damage that would be caused if it were used and “the concrete and direct military advantage” that might be “anticipated”.

The question of a criterion remained. Although that of the “object” or “ends” of war had rightly been abandoned, the law of war had not replaced it by another concept. However, whereas this had not been considered an omission when the Hague Regulations of 1899 and 1907 were drafted, it proved to be one during the two World Wars. The omission was repaired in the Additional Protocol of 1977 by the introduction of the concept of “concrete and direct military advantage” (Article 51 [5, *b*]) or “definite military advantage” (Article 52 [2]). As we have just seen with regard to Article 51 (5, *b*) and as will be shown even more clearly below in discussing Article 52 (2), the meaning and role of this concept is diametrically opposed to the notion of “object” or “ends”.¹³

b) As for the meaning of the terms “unnecessary” and “superfluous” in connection with “injury” and “suffering”, it is necessary to set aside interpretations based either on the presumed evil intentions of potential infringers of HR, Article 23 *e*) or PI, Article 35 (2), or on the results of such persons’ acts as seen in terms of their military usefulness. While the first category comprises interpretations associating the notion of superfluous injury or unnecessary suffering with sadism, cruelty and inhumanity, the second includes interpretations which emphasize what are held to be the irrational and counterproductive aspects of using a means prohibited by HR, Article 23 *e*).

In reply to the latter type of interpretation, based on the association of the two words “uselessly” and “sufferings” in the Preamble to the Declaration of 1868, it may be pointed out that when applied to the concept of superfluous injury or unnecessary suffering the qualifying notion of their uselessness does not necessarily mean “without military

¹³ The two references to the notion of “military advantage” are not equivalent. In particular, they are different with regard to their respective functions.

usefulness or rationale". The use of a means prohibited by HR, Article 23 *e*), or of a method of warfare contrary to PI, Article 35 (2), may indeed provide a belligerent with a military advantage of a tactical or strategic nature which in certain cases may have a decisive influence on the outcome of the conflict. In this connection, the mistaken opinion of a number of legal experts and military experts, according to whom all the rules of the law of war serving to govern the lawful use of violence may be assimilated to the military doctrine known as "economy of means", must be refuted. Such an opinion is wrong from both a logical and a philosophical point of view as well as in fact. What distinguishes the rules of the law of war is that they demand a sacrifice from the belligerents by requiring them to forgo an advantage that a State which observes a given rule would in fact be in a position to obtain if it infringed that rule, and that it cannot obtain by resorting to another available means considered lawful. In logic and in fact, the law of war and the economy of means principle are diametrically opposed, since these two categories of thought and action have different purposes. Whereas the military principle aims at limiting a belligerent's own losses (in men, material, resources and money), the law of war - especially in those rules based on the principle of superfluous injury or unnecessary suffering and on the notion of military necessity as defined above — aims at limiting the losses and damage inflicted on the enemy.

c) As for those factors which define the unnecessary or superfluous character of suffering or injury, it should be noted that they may be either quantitative or qualitative in nature. The Preamble to the Declaration of St. Petersburg took both aspects into consideration: the qualitative one in the idea of "useless sufferings" and the quantitative one in the idea of superfluous deaths. However, it should also be observed that when the quantitative aspect is taken into consideration in the law of war it takes on a qualitative character, since it must be judged on the basis of legal criteria in order to be made the object of a rule. In HR, Article 23 *e*), the two aspects are merged in the notion of "*maux superflus*" (incompletely translated in that document first by "superfluous injury" and then by "unnecessary suffering"), which, because it is a normative notion, is essentially a qualitative one.

The motivations for the basic rule stated in PI, Article 35 (2), have given rise to the opinion that it should be considered unlawful to resort to means or methods of warfare that continue to produce harmful effects after hostilities have ended, thus affecting, strictly speaking, not the "civilian population" of the State against which they were used, but its

entire "population" at a time when the latter has ceased to be an enemy.¹⁴ On this particular point it may be argued that the principle of superfluous injury or unnecessary suffering has a direct application, since it prohibits the adoption and implementation of strategies - of "methods of warfare" - that aim specifically at weakening an enemy State beyond the duration of a conflict by targeting objectives whose destruction is calculated to cripple that State's ability to achieve economic and industrial recovery when it is no longer an enemy. However, there is no need to invoke the principle of superfluous injury or unnecessary suffering to point out that such a strategy is unlawful: a great number of the attacks which would serve to carry it out are explicitly prohibited by PI, Article 52 (1) and (2).

III. ARTICLE 52, PARAGRAPH 2, OF PROTOCOL I

a) Authors have not called sufficient attention to the far-reaching scope of PI, Article 52 (2), which reads as follows:

"Attacks shall be limited strictly to military objectives. 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".¹⁵

¹⁴ Cf. the second sentence of PI, Article 55 (1), prohibiting "the use of methods or means of warfare which are intended or may be expected to cause such damage [wide-spread, long-term and severe] to the natural environment and thereby to prejudice the health or survival of the *population*" - and not of the *civilian* population.

¹⁵ The concept of "military advantage" was first referred to in the 1923 Hague Draft Rules of Aerial Warfare, formulated by a Commission of Jurists which had been set up in accordance with a resolution of the 1922 Washington Conference on the Limitation of Armaments and was composed of experts from France, Italy, Japan, the Netherlands, the United States and the United Kingdom. The Hague Draft Rules, which had only the status of a recommendation, stated in Article 24 (1): "Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent." (Dietrich Schindler and Jiri Toman (eds.), *The laws of armed conflicts. A collection of conventions, resolutions and other documents*, Dordrecht, 1988, p. 210.)

The wording of the second sentence of Article 52 (2) is based on the following paragraph of the Resolution adopted in 1969 by the Institute of International Law, whose terms were likewise adopted with some slight changes by the ICRC in Draft Protocol I:

"There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them," *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary*, ICRC, Geneva, 1973, p. 60

The resolution was adopted by 60 votes to 1, with 2 abstentions.

When commenting on Article 52, authors should not be misled by its title, “General protection of civilian objects”, or by the fact that it is the first article of Chapter III (itself entitled “Civilian objects”), Section I, Part IV: “Civilian population”. After having stated the principle that “civilian objects shall not be the object of attacks or of reprisals” (which is new only with respect to the prohibition of reprisals), paragraph 1 of the article stipulates: “Civilian objects are all objects which are not military objectives as defined in paragraph 2.” The definition of military objectives in the second sentence of the paragraph is not confined to determining what is to be understood by “military objectives”. Indeed, the originality and importance of the rule lies in the fact that within the general category of military objectives, which it exhaustively defines, it establishes a distinction between two sub-categories: that of objects which are military objectives and therefore legitimate targets and that of objects which are not. In itself, this distinction is not a permanent one: the same object may lawfully be attacked in some circumstances and may not be so in others, all the while remaining a military objective in law, that is to say a potentially lawful target.¹⁶

The article was adopted by 79 votes to 0, with 7 abstentions. The interpretative declarations made by certain States at the time of the Protocol’s ratification bear only on a minor point. More important is the fact that in 1976 the United States, which to this day has not ratified Protocol I, officially adhered in advance to the terms of the second sentence of Article 52 (2) by inserting an amendment in the United States Army handbook on the law of war (*FM 27-10*) that reproduces the wording of this sentence as it was adopted by consensus, in commission, during the second session of the Diplomatic Conference.¹⁷

b) From a theoretical and a practical point of view, the rule established by the second sentence of Article 52 (2) represents the most remarkable application both of the principle of superfluous injury or unnecessary suffering and of the principle of necessity.

The underlying mechanism of this rule may be considered a model application of the third article of the Russian draft of 1874 quoted above. The first element of the definition — the constant element — corresponds

¹⁶ With the order of its two paragraphs reversed, the terms of Article 52 (1) and (2) were adopted word for word in Article 2 (4) and (5) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) annexed to the Convention of 10 October 1980, as well as in Article 1 (3) and (4) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).

¹⁷ See *Headquarters, Department of the Army: FM 27-10 - The Law of Land Warfare*, Change No. 1, 15 July 1976, para. 40, c.

to the expression “consistent with the laws and customs of warfare” used in the Russian document, while the second — the variable element — finds a parallel in “justified by the necessities of war”. Although it takes a different form, the method used by the ICRC to define military objectives in its Draft Rules of 1956 (revised in 1958) incorporates a similar mechanism. Article 7 (2) of this document reads as follows: “Only objectives belonging to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives”. Paragraph 3 specifies: “However, even if they belong to one of these categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage”.¹⁸

The second sentence of Article 52 (2) is also related to the principle of military necessity by the fact that the rule is applicable through specific decisions made “in the circumstances ruling at the time”. It should be noted that the time factor, which in this expression plays a decisive role in limiting the definition of military objectives that may lawfully be attacked, plays the same role in the first element comprised in the definition, where it is conveyed by the condition “make an effective contribution to military action” — i.e. the military action of the adversary, who is in possession of the objective in question.

It is less easy to specify the connection between the second sentence of Article 52 (2) and the principle of superfluous injury or unnecessary suffering. The fact that the rule applies to objectives and not, as in the Declaration of 1868 and HR, Article 23 *e*), to means of warfare, cannot be argued to constitute a reason for not assigning the same basis to the later rule. Indeed, the notion of “methods of warfare” itself, introduced in PI, Article 35 (2), encompasses considerably more than is conveyed by the expression “arms, projectiles and material” used in the text of 1899 and 1907. In the final analysis, the link between the rule established by Article 52 (2) and the principle stated in St. Petersburg lies in their shared purpose, concerned as it is with reducing injury or suffering by setting as narrowly as possible “the technical limits at which the necessities of war ought to yield to the requirements of humanity”, to quote the words used in the first paragraph of the Preamble to the Declaration of 1868.¹⁹

¹⁸ ICRC, *Draft rules for the limitation of the dangers incurred by the civilian population in time of war*, second edition, Geneva, 1958, pp. 66, 70.

¹⁹ Contrary to violations of the prohibition on indiscriminate attacks defined in Articles 51 (5), *b*, and 57 (2) *a*, iii, violations of the rule stated in the second sentence

c) The term “military objectives” in the first sentence of Article 52 (2) denotes both material and human military objectives. According to its wording, however, the second sentence pertains only to military objectives that are “objects”. The question therefore naturally arises whether the *ratio legis* for this important rule might not apply with equal force (allowing for the differences involved) to combatants as well. The *ratio legis* is twofold, comprising both an explicit and an implicit aspect. The ICRC had already previously given the explicit reason in connection with the corresponding article in the Draft Rules of 1956; it did so again when it proposed, in draft Protocol I, the rule on which the text of the second sentence of Article 52 (2) is based. In the ICRC’s understanding, the new rule is intended to reinforce the protection of the civilian population by adding, to the principle of the immunity of the civilian population, individual civilians and civilian objects (Articles 51 [2] and 52 [1]) and to the two complementary principles of distinction (ban on indiscriminate attacks, Article 51 [4] and [5a]) and of proportionality (Article 51 [5b]), a further protection which would indirectly result from the limitation of military objectives that may lawfully be attacked. The implicit *ratio legis* for the second sentence of Article 52 (2) is the very one which underlies the principle of superfluous injury or unnecessary suffering. It must therefore be asked whether these two reasons should not apply to attacks against members of armed forces as well.

Strictly speaking, the extension of the rule stated in Article 52 (2) to combatants would not have the purpose of protecting them, but of excluding them, under certain circumstances, from the definition of military objectives that may lawfully be attacked. However great a difference is entailed with respect to the original field of application of the principle of superfluous injury or unnecessary suffering, it may be held that this is not enough to dismiss the idea of extending the rule stated in the second sentence of Article 52 (2) to include armed forces. The hypothetical cases in which the extended rule would, *mutatis mutandis*, be applicable to combatants are in fact much fewer than those involving material military objectives. Indeed, on account of the great mobility of armed forces the two conditions expressed in the definition — the first one in the formula

of Article 52 (2) are not included among the grave breaches of Protocol I listed in its Article 85. However, Article 52 (2) is not meant to be an exhaustive enumeration of war crimes, even in the case of violations of a rule established by the Protocol. Thus, the fact that violations of the rule stated in the second sentence of Article 52 (2) are not explicitly repressed provides possible infringers with no protection against the risk of being prosecuted for war crimes, and more specifically for breaches of the laws and customs of war. However, the problem related to the principle *nullum crimen, nulla poena sine lege* does arise here. See below the corresponding text under note 28.

“make an effective contribution to military action”, the second one by the words “in the circumstances ruling at the time” — would require a fairly broad interpretation.

On the basis of a reasoning that could not have been much different from the one we have just explained, the ICRC placed members of the armed forces at the top of the list of categories of military objectives included in its Draft Rules of 1956. The above-quoted Article 7 (3), which defined, by elimination, the military objectives that may lawfully be attacked, was therefore meant to apply to combatants as well as to objects. The Committee did not adopt this proposed rule in draft Protocol I, probably because it feared — admittedly with some reason — that such an innovation could not but meet with an opposition that might jeopardize the adoption of the rule stated in Article 52 (2).

The lack of a treaty rule extending the principle expressed in the second sentence of Article 52 (2) to members of armed forces does not mean that it is necessary to consider as immutable, and even less as an imperative rule of the law of war, the centuries-old opinion that, by virtue of their status, combatants may lawfully be attacked without restriction in any place, at any time and under any circumstances whatsoever, admitting only those exceptions provided for in the rules pertaining to specific situations: PI, Article 37, (prohibition of perfidy), PI, Article 40, (quarter), PI, Article 41, (safeguard of an enemy *hors de combat*) and PI, Article 42 (1), (occupants of aircraft). To declare that it is unlawful, for example, to shower bombs and shells on troops that are completely defeated, encircled or retreating, and in any case practically defenceless, thereby not even affording them the opportunity to surrender, the principle of superfluous injury or unnecessary suffering expressed in HR, Article 23 *e*), and PI, Article 35 (2), or else PI, Article 40, may exceptionally be invoked. In point of fact, the latter rule should not be understood as being strictly limited to the stipulation that “it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis”. Attacks conducted with such a purpose in mind are prohibited by this article whether they have been ordered or are spontaneous and whether the intention of leaving no survivors has been announced to the enemy or not. In that this rule should be seen as an application both of the principle of humanity and of that of superfluous injury or unnecessary suffering,²⁰ our example shows that the possibility

²⁰ For a similar interpretation establishing a connection between Article 35 and the prohibition of refusing quarter expressed in Article 40, see ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987, p. 476, para. 1598.

of extending to combatants the rule stated in the second sentence of Article 52 (2) must be left open.

IV. STATUS AND ROLE OF THE PRINCIPLE OF SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING

The last paragraph of the Declaration of St. Petersburg, in determining the Preamble's status and role, thereby defined the place of this instrument in the system of standards set by the law of war:

"The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity".

The Declaration thus makes clear that "the principles" expressed in the Preamble are not applicable in and of themselves: their application depends on the adoption, by convention, of specific rules pertaining to new types of weapons — or to a certain type of weapon that has existed for years in the arsenals of certain States but has not yet been generally recognized to be unlawful — whose use is deemed to be contrary to the stated "principles". This term, in the plural, may be summed up in what we have called the principle of superfluous injury or unnecessary suffering. The authors of the Declaration assigned it the status and role of a directing principle requiring that the lawfulness of means and (since Article 35 [2]) of methods of warfare shall be judged according to the criterion represented by the principle itself. Such a concept of the principle expressed in 1868 goes beyond that of a "source of inspiration" suggested by Professor Cassese,²¹ whose opinion the ICRC in its Commentary would appear to share.²²

²¹ A. Cassese, "Weapons causing unnecessary suffering. Are they prohibited?" in *Rivista di Diritto Internazionale*, Vol. 48, 1975, pp. 12-42: "a very significant source of inspiration" (p. 37).

²² *Op. cit.*, p. 404. For an interpretation in agreement with ours, see Erich Kussbach, "Internationale Bemühungen um die Beschränkung des Einsatzes bestimmter konventioneller Waffen", in *Oesterreichische Zeitschrift für öffentliches Recht und Völkerrecht*, Vol. 28, 1977, pp. 1-50. The author sees in the principle stated in HR, Article 23 e), a "general regulating principle" ("*ein allgemeines Regulativ*") and a "juridical principle of the law of war" ("*ein Rechtsgrundsatz des Kriegsrechts*"), and not merely a moral principle (p. 24).

In spite of the terms used in the quoted paragraph from the Declaration of 1868, it would be impossible to rule out the possibility that the use of a certain means or method of warfare may be prohibited by a customary rule. In such a case, the rule's emergence will be preceded by a period of uncertainty during which the unilateral or multilateral claims that this means or method of warfare is illegal will meet with the denial of the State or States which are in possession of it and intend to preserve it, or whose military doctrine continues to provide for the possibility of resorting to it although, according to its opponents, such a method of warfare is contrary to PI, Article 35 (2). Despite the risk of partiality involved, the opinion of third-party States concerning the disputed means or method of warfare is crucial to the possible formation of a rule prohibiting its use. Such an opinion may be expressed, for example, in the form of a paragraph in the military manual on the law of war issued by a State which judges that the use of a certain means with which the armed forces of one or several third-party States are equipped, or that the possible resort to a certain strategy or tactic used or considered for use by a certain third-party State, are prohibited by PI, Article 35 (2).

The recent military manual on the law of armed conflicts issued by the Federal Republic of Germany proceeds in such a manner. After recalling the ban on using dum-dum bullets (Declaration Concerning Expanding Bullets, which prohibits "the use of bullets which expand or flatten easily in the human body", and was adopted by the First Hague Peace Conference of 1899) as well as the customary prohibition of using small-calibre weapons, paragraph 407 of this manual prohibits the use of a new category of projectiles. These are not referred to by their name but by their specific effects, considered as answering to the definition of superfluous injury or unnecessary suffering. The prohibited projectiles are those "of a nature to burst or deform while penetrating the human body, to tumble early in the human body, or to cause shock waves leading to extensive tissue damage or even a lethal shock". At the end of the paragraph, the authors of the manual mention what they consider to be the formal basis for this prohibition: PI, Article 35 (2).²³

The effects thus succinctly described are those of the small-calibre high-velocity weapons used by the United States army during the Vietnam War. The lawfulness of these weapons was often questioned by experts,

²³ Bundesministerium der Verteidigung, *Humanitäres Völkerrecht in bewaffneten Konflikten. Handbuch*, August 1992. The English translation issued by the ministry is entitled *Humanitarian law in armed conflicts. Manual*.

non-governmental organizations and jurists²⁴ as well as by the United Nations. At the ICRC's invitation, a group of international experts called upon to examine the question of weapons of a nature to cause superfluous injury or unnecessary suffering or have indiscriminate effects studied the medical effects of projectiles of the type referred to in the paragraph quoted from the manual. In the report on these meetings published by the ICRC, the paragraph in which the description of these weapons is summed up concludes with the following statement: "Because of the tendency of high-velocity projectiles to tumble and become deformed in the body, and to set up especially intense hydrodynamic shock-waves, the wounds which they cause may resemble those of dumdum bullets".²⁵ Stressing the purely documentary character in the report, the ICRC observed that "it does not formulate any concrete proposals for the prohibition or limitation of the use of the weapons under consideration, although the ICRC and the experts alike hope that this may one day be possible".²⁶ In the opinion of the German Ministry of Defence, the prohibition of using the weapons described in paragraph 407 of the manual comes within the scope of positive law.

Juridically speaking, this is a unilaterally adopted position. As a result, however, and even if other States do not follow suit, the governments of countries whose armed forces are or later will be equipped with the kind of weapon described in the quoted paragraph will be required to prove that the use of such projectiles is lawful. Although it would not constitute sufficient proof to argue that no treaty rule prohibits the use of the weapons under consideration, this argument nonetheless has a certain

²⁴ See for example Giorgio Malinverni, "Armes conventionnelles modernes et droit international", in *Annuaire suisse de droit international*, Vol. XXX, 1974, pp. 23-54. The article concludes as follows: "(...) high-velocity projectiles obviously belong to the category of weapons causing superfluous injury or unnecessary suffering" (p. 47).

²⁵ ICRC, *Weapons that may cause unnecessary suffering or have indiscriminate effects. Report on the work of experts*, Geneva, 1973, p. 38.

²⁶ *Ibid.*, p. 8. Although the type of weapon under consideration was discussed at the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, the debates did not result in a protocol pertaining to the regulation of this means of warfare. The Conference had to limit itself to adopting a resolution which, recalling that dumdum bullets were prohibited by the Declaration of 1899, requested States to continue research into the special traumatic and ballistic effects of small-calibre weapons and called on governments to show great caution in the perfecting of these weapons. — Concerning another new means of warfare, laser weapons, and the questions they raise from a humanitarian point of view, see Louise Doswald-Beck (ed.), *Blinding weapons. Reports of the meetings of experts convened by the International Committee of the Red Cross on battlefield laser weapons, 1989-1991*, ICRC, Geneva, 1993.

importance in positive law in helping to assess to what degree the respective opinions of those who hold that the use of the disputed means of warfare is lawful or not are accepted by the international community. In this respect, it must be acknowledged that the opinion expressed in the quoted paragraph of the manual belongs to *lex ferenda*.²⁷

The most recent application of the customary principle prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering is Article 3(a), of the statute of the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, adopted by Security Council Resolution 827 of 25 May 1993. Heading the list of violations of the laws or customs of war that come within the Tribunal's competence, Article 3 (a) mentions "[the] employment of poisonous weapons or other weapons calculated to cause unnecessary suffering".

This paragraph gives rise to the following criticism:

Concerning the form. — Between the use of "poisonous weapons" prohibited by HR, Article 23 (a), and the use of weapons of a nature to cause superfluous injury or unnecessary suffering, prohibited by Article 23 *e*), no relation exists in fact or in law that can justify listing them together as constituting a single violation. While it is to be regretted that the authors of the English version committed the negligence of adopting the restrictive translation of 1907 (made so by its use of the expressions "calculated to cause" and "unnecessary suffering"), it is to be regretted even more that the authors of the French version translated this doubly flawed text back into their own language instead of keeping to the authentic French version of Article 23 *e*).

²⁷ This is probably the correct way to interpret the cautious opinion of a writer who commented on the above-quoted paragraph in D. Fleck (ed.), *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, C.H. Beck, Munich, 1994.

On this particular point we are in agreement with the opinion of Professor Kalshoven, who does "not share the optimism" of those who "believed that 'unnecessary suffering' and 'indiscriminate effects' provided standards that could simply 'be applied to existing and possible future weapons'. For any such straightforward application, their component parts on the one hand and the characteristics of modern weaponry on the other provide far too many complications and difficulties of interpretation." ("The conventional weapons convention: underlying legal principles", *IRRC*, No. 279, November-December 1990, pp. 510-520 (p. 517)).

Concerning the content. — Neither one of these two violations is mentioned in the provisions of the Geneva Conventions or in those of Protocol I, nor are they included in the definition of war crimes provided in Article 6 (b) of the Statute of the International Military Tribunal of Nuremberg. However, neither the article of the Conventions pertaining to grave breaches nor Article 85 of Protocol I claim to define war crimes in an exhaustive manner, and Article 6 (b) of the Statute of the Nuremberg Tribunal itself specifies that it is not all-inclusive. No objection can be raised against making the use of poisonous weapons a violation, that is to say an indictable offence, and indeed the prohibition of such weapons is a well-established rule of customary law. The same may not be said, however, for the prohibition of using “weapons calculated to cause unnecessary suffering”. Although the use of such weapons is termed a violation in the Report of the United Nations Secretary-General containing the draft Statute as subsequently adopted by the Security Council, to term it as such was to ignore the concern expressed in that Report that “the application of the principle *nullum crimen sine lege*” requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise”.²⁸ The terms in which the violation under consideration is formulated are much too general to meet this explicit requirement by the Secretary-General, which derives from the basic conditions laid down by international criminal law and by the domestic criminal law of States governed by the rule of law. In fact, only a very limited number of specific treaty rules meet this requirement, and they are applications of the prohibition stated in HR, Article 23 *e*). The only ones that can actually be cited are the prohibition of using dum-dum bullets and the prohibition “in all circumstances [of using] any booby-trap which is designed to cause superfluous injury or unnecessary suffering” set out in Article 6 (2) of Protocol II annexed to the 1980 Convention.

One further point should not be omitted when dealing with the topic under examination. It is important to assert that the principle of superfluous injury or unnecessary suffering is equally applicable to international *and* non-international armed conflicts, with no need to distinguish between conflicts coming within the provisions of Article 3 common to

²⁸ S/25704, p. 9.

the four Geneva Conventions and conflicts having reached the level defined in Article 1 of Protocol II thereto. Such applicability is imperative, we believe, for fundamental reasons of humanity.²⁹

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²⁹ For a similar opinion see the Declaration on the rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts, adopted in 1990 by the Council of the International Institute of Humanitarian Law (*IRRC*, No. 278, Sept.-Oct. 1990, pp. 404-408 [p. 405]). On the applicability of the three Protocols of 1980 to non-international armed conflicts, see also Yves Sandoz, "The question of prohibiting or restricting certain conventional weapons", *IRRC*, No. 279, Nov. - Dec. 1990, pp. 473-476, and Maurice Aubert, "The International Committee of the Red Cross and the problem of excessively injurious or indiscriminate weapons", *ibid.*, pp. 477-497 (pp. 493-494).

**REPORT OF THE
INTERNATIONAL COMMITTEE
OF THE RED CROSS**

for the

REVIEW CONFERENCE

of the

1980 UNITED NATIONS 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**

INTERNATIONAL COMMITTEE OF THE RED CROSS

February 1994

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PART I

THE SIGNIFICANCE OF THE REVIEW CONFERENCE IN THE CONTEXT OF PRESENT-DAY ARMED CONFLICTS AND WEAPON DEVELOPMENTS

I. The importance of the 1980 Convention and the role of the Review Conference

The International Committee of the Red Cross has first-hand experience of the real consequences of the many armed conflicts now taking place and of the actual use and effects of weapons. It therefore has a particular interest in ensuring that the law takes into account the realities of the use of weapons in order to effectively reduce the amount of suffering caused in armed conflicts.

International humanitarian law aims at reducing the suffering caused by the use of weapons by prohibiting indiscriminate attacks and by prohibiting the use of weapons that are by nature indiscriminate or of a nature to cause unnecessary suffering or superfluous injury. These international customary rules are universally applicable and are codified in major international humanitarian law treaties, in particular Protocol I of 1977 additional to the Geneva Conventions of 1949. The ultimate purpose is to mitigate the suffering and damage caused during armed conflicts as much as is practically possible. In order to achieve this effect, it is essential that international humanitarian law treaties, including the 1980 UN Convention on certain conventional weapons, be ratified widely and implemented correctly.

The 1980 Convention has the purpose of codifying and developing specific rules on the use of weapons, either by totally prohibiting the use of certain weapons, or by regulating their use, so that the customary principles of international humanitarian law on the use of weapons are given concrete expression in treaty form. However, in many respects this Convention has not achieved its

aim, not only because it has been insufficiently ratified or implemented, but also because in many ways it does not provide the means needed to prevent the excessive damage that is actually being caused in armed conflicts, the majority of which are non-international. In particular, the Convention relies too extensively on regulating behaviour in relation to the use of certain weapons, which is frequently difficult to enforce, rather than prohibiting the use of certain types of weapons altogether. Further, no parallel measures have been taken in the disarmament context, although they are proposed in the preamble to the Convention.

The Review Conference is a unique opportunity to make a careful assessment of the real problems caused by the use of certain weapons and of the reasons for these problems, so as to decide on the most effective measures to redress the situation. It is also an opportunity to decide on measures that may be necessary to prevent major problems arising from weapon developments in the near future.

Mines

The most urgent problem which the Review Conference must address is that of landmines. Despite the fact that the legal regulation of the use of mines was carefully discussed in the 1970s and that these deliberations culminated in Protocol II of the 1980 Convention, the situation that we are facing today as a result of landmine use is a disastrous one. It is estimated that there are about 100 million uncleared mines in the world, rendering huge expanses of land uninhabitable and uncultivable. It is estimated that every month landmines kill about 800 people and maim thousands, most of the victims being innocent civilians, especially children. The worst feature of mines is that they continue to cause damage for years or even decades after the end of hostilities. Mine clearance is a very slow and dangerous task and in some situations virtually impossible. It takes many years to clear very small areas and casualty rates among mine-clearing teams are appallingly high.

Part of the problem is that mine-laying has been undertaken in ways that are in violation of the law, and there would have been fewer casualties had the law been respected. However, Protocol II has serious shortcomings as it stands and it is clear that in order to try to find an effective way of improving the situation it is essential to consider much firmer measures, including complementary arms control measures. This issue will be examined in Part II of this report.

Weapon developments

The Review Conference is also a critical opportunity for a more forward-looking assessment of the likely problems that weapons production and use are going to create.

The situation caused by the use of modern landmines is a pertinent example in this respect. These weapons have always been considered normal conventional

weapons and certainly not weapons of mass destruction that merited important international arms control measures. However, a certain amount of thought and foresight would have shown that the introduction of plastic mines which can be sown in large quantities, which are cheap and widely available, and which remain active for an indefinite period would lead to the grave situation that we now face.

The international community does not have to wait for catastrophes to happen, but can rather anticipate probable dangers. In this respect it needs to take into account the types of conflicts that actually occur and the way in which weapons proliferate. Once a weapon is fielded it is very difficult to stem its proliferation and widespread use. Therefore it makes sense to devote some time to taking preventive steps that would avert enormous problems at a later stage.

Part III, Section II of our report looks at some of these issues, including the present development of directed energy weapons which could well begin to be used in the near future.

Implementation and non-international armed conflicts

The Review Conference is also an opportunity to address the fact that most damage inflicted by weapons, frequently as a result of indiscriminate use, occurs during internal armed conflicts, that effective implementation mechanisms are necessary for achieving better respect for the law, and that the Convention is lacking in both these respects. These issues will be addressed in Part III, Section I of this report.

II. The need for regular review of the 1980 Convention

The 1980 Convention was intentionally structured in the form of a basic Convention with annexed Protocols so as to provide for the addition of further Protocols to specifically regulate, or prohibit where appropriate, the use of new weapons. The use of weapons is, of course, subject to international customary law but it is clear that specific treaty regulation is preferable in that it favours clarity of legal obligations.

Article 36 of Protocol I of 1977 additional to the Geneva Conventions of 1949 requires States Parties to review new developments in weaponry:

“In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party”.

The 1980 Convention provides for a review procedure, which ought to be used regularly. Such reviews could evaluate the effectiveness of the provisions of the Convention and also take timely preventive measures in relation to new developments, whether entirely new weapons or new designs of existing weapons, that are likely to create problems.

III. The need for a reinforcement of the complementary roles of international humanitarian law and arms control law in the light of present circumstances

The proliferation of non-international and unconventional armed conflicts, in which the combatants have access to modern weaponry by various means, has resulted in conflicts that are far more murderous and damaging than in the past. As the case of mines has shown, the wide availability of small weapons has contributed to a situation which, if left unchecked, is likely to grow worse.

This fact requires a fundamental review of how to use humanitarian law and arms control law most effectively in order to limit the damage caused by these spreading conflicts.

Arms control and disarmament law

Arms control and disarmament law has for the most part concentrated on containing the threat caused by the existence of nuclear weapons and, for the last two decades, on biological and chemical weapons. More recently, however, international attention has been drawn to the dangers of the unsupervised trade in conventional weapons, although this is at present limited to an optional register of the transfer of certain conventional weapons.

This report will indicate that serious consideration should be given to extending disarmament and arms control measures to support new regulations on the use of mines and possibly other weapons.

International humanitarian law

International humanitarian law originally controlled the damage caused by weapons by altogether prohibiting the use of weapons that were perceived as excessively cruel or "barbaric". The centuries-old customary prohibition of the use of poison was based on the perception of its treacherous nature and the fact that poisoned weapons inevitably caused death. The prohibition of the use of explosive bullets by the St. Petersburg Declaration was similarly based on the wish to outlaw weapons which inflicted excessively cruel injuries or which normally killed the victim. Subsequently humanitarian law prohibited the use of

expanding bullets (dum-dum bullets) in Hague Declaration IV,3 of 1899 and chemical and biological weapons in the Geneva Protocol of 1925.

Since 1925, however, international humanitarian law has not made any significant progress in prohibiting the use of specific weapons, but has instead concentrated on imposing limitations on their use in the hope of sparing the civilian population as far as possible.

However, this approach has grave shortcomings in that it assumes that all concerned will in fact abide by the rules regulating the use of weapons and that this will indeed spare civilians from the effects of the weapons in question. In reality neither of these assumptions is correct, for not only are weapons in practice used indiscriminately by a very large proportion of the persons that have them, but also, even if they are used correctly, civilians frequently suffer their "incidental" effects. The result is that unless the use of certain weapons is altogether prohibited, civilians will inevitably become victims of them.

Further, the rule prohibiting the use of weapons of a nature to cause unnecessary suffering or superfluous injury to combatants is still a valid legal rule, but unless it is applied to new weapons it will fall into desuetude.

One should think very seriously, therefore, of returning to the system of altogether prohibiting the use of weapons whose effects are particularly cruel and whose use is not indispensable.

The complementary effects of humanitarian law and arms control law

Given the reality of the proliferation and transfer of weapons, it is evident that prohibiting the use of a certain weapon will not completely prevent its use if the weapon continues to be manufactured and stockpiled. Therefore a prohibition on use is more effective if it is accompanied by arms control and disarmament measures, which should include verification mechanisms.

Conversely, it is unrealistic to assume that certain restrictions on the transfer of weapons will in practice prevent these weapons from reaching prohibited destinations, and still less that these restrictions will be sufficient to prevent them from being used in the many types of conflicts around the world.

The example of the development of legal restraints on chemical weapons

The problem of the potential development of chemical weapons was first addressed at the First Hague Peace Conference of 1899, which adopted a Declaration (IV,2) prohibiting the "use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases". This Declaration did not receive the complete support of the major nations at the time and, of course, was not accompanied by any verification mechanisms.

It was the use of chemical weapons in the First World War, and the fact that public opinion was horrified by the effects of chemical weapons on soldiers, that led to the move to firmly ban their use in the 1925 Geneva Protocol. It is interesting to note that most delegates to the diplomatic conference did not make a minute legal analysis of the effects of chemical weapons as compared with other weapons, or make a careful assessment of their military necessity as compared with the suffering they caused, but rather boldly stated that the use of these weapons was “barbaric” and “horrific” and therefore to be outlawed.

At the time it was suggested that legal measures taken should be limited to a ban on the export of chemical weapons. However, the majority of States thought it important to make a statement of principle that their use was prohibited. History has certainly proved that a mere export ban would not have prevented chemical weapons from being used like any other weapon, as it would not have had the effect of stigmatizing chemical weapons that outlawing them did.

It is certainly also true that if the treaty regulating chemical weapons had merely indicated that they should only be aimed at military objectives, with the usual provisions to limit incidental civilian injury, as may well have been the case had the issue arisen not in the 1920s but some decades later, the situation would be very different now.

Subsequent experience showed, however, the need for additional prohibitions on the manufacture and stockpiling of chemical weapons, together with effective verification mechanisms.

Therefore experience, which took almost a century to develop in the case of chemical weapons, has revealed the need to take probable new weapon developments seriously, to take preventive measures through the total prohibition in principle of weapons that are likely to be particularly damaging, and to back these up with effective disarmament and arms control measures.

IV. The role of the International Committee of the Red Cross

Pursuant to its mandate to work for the mitigation of suffering caused by armed conflicts, and in particular to work for the faithful application of international humanitarian law and to prepare its development, the ICRC has over the years taken a number of initiatives in relation to weapons.

One of these initiatives was the appeal made by the ICRC to governments and to the League of Nations to take action to prohibit the use of chemical weapons, which contributed to the adoption of the 1925 Protocol.

Work on the 1980 Weapons Convention was initiated at a Conference of government experts which was convened by the ICRC and which met for several weeks in 1974 in Lucerne and again in 1976 in Lugano. The ICRC had prepared

a preliminary report for this Conference based on consultations with experts and subsequently published the report of the Conference, which was later used as a basis for the United Nations Conference that adopted this Convention.

Purpose and structure of this report

The present report, which the ICRC has prepared for the forthcoming Review Conference, is intended to serve as a working document for the Group of Governmental Experts that will prepare the Conference. It is divided into two main parts.

Part II concerns the problem of landmines and is an analysis of the advantages and difficulties of the various proposals that have been made to amend Protocol II in order to achieve better regulation of landmines. This analysis takes into account the recommendations of the participants in the Montreux Symposium and of the military Symposium which the ICRC hosted, as well as other proposals.

Annex I to this report contains a summary of the principal findings of the Montreux Symposium; the full report has been sent to all States and is available from the ICRC.

The results of the Symposium of military experts are reproduced in full in Annex II.

Part III briefly examines other issues of relevance to the Convention which could be examined once progress has been made on the issue of landmines. The ICRC is of the opinion that it would be appropriate for these subjects to be on the agenda of the Review Conference, even if they do not necessarily result in agreed amendments or further protocols, and that more complete documentation will facilitate careful analysis once the Review Conference turns its attention to these subjects.

PART II

MINES

SECTION I

HUMANITARIAN, LEGAL AND MILITARY ASPECTS OF LANDMINES: NEED FOR THOROUGH DISCUSSION

Every year, thousands of men, women and children are victims of anti-personnel mines. Landmines not only kill but mutilate horrendously, strike blindly at all human beings alike, and continue to spread terror for years or even decades after the hostilities have ended. The effects of mines are frequently inconsistent with certain fundamental rules of international humanitarian law which require parties to distinguish between civilians and combatants, prohibit the use of indiscriminate weapons, and also prohibit the use of weapons that are liable to cause excessive suffering.

The magnitude of the damage caused by anti-personnel mines, in terms of both human suffering and long-term socio-economic destabilization, as witnessed by ICRC delegates and medical teams, prompted the ICRC to hold the Montreux Symposium on anti-personnel landmines in April 1993. It was recognized that the problems created by the use of mines are complex and multifaceted and that there would certainly not be a single solution to the present situation. Therefore, in addition to the surgical and orthopaedic needs of mine victims, the Symposium discussed the difficulties of mine clearance, the actual military use of mines in different situations, the technical construction of mines and possible developments, the manufacture and trade in mines, and, of course, the present legal regulation of mines and its shortcomings. It was clear that further legal regulation would require consideration of all the factors concerned in order to arrive at the most effective solution.

During the Montreux Symposium, the need was felt to secure a wider and more detailed military viewpoint on the operational use of landmines. Towards this end, the ICRC organized a Symposium of military experts on the military utility of anti-personnel landmines, in January 1994.

Annex I contains the results of the Montreux Symposium. These have been grouped under five themes: humanitarian, medical and socio-economic costs of landmines; prohibition of the use of certain types of mines; proposals for modification of the 1980 Convention and of its Protocol II; possible arms control and disarmament measures; and information to the public.

Annex II reproduces the results and proposals of the Symposium of military experts.

Possible amendments to Protocol II of the 1980 Convention

Section II of this Part will now give an overview of the various amendments to Protocol II that were proposed during the two symposia organized by the ICRC and by other persons or bodies. All suggestions pertinent to the possible amendment of Protocol II have been included. They are not necessarily alternative suggestions but could be combined. This report analyses the advantages and possible disadvantages of each proposal and indicates the conditions that would be necessary to make the proposal most effective.

For ease of reference, the proposals are presented in two groups:

- proposals on the prohibition of certain types of mines;
- proposals for further regulations on how mines are used.

SECTION II

ANALYSIS OF VARIOUS PROPOSED AMENDMENTS TO PROTOCOL II

A number of proposals were made by experts during the two symposia the ICRC hosted as well as by other persons or bodies on possible approaches that could be adopted to improve the situation caused by landmines. Most of these proposals have their advantages and difficulties and need to be considered in the light of a number of relevant factors. With a view to helping the Review Conference find the most realistic and effective solution possible, this part of the report will briefly analyse each of the proposals bearing in mind the considerations that need to be taken into account by the Review Conference.

I. Proposals suggesting the prohibition of the use of certain types of mines

The Review Conference could amend Protocol II of the Convention by introducing a prohibition on the use of certain types of mines or a prohibition

on the use of mines which do not have certain features. As this Convention is a humanitarian law treaty, it can only address the regulation or prohibition of the *use* of certain types of mines.

However, given the low price and widespread availability of mines, it is clear that any new prohibition relating to use must be accompanied by appropriate arms control/disarmament measures in order to make the rule effective. Therefore discussions during this Review Conference should take into account the arms control measures that would be necessary in order to choose which would be in fact the most effective rule.

1. Prohibition of the use of all anti-personnel mines

This is the proposal that was supported by a number of participants at the Montreux Symposium and is being put forward by many non-governmental organizations, Senator Leahy of the USA and other influential individuals and organizations.

There is no doubt that from the humanitarian point of view this would be the best option, as a total ban would have the effect of *stigmatizing* the use of mines and a violation of the rule would be easily provable. Although it is recognized that lawless groups would be likely to make their own explosive devices if anti-personnel mines were not available, such improvised devices would not be available in the vast quantities that antipersonnel mines are and the problem would therefore be reduced. The advantage of this option over a ban on anti-personnel mines without self-destruct mechanisms is that the latter would still be around for the duration of their life and, in the case of internal armed conflicts that frequently last for years, if not decades, they are still likely to cause civilian casualties. It is recognized, however, that with self-destruct mines there would not be the cumulative effect that results from decades of laying live mines. Another advantage of a total ban is the fact that there would not be the danger of the technical failure of self-destruct or self-neutralizing devices and that refugees could immediately return home at the end of hostilities.

In order to be effective, however, this option would require the following:

- (i) General agreement among States, which would need to weigh the advantages and disadvantages of the continued use of anti-personnel mines. The meeting of military experts came to the conclusion that anti-personnel mines are the most effective means of achieving the objectives for which they are used. Alternative systems would require greater resources and the armed forces would be likely to suffer greater losses during the conflict.

However, these considerations are to be balanced against the loss of and damage to innocent civilian lives, the loss of agricultural land, and the enormous resources necessary for mine clearance and for care of the victims of mines. These negative effects of mines would not be altogether avoided

by the use of mines that self-destruct or self-neutralize, for the reasons outlined above.

- (ii) There should also be an arms control agreement to ban the manufacture and stockpiling of anti-personnel mines, together with appropriate verification procedures. This verification might not have to be quite as strict as would be necessary if it were agreed that mines need self-destruct and self-neutralizing mechanisms, as the stigmatization of mines would have its own effect (as with the banning of the use of chemical and biological weapons in 1925).
- (iii) There would need to be a very careful definition of anti-personnel mines that are to be banned, especially as dual use systems exist and any vagueness in the wording would allow the prohibition to be evaded.
- (iv) It would be useful to have an additional requirement that anti-tank mines must be both detectable and fitted with neutralizing mechanisms, for although these mines are causing fewer casualties than anti-personnel mines they are still very dangerous and ought not be left around for an indefinite period of time.

2. Prohibition of the use of scatterable (remotely-delivered) mines that are not fitted with self-destruct mechanisms

This was one of the proposals of the Symposium of military experts. The advantage of the incorporation of self-destruct mechanisms is that it would reduce the need for mine clearance and also cause fewer civilian casualties in the long term. Civilian casualties from mines would not be avoided as they would still occur during the active life of the mines and would continue to be caused in the longer term by mines whose self-destruct mechanism failed to function. Civilian casualties are particularly likely to persist in internal armed conflicts which typically last for years and sometimes even decades, and where widespread mining tends to occur. However, one would avoid the build-up effect of the laying and relaying over many years of minefields that remain active throughout the hostilities and for years afterwards.

In order to make this proposal both effective and realistic, the following conditions need to be met:

- (i) There must be general agreement on the proposal, otherwise those who do not agree will continue to use scatterable systems without self-destruct mechanisms.
- (ii) There must be an arms control agreement to the effect that only scatterable mines with self-destruct mechanisms can be manufactured, and appropriate verification measures instituted. This is essential as there would be a temptation to manufacture scatterable mines without self-destruct mechanisms, which would be cheaper and therefore assured of a market.

- (iii) There must be a defined time-limit on the active life of the mine once it is laid. This is critical, as without such a specification the regulation is meaningless. From a humanitarian point of view, the time-limit should be as short as possible. If the mines in question continue to be active for years, there will be no reduction in the damage that mines inflict on the civilian population.
- (iv) The mechanism chosen must not depend on the good faith of the user for its correct functioning. Practice has shown that one cannot rely on proper behaviour. The self-destruct mechanism must therefore be incorporated into the mine in such a way that it cannot be easily tampered with and that the mine will automatically self-destruct at the end of a given period once the mine is activated.
- (v) The mechanism chosen must have an extremely low failure rate. As scatterable mines are laid thousands at a time, any failures will continue to pose a serious threat to the civilian population.
- (vi) This proposal should not be taken in isolation, as the problems caused by mines emplaced by hand or vehicle are equally serious.

3. Prohibition of the use of anti-personnel mines that are not fitted with self-destruct mechanisms

This proposal, which was put forward by participants at the Montreux Symposium, would apply to *all* anti-personnel mines, whatever their method of delivery and intended use.

Self-destruction in the case of anti-personnel (AP) mines was considered preferable to self-neutralization for a number of reasons and the Symposium of military experts concurred with this, with the possible exception of jumping and directional fragmentation (Claymore) mines (see point 5 below).

There would need to be a definition of “anti-personnel mines” for the purpose of such a rule and, in order for the rule to be effective, the considerations outlined in point 2 above (scatterable systems) would also apply here.

As with the proposal to incorporate self-destruct systems in scatterable mines, this proposal would certainly reduce the numbers of civilian casualties, although it would not eliminate the problem.

4. Hand-emplaced anti-personnel mines used for tactical purposes and scatterable mines should have a self-destruct mechanism, but hand-emplaced mines used for long-term and barrier minefields need not have such a mechanism

The participants in the Symposium of military experts made a distinction between hand-emplaced mines that are used for tactical purposes during a given conflict, on the one hand, and those used for long-term protective purposes, such as protecting a border, on the other. In their opinion, hand-emplaced mines that

do not self-destruct should still be permitted for long-term and barrier minefields, but would have to be used under tightly controlled circumstances.

Although these are clearly two different military uses, there are serious objections to basing an international regulation on this distinction:

- (i) If hand-emplaced mines continue to be manufactured, there is at present no means of controlling that they are sent only to countries that need them for such long-term barrier minefields and that they are indeed only used for that purpose.
- (ii) Very few mines would need to be manufactured for these types of minefields because of their limited number. Further, if the mines do not self-destruct, they do not need regular replacement. How could one control that only this small amount is manufactured and by which companies? Again, how could one control to which countries they are sent, according to which criteria and on whose decision?
- (iii) Given the above difficulties, and the very great danger from a humanitarian point of view of allowing such “dumb mines” to continue to be manufactured, it would be preferable to require that all AP mines have self-destruct mechanisms. This would mean that barrier minefields would need to be replaced regularly (probably every year). This is essentially a financial problem but it should be seen against the enormous cost of demining that would otherwise continue to be needed as well as the medical, social and infrastructural costs that result from the use of “dumb mines”.

5. Directional fragmentation mines do not necessarily have to be fitted with a self-destruct mechanism, but jumping mines must be fitted with either a self-destruct or a self-neutralizing mechanism

The military experts drew a distinction between these anti-personnel mines and point detonating mines, as directional fragmentation mines and jumping mines have a much greater radius of lethality. They pointed out the disadvantage in equipping these types of anti-personnel mines with self-destruct mechanisms: there would be a greater danger to anyone who might be passing at the moment of self-destruction. The difficulty with self-neutralization is that one cannot be certain that the mechanism has functioned, and parts of the mine might still be available for reuse.

It was thought that directional mines would be reused and are therefore less likely to be left in place to pose a threat to civilians. It will have to be established whether one can assume that these mines will indeed not be left lying around, or whether it would be safer to equip them with a self-neutralizing mechanism that would take effect after a certain period if the mine is not switched off for reuse.

With regard to jumping mines, it will have to be assessed whether it would be safer to provide for the incorporation of a self-destruct mechanism or a self-neutralizing mechanism, taking into account the advantages and disadvantages of each system.

6. Prohibition of the use of mines that are not detectable

This proposal was put forward by the participants in both symposia. The military experts agreed that in future anti-personnel mines should be manufactured so as to be detectable. However, they were unable to agree on the feasibility of rendering existing stocks of mines detectable. The problem of future stocks will be considered separately below.

The proposal to require that mines be made detectable is a useful one, although it should be combined with one or more of the other proposals in this section in order to have a real impact on the worldwide problem of mines. The requirement must provide, however, that the detectable element in the mine cannot be easily removed. There must also be verification that mines not conforming to these specifications are not manufactured.

7. Prohibition of the use of anti-tank mines that are not fitted with self-neutralization mechanisms

Anti-tank mines were not discussed at any length during the ICRC-hosted symposia, as these concentrated on anti-personnel mines. However, it was indicated during the Symposium of military experts that anti-tank mines frequently have a self-neutralizing device. This is because these mines are expensive and therefore frequently need to be reused, and to equip them with self-destruct devices would be too dangerous for passers-by.

It would therefore be useful to require that all anti-tank mines be fitted with neutralizing mechanisms, and it would have to be verified that only this type is manufactured.

8. Prohibition of the use of mines with anti-handling devices

This was a proposal put forward at the Montreux Symposium. It was felt that the military purposes of these devices, that is, to lower the morale of the enemy and act as a deterrent to breaching a minefield, did not justify the difficulty they create for mine-clearance operations after hostilities.

It was pointed out during the meeting of military experts that anti-handling devices are fitted to anti-personnel mines used to protect anti-tank mines. This makes it far more difficult for the opposing forces to remove the anti-tank mines. However, the major problem is that these anti-handling devices render mine-clearance efforts extremely difficult and dangerous. The majority of the partici-

pants in this meeting agreed that if anti-personnel mines fitted with anti-handling devices were also equipped with self-destruct mechanisms there would be less of a problem, as instead of attempting to clear the minefield one would simply wait until the mines had self-destructed.

The difficulty with this approach is that:

- (i) It may well be necessary to clear an area before the active life of the mines has expired, and the longer the active life of the mines, the more likely this will be.
- (ii) If there is no agreement on and effective implementation of a new rule that all mines are to have self-destruct or self-neutralizing devices (self-destruct for point detonating anti-personnel mines and self-neutralization for jumping and possibly Claymore anti-personnel mines and anti-tank mines), then the problem of anti-handling devices will remain as acute as ever.

This proposal would, of course, have to be combined with some of the other proposals as by itself it would not have any major effect on the problems caused by the use of mines.

9. Existing stocks should be modified to be in conformity with the new law or destroyed

Although this is an arms control or disarmament measure and therefore is not actually a proposed amendment to Protocol II of the 1980 Convention, it is a subject that should be kept in mind during the Review Conference.

It is estimated that in existing stocks there may be up to one hundred million mines, most of which are undetectable and do not incorporate self-destruct or self-neutralization mechanisms. Should the Review Conference decide to render illegal the use of certain types of mines (e.g. anti-personnel mines without self-destruct mechanisms), the question will arise as to what should be done with these stocks. States which accept the new prohibition would not themselves be able to use them and, in the case of small anti-personnel mines, it would not be possible to add such mechanisms.

There is a great danger in allowing such stocks to continue to exist, for they are likely to be used in one way or another, making the massive problem that has been created world-wide by the use of such mines much worse. It would be simple to add a means of detecting the mine, by applying a metal strip for example, but this in itself would not prevent the enormous numbers of civilian casualties that will continue to occur before comprehensive mine-clearance is undertaken. There would also need to be verification that this modification to mines in stock has indeed been carried out, but given the limited result this measure would have in humanitarian terms, it is questionable whether such a proposal is worthwhile.

The only major difficulty relating to the destruction of stocks is financial. However, the cost of destruction and of possible restocking with the new mines has to be compared with the enormous cost of mine-clearance operations, which would have to be stepped up if existing stocks continue to be used. This is in addition, of course, to the cost of medical care, loss of agricultural land, etc.

II. Proposals on further regulations on how mines are used during an armed conflict and cleared after hostilities

The existing provisions of Protocol II of the Convention relate exclusively to the way mines are to be used during an international armed conflict and to clearance operations after active hostilities. The effectiveness of these provisions depends entirely on combatants behaving in conformity with the law.

Although this is the case with all humanitarian law rules, non-compliance with the law has particularly serious effects in the case of the use of mines because of the fact that they continue to be active for such long periods. Prohibition of the use of certain types of mines is therefore necessary, as one cannot ensure behaviour in accordance with the law even in areas where various implementation mechanisms exist.

However, the participants in both ICRC-hosted symposia felt that rules on the way mines are used are still necessary. The Montreux Symposium looked at some of the shortcomings of Protocol II as it now stands (see pages 43-44), and both this Symposium and that of the military experts made some suggestions on possible improvements.

1. Introduce implementation mechanisms

The experts noted that a major shortcoming of the 1980 Convention is its lack of implementation mechanisms. Although it may be possible to conceive of implementation mechanisms appropriate only for the use of mines and booby-traps, and therefore incorporated in Protocol II, it is proposed that the more logical place to introduce implementation mechanisms is in the body of the Convention itself. This proposal will therefore be examined in more detail in Part III of this report.

Possible arms control/disarmament measures relating to the manufacture, stockpiling and transfer of mines were examined by participants in the Montreux Symposium (see pages 45-47). Such measures would probably not be included in Protocol II to the 1980 Convention as it is a humanitarian law treaty, but they would be necessary in order to render new rules on the use of mines effective.

2. Extend the applicability of the law to non-international armed conflicts

As the majority of conflicts are non-international, and as the appalling situation caused by the widespread and indiscriminate use of mines has occurred primarily as a result of these conflicts, it would make sense to extend the applicability of the law on the use of mines to non-international armed conflicts.

However, such an extension of the applicability of the law would normally be effected by an amendment to the Convention itself which specifies its scope of application. This proposal will therefore be considered in Part III of this report.

It should be noted, however, that in regard to the use of mines a mere extension of the applicability of the Convention to non-international armed conflicts is even less likely to have the effect of ensuring respect for the rules than is the case in international armed conflicts. There will inevitably be more violations of the law in non-international conflicts, and the report of the military experts indicates why insurgents are likely to continue relying extensively on the use of mines, especially if they are easily available (see pages 52-53). It is of particular interest, therefore, to seriously consider a total ban on the use and manufacture of certain types of mines so that forces in these conflicts do not have access to them. It is recognized that this will not stop insurgent forces from making explosive devices by hand and that each of these devices is likely to be very dangerous. However, there is a limit to the number they could make and they therefore would not be able to strew vast numbers of them around as is presently the case with mines manufactured on a large scale.

3. Introduce stricter rules relating to the precautions that should be taken to protect civilians

The participants at the Montreux Symposium noted that the duty to take precautions to protect the civilian population that is contained in Article 3 of Protocol II is very weak in that it is limited to taking "all feasible precautions". Some participants suggested that the word "feasible" should be removed as it leaves too large a loophole, but others were of the opinion that this would place an impossible burden on the military in some situations.

The Symposium of military experts thought that all efforts should be made to mark minefields by fences or other means, even if they comprise mines that self-destruct or self-neutralize. They also suggested that there should be a duty to mark scattered minefields if at all possible, although they recognized that this is less feasible in most circumstances. Such provisions are in fact already included in Protocol II as it stands, although the reference to precautions in Article 3 could be rendered more specific by indicating that fences, etc., are to be used wherever possible for all types of minefields.

In any event, the report of the Montreux Symposium shows that one cannot put too much trust in the rule requiring such precautions, not only because they are frequently not taken, but also because experience has shown that markers such as fences and signposts tend to be removed by the local population for their own use as they are seen as valuable items.

4. Introduce stricter rules on the recording of minefields

The participants in the Montreux Symposium criticized the provisions of Protocol II relating to the recording of minefields. There is a duty to record "pre-planned" minefields (Article 7) but no definition of this term. With regard to all other minefields, parties are only required to "endeavour" to record. A more careful definition of the content of the legal duty to record should be considered; it was suggested that records should also indicate the types of mines used.

The Symposium of military experts suggested that the recording of minefields should be required even in the case of mines that self-destruct or self-neutralize. With regard to mines that are scattered by aircraft or artillery, their general area of use should be recorded. Self-destruct or self-neutralization times should also be recorded.

Although the situation would be improved if these proposals were carried out, one cannot place too much reliance on the duty to record for the following reasons:

- (i) in the light of past experience, even if there were an absolute rule that all minefields (or at least their general area of use) had to be recorded without exception, it is unlikely that the rule would be generally respected, especially in non-international armed conflicts;
- (ii) in the confusion of war, records frequently get lost;
- (iii) the recording of minefields is less effective than is generally expected as mines (especially scattered ones) frequently move to quite different locations owing to rainfall (which can displace mines kilometres from their original position) and to the movement of the soil or sand.

5. Introduce the requirement that self-destruct times and other minefield information should be declared to all parties at the end of the hostilities

This would be a useful step if it were carried out, but there are reasons to doubt that such a provision could be relied on:

- (i) States did not accept a rule to this effect during the negotiation of the 1980 Convention, and Article 7, para. 3(a), sub-para. (ii) and (iii), indicate only that such information is to be given once territory is no longer occupied by the adverse party. This reticence may still exist.

- (ii) Such information will be available only if records have indeed been made and kept, and will be useful only if the mines have not moved to any great degree.

6. Extend the duty to take measures for the protection of third-party forces or missions

The participants in the Montreux Symposium thought that the duty to take certain measures for the protection of United Nations forces or missions currently contained in Article 8 should be extended to include other missions, such as those undertaken by the CSCE. Some of the provisions could also be of use for the protection of mine-clearance organizations or humanitarian agencies that are attempting to work in the area.

If complied with, these rules would help alleviate the problems that arise after hostilities. It should be noted that the duty created by Article 8, para. 1, is conditional on whether the party concerned "is able" to undertake the measures. It is uncertain whether this can be improved on, especially as a large proportion of mines are laid not by government troops but by insurgents.

7. Introduce stricter rules on the duty to clear minefields at the end of active hostilities

The participants in the Montreux Symposium stressed that at present no one has responsibility for clearing minefields, and that this is a major shortcoming of the law. They recognized, however, that finding an acceptable and effective solution in this respect may be difficult.

Some participants in the Symposium of military experts expressed the view during discussion that, in principle, those who laid the mines should be responsible for their removal. A suggestion was made during the Montreux Symposium that the Security Council could determine who should pay for mine clearance and who should carry it out.

8. Introduce rules to prevent the indiscriminate effects of unexploded sub-munition

The symposia that the ICRC hosted did not deal directly with the problem of unexploded sub-munition, and therefore did not make any particular proposals in that regard, as it does not fall into the category of mines. However, participants in both meetings pointed out the extensive danger caused by these remnants of war which in many respects constitute the same type of hazard to civilians and clearing difficulties after hostilities as mines do. However, some of the issues involved are different from the question of mines. This subject will be looked at again in Part III below.

PART III
SUBJECTS RELATED TO
THE CONVENTION ITSELF AND
TO POSSIBLE ADDITIONAL PROTOCOLS

SECTION I
POSSIBLE AMENDMENTS TO THE CONVENTION

I. The introduction of implementation mechanisms

The total lack of implementation mechanisms in the 1980 Convention is a problem that should be addressed during the Review Conference.

The Symposium on mines that the ICRC hosted in Montreux, while recognizing the limits of the implementation mechanisms provided by international law, proposed that certain implementation provisions be incorporated into the main body of the 1980 Convention. With this in view, the participants looked first at implementation mechanisms in other humanitarian law treaties that could be used in the 1980 Convention and then at other international law mechanisms that could be useful.

(i) Proposals on implementation mechanisms stemming from those that exist in other humanitarian law treaties

Insofar as the provisions of the 1980 Convention reaffirm the rules of international humanitarian law found in other treaties, implementation measures provided for in those other treaties are naturally also relevant to the 1980 Convention. However, it may be desirable to specifically include such measures in the 1980 Convention.

Provision of legal advisers

This is presently required by virtue of Article 82 of Protocol I additional to the Geneva Conventions. A similar provision in the 1980 Convention could

indicate that legal advisers should give guidance on matters relating to the use of weapons. The participants in the Montreux Symposium recommended that legal advisers be appointed at all levels down to brigade or equivalent level and be incorporated into planning staffs.

Specific requirements for training in humanitarian law

Several of the participants in the Montreux Symposium placed great stress on the importance of correct training. The requirement to instruct the armed forces in the law is provided in Hague Convention IV of 1907, the four Geneva Conventions of 1949 and their Additional Protocols of 1977. It was thought that such a requirement ought also to appear in the 1980 Convention.

Certain specific suggestions were made in this regard:

- there should be training in the use of weapons in accordance with humanitarian law at cadet academies and in all command and staff training programmes;
- manuals on weapon systems should incorporate the law applicable to their correct use in the languages of the user countries;
- the packaging of weapons should include warnings of the legal limitations on their use;
- all military training of foreign nationals should include training in humanitarian law.

Incorporation into domestic law

The 1980 Convention should be translated into local languages, and appropriate national laws and regulations should be adopted. This is similar to the provision in Article 84 of Protocol I of 1977.

Liability and criminal sanctions

It is clear that the law of international responsibility applies in relation to violations of the law governing the use of mines. The difficulty lies in determining liability with respect to compensation for damage resulting from violations of the law, and establishing which body should be responsible for making such decisions. The possibility of compulsory adjudication will be considered below.

With regard to individual liability, the participants in the Montreux Symposium thought that as a matter of principle criminal sanctions ought to be obligatory for violations of the rules contained in the Protocols of the 1980 Convention. However, they recognized that similar provisions in the 1949 Geneva Conventions and Protocol I of 1977 have not usually been respected.

If Protocol II to the 1980 Convention were to be amended to prohibit the use of certain types of mines, violation of such a rule would be much easier to establish than violation of the present rules, which place certain constraints on behaviour only. The experts at the Montreux Symposium made some general suggestions as to how to improve implementation of the rule requiring the application of criminal sanctions (page 164).

International Fact-Finding Commission

It was suggested that the International Fact-Finding Commission provided for in Article 90 of Protocol I additional to the Geneva Conventions could also be used to investigate possible violations of the 1980 Convention. In the context of the 1977 Protocol, the competence of the Commission is based on consent that can either be given in advance, in the form of a declaration, or *ad hoc*. It would have to be decided whether the same formula would be appropriate for the 1980 Convention and whether it should also be based on confidentiality, as provided for in the 1977 Protocol. The participants in the Montreux Symposium pointed out that the Commission would be more effective as a law-enforcement mechanism if it had an automatic right to monitor possible violations of the 1980 Convention.

(ii) Other possible implementation mechanisms

Compulsory adjudication

The following are possibilities:

- International Court of Justice. The compulsory jurisdiction of the ICJ is provided for by several treaties and a similar provision could be incorporated into the 1980 Convention. The disadvantage is that the ICJ has jurisdiction only over international disputes and cannot cover individual accountability.
- International arbitration. This depends on a certain degree of cooperation by the parties involved in order to create the arbitral tribunal and its regulations.
- International criminal court. The United Nations International Law Commission is at present studying the possibility of setting up such a court. However, the suggestion of establishing such a court has existed for a long time and it is not likely to materialize in the near future.
- A court created especially for the 1980 Convention. A number of international treaties create courts for the implementation of their rules by deciding on allegations of violations and sometimes also by delivering advisory opinions. These courts are frequently very effective law-enforcement mechanisms as they often have jurisdiction not only over inter-State disputes but also over cases brought by individuals or organizations.

The participants in the Montreux Symposium thought that it was unlikely that States would accept compulsory adjudication, as this does not at present exist in any international humanitarian law treaty. However, there is no doubt that it could be a very effective method, especially if individuals or organizations were able to bring claims.

United Nations Security Council

It was suggested during the Montreux Symposium that, in the absence of a compulsory adjudication mechanism, the Security Council might be able to impose suitable remedies for violations of the 1980 Convention. However, this would depend on the political will of the members of the Council.

Creation of a supervisory body

A number of international treaties create specific supervisory bodies to help the implementation of their provisions. These bodies typically receive periodic reports submitted by States Parties on the measures they have taken to implement the treaty, receive complaints about alleged violations, undertake investigations and discuss the results of these activities with the States concerned. They also often undertake promotional activities in order to improve compliance with the law.

The Review Conference could consider whether it would be appropriate to create an analogous body for the 1980 Convention or whether the terms of reference of the International Fact-Finding Commission could be extended to cover these roles for the purposes of the 1980 Convention.

II. Extension of the scope of application of the Convention to non-international armed conflict

The 1980 Convention at present formally applies only to international armed conflicts, even though the majority of conflicts are internal. The laying of millions of mines during non-international armed conflicts has caused not only tremendous immediate suffering but also severe social and economic damage to the countries concerned.

The major rules of international humanitarian law already apply to non-international armed conflicts by virtue of Article 3 common to the Geneva Conventions of 1949, Additional Protocol II of 1977 and international customary law. However, specific rules applicable to the use of weapons in non-international armed conflicts would give useful precision to the law.

The participants in the Montreux Symposium thought that the 1980 Convention ought also to apply to non-international armed conflicts, although they recognized that this may be a sensitive issue. They felt that given the enormous

damage that is frequently inflicted on the assets of a State by the widespread improper use of weapons in an internal armed conflict on its territory, there may be greater interest in making these international rules applicable in such conflicts.

The most obvious way to extend the application of the 1980 Convention to non-international armed conflicts is by an amendment to Article 1 of the Convention. Should this cause too much difficulty, another possibility is to create an optional protocol to this effect, or to introduce into the Convention an additional article which parties could accept by a declaration to that effect or, conversely, which would be applicable to parties unless they specifically opted out. All three methods are to be found in other international treaties when a specific provision is desired by some of the parties but not by others.

As indicated in Part II above (pp. 142-145), additional arms control measures are vital to limit the damage inflicted during internal armed conflicts.

SECTION II

SPECIFIC WEAPONS

I. Blinding weapons

The ICRC is of the opinion that blinding weapons should be on the agenda of the Review Conference with a view to the possible adoption of an additional protocol on this subject. Given the advanced stage of development of hand-held versions of this type of weapon, together with the real possibility of their appearance on the battlefield in the near future and their subsequent proliferation among all groups that use force, it is essential that the Review Conference use this last opportunity to take preventive action.

(i) Information gathered at expert meetings convened by the ICRC

Prompted by reports concerning the development of certain types of laser weapons which would result in permanent and incurable blindness, the ICRC convened four meetings of experts. The meetings were attended by leading specialists in laser technology, ophthalmology, military medicine and psychiatry, and international humanitarian law. The scientists described the nature and effects of these laser weapons and the physical, psychological and social effects of blindness as compared with other combat injuries. Subsequently, the legal and policy aspects of this issue were discussed, together with possibilities for future legal regulation.

Technical characteristics of new laser weapons and their effects in medical terms

The specialists gave information on laser weapons under development as reported in unclassified sources.

A number of weapons were said to be designed for anti-sensor or anti-personnel use. "Anti-sensor" use refers to the destruction of enemy optical viewing systems, whereas "anti-personnel" use refers to an intentional effect on peoples' eyesight. As the energy and wavelength of the laser necessary to destroy sensors is similar to those necessary to damage eyes, laser systems said to be designed for anti-sensor purposes could also be used for anti-personnel purposes.

With regard to current technical possibilities for the further development of anti-personnel laser systems, the experts stressed that lasers can be very small and pointed out that small, clip-on laser devices that can now be fitted to rifles for training purposes could easily be made non-eye-safe. At present the range of these training devices is relatively limited but more powerful ones are being designed. It was also indicated that lasers can be very cheap. The group further pointed out that range-finding systems (which are less powerful than the anti-sensor/anti-personnel lasers being developed) could be misused to blind intentionally and that some accidents have indeed already occurred with these.

With regard to the effect of these lasers on the eye, it was indicated that the extent of damage to the eye will depend on the energy and distance. The anti-personnel and anti-sensor weapons presently under development will permanently blind a person up to a distance of a kilometre or more. Beyond this distance a person may be flashblinded, or even further away may be dazzled if a visible wavelength is used. The exact distance at which there is no longer a permanent blinding effect is unpredictable because a laser beam is affected by atmospheric conditions and dust. The aiming of the beam does not appear to be particularly difficult as it can be diverged to an area of about 50 cm across at a range of one kilometre, and the very large number of shots in each battery pack means that it is possible to sweep the battlefield with the beam. The weapon is silent and the beam is invisible.

The specialists then studied the possibilities for medical treatment and means of protection and concluded that neither was adequate. Damage to the retina is permanent and irreparable; vision loss caused by haemorrhage might be successfully treated in only a small minority of cases and even in those cases the long-term outcome would be doubtful.

Protection by special goggles would also seem to be largely illusory, as they would only screen out a limited range of known wavelengths, whereas lasers can operate over a wide range of wavelengths.

Functional disabilities and psychological problems that would be caused by blinding weapons as compared with those caused by other weapons

In making this assessment, the specialists drew attention to a number of considerations specific to blindness:

There is no prosthesis to reduce the effect of the disability, and in functional terms blindness is an exceptionally severe handicap, even when compared with the worst of injuries.

Rehabilitation training for the blind is essential, but it is not available everywhere, and it also gives rise to major difficulties:

- a. the learning process is long and very complex;
- b. a psychologically robust personality is needed to undertake this learning effort, but people who have been blinded usually suffer from severe depression and cannot do it well;
- c. comparatively satisfactory results are seen only in persons with a good education and sound financial, family and social support;
- d. successful rehabilitation allows recovery of only a fraction of the person's previous skills and he will always remain dependent to quite a large degree.

The experts stressed that blindness almost always causes very severe depression which in a large proportion of cases lasts for many years, if not permanently.

Another matter of importance in a war context is the prevalence of an extreme fear of blindness; for the majority of people it is the most dreaded injury and soldiers are no exception. If soldiers are aware of the existence of weapons that can silently and invisibly blind them, there will be an increased incidence of combat stress disorder during battle and such weapons will cause more mental illness in the long term.

The medical experts thought that public reaction to blindness caused by weapons especially used for that purpose is likely to be very negative, as the public in general tend to feel special pity for blind persons. They likened the fear of blindness and the probable reactions to blindness-inducing weapons to the fear and disgust aroused by chemical weapons.

Finally, the experts pointed out that large numbers of blind persons would put an exceptionally heavy burden on medical and social services and on society in general.

Foreseeable situation if there were to be widespread use of anti-sensor/anti-personnel laser weapons

There would evidently be an increase in the numbers of blind servicemen returning from war. The number of eye injuries has steadily increased from 0.5%

in the last century to between 5 and 9 % in the Vietnam war. The increase is said to be due to the effects of fragmentation weapons. It has been estimated that if anti-sensor lasers were used, but not to target the human eye, eye injuries would nevertheless increase by 2-3%. If, however, lasers were to be used intentionally to inflict blindness, so that blinding as a method of warfare became common practice, serious damage to the eye might account for between 25% and 50% of all casualties.

The experts also pointed out that laser weapons could easily be used to cause terror outside armed conflict situations by repressive regimes, terrorists or criminals. Since such weapons are so light and easy to transport, proliferation would be inevitable.

Legal and policy considerations

The final expert meeting was attended by 37 government officials, participating in their personal capacity, from 22 countries. They considered the legal and policy implications of the information gathered by the scientists.

The present lawfulness of the use of blinding weapons was discussed mainly in the light of the rule prohibiting the use of weapons of a nature to cause unnecessary suffering and superfluous injury. One participant was of the opinion that any intentional blinding would violate this rule, including the use of lasers to blind the pilots of aircraft. The majority of participants, however, thought that the most controversial use of lasers would be against infantry, as the latter can easily be put out of action by means other than blinding. There was a division of opinion, however, as to whether such use is already illegal under existing law.

The majority of participants thought that whatever the assessment of the present lawfulness of such use, it should be subject to legal regulation because there are important policy reasons for prohibiting blinding as a method of warfare. Many thought that such a prohibition ought to be introduced simply because blinding weapons are horrific and therefore totally unacceptable. The various possibilities for legal regulation were discussed and are outlined below.

(ii) Possibilities for legal regulation

Humanitarian law

Several approaches have been used to prohibit or restrict the use of certain weapons in international humanitarian law; it is possible to consider which would be the most appropriate by analogy in the case of blinding laser weapons:

a. Prohibition of the use of a certain type of weapon

This was the method used for chemical weapons and dum-dum bullets, because it was recognized that the overall dangers represented by the use of

such weapons outweighed their military utility. In the case of laser weapons, this could involve prohibiting the use of all or of some types of anti-sensor/anti-personnel weapons. The difficulty is that these weapons can be used for both anti-sensor and anti-personnel purposes, but it could be decided that those more obviously suited to anti-personnel purposes should be prohibited.

b. Prohibition of certain uses of a particular weapon

Examples of limitations of this type are seen in some military manuals which prohibit the use of incendiary weapons against unprotected soldiers, or state that explosive bullets may be used against objects but not persons. In the case of laser weapons, such a regulation could prohibit the use of lasers against persons, or against certain classes of persons, e.g., infantry.

c. Prohibition of the use of weapons which have a certain effect, without mentioning the weapon by name

An example of this type of provision is Protocol I to the 1980 Weapons Convention, which prohibits the use of any weapon the primary effect of which is to injure by fragments which cannot be detected by X-rays.

In the case of laser weapons, a norm of this type could read as follows:

"The use of weapons the primary effect of which is to damage eyesight is prohibited."

Such an approach would have the advantage of covering not only lasers whose primary effect is to blind but also any other future weapons which may have this effect. A disadvantage is that such a wording may give rise to arguments as to whether blinding is a *primary* effect, given that these lasers can also have other uses (anti-sensor in particular), and that at the end of their range they only have a dazzle effect. This wording would not cover intentional blinding by the misuse of other systems such as range-finders.

d. Prohibition of certain types of behaviour without any reference to the characteristics of a weapon

This alternative could concentrate on the prohibition of blinding or of the use of weapons with the primary intention or expected result of permanently damaging eyesight. A norm of this type could be worded as follows:

"blinding as a method of warfare is prohibited",

or

"blinding as a method of rendering a combatant hors de combat is prohibited".

Alternatively, the wording of the rule could be more specific, such as:

“weapons may not be used against persons with the primary intention or expected result of permanently damaging their eyesight”.

Such an approach could also include rules that create a duty to take precautions to avoid accidental blinding by weapons that are particularly dangerous for eyesight.

Arms control regulation

States might wish to think about prohibitions or limitations on the production of certain types of lasers that could be too easily misused to blind because of their particular features, e.g., tunability, power, portability. Other possibilities would be regulations to prevent undesirable proliferation, or policies favouring eye-safe lasers for range-finding, etc., in order to prevent avoidable cases of blindness.

II. Unexploded sub-munitions

Unexploded sub-munitions are remnants of war that in many ways represent the same type of threat to the civilian population as anti-personnel landmines.

Sub-munitions are bomblets which are delivered by aircraft or by artillery, rockets or guided missiles. The bomblets are assembled in “clusters” of hundreds or even thousands and delivered from aircraft dispensers, artillery shells or rocket or missile warheads. The bomblets are small (typically under 800 grams and under 7 cm in diameter) and can contain various payloads for use against different targets, such as a high explosive inside a controlled-fragmentation casing, a shaped charge (with or without a fragmentation casing), or a high explosive combined with an incendiary material. They may be fitted with an impact fuse (with or without a delay mechanism) or a proximity fuse.

Unlike landmines, which cause casualties among the civilian population when they are functioning normally, these bomblets create a similar situation as a result of malfunction, namely, when they have not exploded on impact and are left lying on or near the surface of the ground in an unstable condition.

Bomblets have reportedly had very high failure rates — up to 40%, depending on the state of the ground (the rate is usually higher on soft ground) and on meteorological conditions (especially if the soil is covered with snow). Once on the ground and unexploded, some of these bomblets are extremely unstable. They are liable to explode at any time and can be triggered by even the slightest movement of the ground on which they are lying, such as vibrations caused by people walking or a moving vehicle.

Clearing this unexploded munition is very difficult. If the bomblets are in an unstable condition, is it not possible to touch them and they cannot be neutralized. They must therefore be destroyed, but this too can be difficult. Indeed, it is very risky even to approach them as this might disturb the ground and trigger their explosion.

The use of cluster bombs has increased tremendously over the last 30 years.

Like anti-personnel mines, they have been used as area denial weapons. This means that very large quantities of unexploded bomblets are now threatening the civilian population and, unless some solution is found, their numbers will increase.

Possible solution

This lack of reliability in exploding at the intended time has prompted many manufacturers of bomblets to include self-destruct devices in their new models now in production. It is suggested that as the incorporation of such self-destruct devices is clearly a technical possibility, and acceptable to manufacturers, the Review Conference should seriously consider making such a measure mandatory.

III. Small-calibre weapon systems

During the United Nations Conference that led to the adoption of the 1980 Convention, the governments of Mexico and Sweden submitted a draft protocol on the regulation of the use of small-calibre weapon systems.

The Conference felt that further research was necessary to establish more accurately the wounding effects of new types of bullets in order to prevent an unnecessary increase in their injurious effects. The Conference therefore adopted a resolution on small-calibre weapon systems, at its seventh plenary meeting on 23 September 1979, expressing the view that:

“...such research, including testing of small-calibre weapon systems, should be continued with a view to developing standardized assessment methodology relative to ballistic parameters and medical effects of such systems.”

The resolution also invited “Governments to carry out further research, jointly or individually... and to communicate, where possible, their findings”, and to “exercise the utmost care in the development of small-calibre weapon systems, so as to avoid an unnecessary escalation of the injurious effects of such systems”.

A considerable amount of research has taken place since the adoption of this resolution and has confirmed that energy transfer is the most important factor for wound severity. High energy transfer, resulting in more severe wounds, is often caused by early turning of the bullet once it hits the body and by the break-

up of the bullet. These phenomena can be caused by poor stability and by the construction of the bullet itself, especially the materials used and the thickness and toughness of the jacket.

On the basis of this information, some States have taken steps to improve the design of their bullets, in particular to increase their resistance to fragmentation so as to conform to the letter and the spirit of the Hague Declaration of 1899 which prohibits the use of expanding bullets.

Standardization of the testing of bullets would be a very important step towards clarification of manufacturing specifications in order to ensure that bullets do not fragment easily. To this end, the Swiss government has offered (in a diplomatic note of November 1991) to put its anti-personnel weapon test facilities at the disposal of all interested States.

The Review Conference could consider the most appropriate way to take these developments into account.

IV. Naval mines

In November 1991, the government of Sweden submitted to the First Committee of the United Nations General Assembly a working paper and a draft Protocol on Prohibitions or Restrictions on the Use of Naval Mines. This draft was presented as an additional protocol to be attached to the 1980 Convention on certain conventional weapons.

The only existing treaty regulating the use of naval mines is the 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII). Although this Convention is still in force and has the effect of preventing the indiscriminate use of naval mines, it is clear that it has become outdated in certain respects. In particular, it makes specific reference to automatic contact mines and does not take later technical developments into account.

It would therefore be appropriate to consider this draft during the Review Conference with a view to adopting a new protocol to the 1980 Convention.

The draft will need to be studied with care to make certain that it does not in any way provide less protection than the 1907 Hague Convention. In this respect, it should be noted that Article 5 of the Hague Convention provides very clear guidelines as to which party is responsible for clearing mines after the conflict. This question is a critical one from a humanitarian point of view and the new protocol should not be weaker in this respect. The other provisions can be studied in the light of suggested new rules relating to landmines, taking into account considerations peculiar to the naval context.

V. Future weapons

The Conference of Government Experts that met in Lucerne and Lugano in 1974 and 1976, and whose findings served as a basis for the United Nations Conference that adopted the 1980 Convention, discussed a number of futuristic weapons. These included laser weapons, microwave, infrasound, and light-flash devices, environmental warfare and electronic warfare.

The experts recognized that at that time it was too early to consider specific restrictions on devices that were only at the research stage. However, the majority stressed the importance of keeping a close watch on developments in order to introduce specific prohibitions or limitations that might be necessary before the weapon in question became widely accepted. Several experts underlined the importance of national review measures, which are now required under Article 36 of Additional Protocol I of 1977, as well as of international review measures.

As regards the futuristic weapons discussed at the Lucerne/Lugano Conference, developments in laser technology have raised the possibility of one disturbing application, namely, the use of lasers as anti-personnel weapons to damage eyesight. This matter is referred to above under the heading "Blinding weapons".

There has also been further research into other new technologies, in particular directed energy weapons such as high-power microwave and infrasound devices. Although it may be too early to consider the need for specific regulation, it should be recognized that such future developments are subject to the standards of humanitarian law. In particular, it is important to ensure that new weapons do not have indiscriminate effects and that they do not contravene the rule prohibiting the use of weapons of a nature to cause unnecessary suffering or superfluous injury to combatants. With regard to the interpretation of this latter rule, reference can be made to the standard on which it was originally based, namely, the provision in the 1868 St. Petersburg Declaration which states that weapons which "uselessly aggravate the sufferings of disabled men or render their death inevitable" are "contrary to the laws of humanity".

ANNEX I

**RESULTS OF THE MONTREUX SYMPOSIUM
ON ANTI-PERSONNEL MINES**

The general objective of this Symposium, which was held in April 1993 in Montreux, was to collect the necessary facts and ideas to coordinate future action by bodies that are interested in improving the situation of mine victims and in taking preventive action. More specifically, the aims of the Symposium were to gain as accurate a picture as possible of the actual use of mines and the consequences thereof; to analyse the mechanisms and means currently available to limit this use and to alleviate the suffering of victims, as well as to identify any lacunae in this respect; to decide on the best remedial action; to establish a strategy for coordinating the work of different bodies involved in such action; and to write a report which could be used as a reference for future measures.

In order to ensure a multidisciplinary approach, the participants invited to attend comprised established experts in different fields related to the whole issue of the use of anti-personnel mines and their effects, and included military strategists, mines specialists and manufacturers, experts in international humanitarian law and disarmament, surgeons and orthopaedists, representatives of demining organizations, concerned non-governmental organizations, and the media.

Twenty-five expert reports were distributed to the participants prior to the Symposium, and were discussed at its first plenary session. These reports have not been included in the present document but are reproduced in the full report of the Symposium, which was sent to all governments in August 1993. The participants were then divided into six working groups, each of which conducted an in-depth examination of various political, legal, military and technical aspects of the landmine problem, with a view to weighing the advantages and disadvantages of various remedies, including their feasibility, and to come up with proposals for action, both preventive and remedial. The conclusions reached by the working groups, as they stood after discussion in the final plenary session of the Symposium, are summarized below.

I. Humanitarian, medical and socio-economic cost of landmines

Several expert reports underlined the magnitude of this cost, and backed up their statements with figures. The figures highlight that most of the victims are non-combatants, especially women, children and agricultural workers, that 800 people worldwide die from mines each month, and that the scale of the problem is best illustrated by the case of Afghanistan. At the current rate of mine clearance achievable by over 25 United Nations teams working there, it is estimated that it would take 4,300 years to clear that single country of landmines. Other reports drew attention to the fact that there is a serious lack of medical expertise and equipment to cope effectively with the number of casualties, often resulting in much unnecessary loss of life and limb. Moreover, the surgical care of mine

victims is particularly demanding and time-consuming when done properly, and places considerable strain on blood bank services where they exist. In most mine-affected countries today, inadequate or non-existent blood transfusion services add to the difficulty of providing medical care for the mine-injured. The infrastructure necessary for adequate rehabilitation needs attention. Organizing training programmes for local prosthetists so that continuity is assured after the withdrawal of foreign humanitarian agencies and medical teams is far from easy in most affected countries, owing in particular to lack of financial resources and the shortage of local personnel trained at least in the basics.

In many severely mine-affected countries, clearance costs represent the equivalent of many years' gross domestic product. Furthermore, massive and indiscriminate sowing of anti-personnel mines has rendered whole regions unfit for human habitation, cultivation or animal grazing, spelling economic disaster for the affected countries as most of the societies concerned are rural and agricultural. This in turn has led to substantial internal and cross-border population movements causing economic destabilization, compounded by social tensions, in neighbouring countries. There is, furthermore, little chance of the majority of refugees returning, and certainly not in the near future.

The Symposium proposed that the possibility of using military medical units and facilities for the treatment of mine injuries be explored, together with that of establishing an international compensation fund. Governments, manufacturers, buyers, sellers, and licensors of mines, and violators of humanitarian law, could figure among the contributors. Besides paying compensation to mine victims, the fund would finance rehabilitation and mine-clearance activities, research and development, educational programmes and training.

II. Prohibition of the use of certain types of mines

1. Prohibition of the use of all anti-personnel mines

It was generally felt that this would be the best solution, not only from the humanitarian point of view but also because restrictions on the use of weapons are more difficult to control than their total prohibition. However, this solution was considered by a number of participants as unrealistic, for two main reasons. First, as some of the expert reports pointed out, the global annual production of anti-personnel mines has averaged five to ten million over the past quarter century, meaning that there are possibly more than 200 million mines already existing in the world today. Moreover, the world trade in landmines, involving around 30 countries, is both flourishing and complex, is cloaked in secrecy and involves various institutions and agents who interact to circumvent the regulations on the trade in such weapons. Secondly, governments would agree to such a prohibition only if their military establishments found it acceptable. The military experts present pointed out that it would be difficult to conceive of military operations being conducted without anti-personnel landmines, as there would be a definite loss in military capability and, were such a prohibition to be imposed, adapted anti-tank mines would probably be used. However, restric-

tions on the use and production of certain types of mines, such as those not fitted with self-destruct or self-neutralizing mechanisms, or non-detectable mines, would probably be approved. In this context, there was a need for a wider military view on the overall effectiveness of anti-personnel mines and whether or not they were essential in military terms.

2. Prohibition of the use of anti-personnel mines not fitted with self-destruct or self-neutralizing mechanisms

The expert reports pointed out that the technological capability to produce mines with a comparatively reliable self-destruct or self-neutralizing mechanism is certainly available. Examples of self-destruct mines cited were the Russian POM-2S, the PFM-1S (butterfly mine), the American GATOR (anti-personnel and anti-tank variants available). As for self-neutralizing mines or mechanisms, the Chinese Type 72-B, the Russian MVE-72 break-wire fuse and the VP-13 seismic fuse or control unit were mentioned.

With regard to **self-neutralizing mechanisms**, the strongest argument against them was that they still denied the use of land because it was not obvious whether they had indeed been neutralized. They therefore necessitated the same amount of time and cost for mine clearance. Added to this was the assertion that the explosive charge remains in the ground, and can over a period of time become more dangerous, or even be dug up and resold or reused. The one case clearly favouring self-neutralizing mechanisms was anti-tank mines, because of the immense damage created by the explosion of these mines.

Mines fitted with **self-destruct mechanisms** seemed the best solution, as after the mechanism has functioned the danger is completely eliminated. No explosive components remain. Moreover, the evidence of detonation (for example, craters, fragments and the explosions themselves) serve to alert inhabitants to the presence of mines, including those whose self-destruct mechanisms have failed. It was felt that prohibition of the use of anti-personnel mines not equipped with such a mechanism would present a definite improvement over the existing situation, principally by helping bring the problem down to a more manageable level.

However, certain questions remain to be resolved. First, existing mines thus equipped are sophisticated and at present expensive. It was nevertheless felt that with the introduction of such a prohibition, economies of scale would greatly reduce the price of such mines. Secondly, current failure rates average approximately 10%, a figure which would have to be considerably reduced; such an improvement is attainable given existing technological capability. Thirdly, such mechanisms could easily be fitted into anti-personnel landmines by industrialized countries, but there would remain the problem of simpler mines manufactured indigenously by nations or groups involved in low-intensity guerrilla warfare. It was, however, recognized that strict observance of the rule by the leading manufacturers would lead to a sharp decrease in the current widespread availability of anti-personnel landmines without self-destruct mechanisms. The full

report of the Montreux Symposium contains expert reports on technical aspects of self-destruct and self-neutralizing mechanisms, including those that are activated mechanically, electronically, by battery, or by acids or other chemicals, as well as a discussion on the advantages and disadvantages of each type. One final question remained outstanding, that is, the delay time before self-destruction. This was a predominantly military issue, and it was recognized that the opinion of military experts was needed to establish a realistic and acceptable delay time.

3. Prohibition of the use of mines which are not detectable

It was found that among the main reasons for the production of all-plastic, non-magnetically detectable mines were ease and cheapness of manufacture as compared with those with metallic components, and increased longevity because of the absence of corrosion-sensitive components. However, it was pointed out that the cost and inconvenience of fitting non-removable metallic detection rings or plates, ideally by casting them into the explosive fill to prevent removal, would be minimal, and that non-detectability of mines provided little if any military advantage.

Detectability would be of great help in mine-clearance operations, and was also regarded as important in conjunction with the introduction of a prohibition of anti-personnel mines without self-destruct mechanisms, because of the failure rate of those mechanisms.

4. Prohibition of the use of mines with anti-handling devices

There were strong arguments in favour of banning the use of integral anti-handling devices, since they have no apparent military value and their main effect is to hamper clearance operations. The only possible military advantage they present is in terms of lowering of morale, and as a further deterrent to breaching a minefield.

5. Existing stocks

Information furnished in one expert report indicated that at least 78 producers in 44 countries have manufactured at least 307 anti-personnel landmine products in recent decades. Production of landmines currently averages between five and ten million annually, implying that there exist, worldwide, well over 100 million and possibly more than 200 million mines. Today, landmines are deployed in more than 50 countries.

Given this situation, a complete ban on the use, production and transfer of all anti-personnel mines, and the destruction of all existing stocks, was seen as the ultimate objective, probably to be achieved through a multilateral agreement. Until such an agreement can be reached, however, existing stocks ought to be modified and fitted where possible with self-destruct or self-neutralizing mechanisms, or destroyed. The technical means to do so are certainly available,

although many anti-personnel mines are too small to be fitted with self-destruct mechanisms. Two problems would still remain. The first would be that of effective verification of compliance by States. The second would relate to the financial implications of the destruction of existing stocks, but this could be weighed against the exorbitant cost of mine clearance, which in some areas approaches US\$ 1,000 per mine.

III. Proposals for amendment of the 1980 Convention and of its Protocol II

A study of the negotiating history of the 1980 Convention, undertaken in one expert report, shows that an attempt had been made to seek common ground between the military view that anti-personnel mines were an effective and operationally almost indispensable weapon, and the humanitarian view that these weapons were terrible in their effects as they not only caused unnecessary suffering but were indiscriminate by their very nature, inflicting heavy casualties among the civilian population and continuing to do so well after the conflict in question had ended. However, the final result was a modest treaty which in many respects was the product of various compromises. This has greatly undermined the protection from the effects of anti-personnel landmines that the Convention was initially intended to afford. The Symposium discussed at length some of the main shortcomings of the treaty and came up with proposals to overcome them.

1. Introduction of implementation mechanisms

One of the major weaknesses of the 1980 Convention is its lack of implementation mechanisms. The participants, while fully recognizing the limited effectiveness in practice of implementation measures provided for in international law, were nevertheless convinced of the necessity and utility of incorporating some such measures into the Convention. Again, even though some measures could be considered appropriate only for mines and booby-traps, it was generally felt that it would be more logical to introduce such provisions in the body of the Convention itself and not in just one of its protocols.

The implementation provisions found in 1977 Protocol I additional to the Geneva Conventions were regarded as providing a model. Three possibilities were considered: a simple reference to certain articles of 1977 Additional Protocol I; wholesale reproduction of the appropriate articles of this Protocol; or reproduction of the appropriate articles but with suitable changes in the wording so as to make them obviously applicable to the use of weapons. The third alternative was preferred and the following articles were identified as being the most relevant:

Article 82. Provision of legal advisers. It was recommended that legal advisers be incorporated at all levels down to brigade or equivalent level, and be incorporated into planning staffs.

Article 83. Training in humanitarian law. It was felt that the following four measures should be taken:

- a. Training in the use of weapons in accordance with humanitarian law in cadet academies, and in all command and staff training.
- b. Incorporation of legal provisions in all weapon systems manuals, in the languages of the user countries.
- c. Incorporation of warnings of legal limitations on weapons packaging.
- d. Incorporation of training in the international law of war in all military training of foreign nationals.

Article 84. Translation of the 1980 Convention into local languages and the adoption of necessary national laws and regulations.

Articles 85 - 87. Criminal sanctions. It was recommended in particular that Article 85, paras. 1, 2, 3a-d, 4d, and 5 (suitably amended), be incorporated, recognizing that these provisions have not generally been enforced in the past.

In regard to enforceability, it was proposed that grave breaches as defined in these articles could in practice be identified or notified by the following measures:

- a. Action by the appropriate authorities within the nation accused of the grave breach.
- b. Notification to the Secretary-General of the United Nations.
- c. Enquiries by an *ad-hoc* fact-finding group, the International Fact-Finding Commission, or other fact-finding mechanisms.

Finally, the possibility of inserting a provision on the compulsory jurisdiction of an adjudication body was considered, but serious doubts were expressed in this respect. It was pointed out that no compulsory jurisdiction provisions appear in other international humanitarian law instruments; the International Court of Justice has jurisdiction only over inter-State disputes and does not cover individual accountability; and the establishment of an arbitration tribunal and its regulations call for a considerable degree of cooperation between the parties involved. Participants felt that it was unlikely that States would accept the insertion of compulsory adjudication measures in the Convention.

2. Extending the applicability of the Convention to cover non-international armed conflicts

It was unanimously recognized by the participants that most of the human suffering caused by anti-personnel landmines occurred in the context of non-international armed conflicts. However, as it stands the 1980 Convention formally applies only to international armed conflicts. There was therefore general agreement on the advisability of extending the application of the Convention to non-international armed conflicts through an amendment to the provision of the Convention itself which specifies its scope of application. However, several difficulties inherent in such an extension of the applicability of the Convention

were identified. One major difficulty would be objections by States invoking national sovereignty, especially States which generally resist any international involvement in internal armed conflicts. Attempts could nevertheless be made to persuade States that it would be in their interest to extend the applicability of the instrument by arguing that it could be their own countries being devastated and their own population the victim. Another less satisfactory alternative would be an optional protocol on applicability to non-international armed conflicts. It was felt, however, that this would be disregarded by irregular insurgent forces. The extreme difficulty to entering into contact with such forces drastically reduced the chances of persuading them to comply with the law.

3. Shortcomings of the rules in Protocol II even if implemented

Article 3 of 1980 Protocol II, imposing general restrictions, is based on the generally accepted distinction between military and civilian objectives, but such a distinction is difficult to maintain once a military target has moved away from the mined area, leaving behind the anti-personnel mines which then automatically became indiscriminate.

Moreover, the duty to protect civilians from the effects of these weapons is couched in very weak terms, as paragraph 4 of this article makes reference to all "*feasible*" precautions. The term "*feasible*" allows for great flexibility in interpretation, but on the other hand it was felt that removing this term altogether would place the military in a position they were highly unlikely to accept. Furthermore, the provision is weak because feasible measures would include the installation of fences or signposts, but experience has shown that these tend to be removed by members of the local population, either out of ignorance or for the profit they can derive from such items. It was felt that Article 3 might be the right place to introduce the prohibition on the use of anti-personnel mines without self-destruct mechanisms.

Article 4 on restrictions on mines other than those that are remotely delivered has the same shortcomings as Article 3.

Article 5 deals with restrictions on remotely delivered mines. There are difficulties in recording accurately the locations of mines delivered by fixed-wing aircraft, artillery and rockets. Therefore the recording requirements in Article 5.1a in the absence of a neutralizing mechanism are not applicable when using these methods. Problems remain with the implementation of Article 5.1b, because self-destruct and self-neutralization devices are currently insufficiently reliable to guarantee the safety of a mined area; further, no maximum time limit is set for the active life of these mines. The wording of paragraph 1b also creates confusion between self-destruct and self-neutralizing mechanisms. In paragraph 2 there is no definition of "*effective advance warning*".

Article 7 contains a major flaw in that there is no definition of a "*pre-planned*" minefield, which is the only type that requires recording. With regard to all other minefields, parties are only required to "*endeavour*" to record them, which is a rather weak provision. In practice, it was found that further difficulties arose. For instance, some regular armies have followed strict procedures with respect to

mine-laying and there are clear rules for marking and recording minefields. However, history has shown that such records are properly drawn up and kept by very few armies. They are also quite frequently lost.

Even where such records are available, successful minefield clearance can rarely be guaranteed for a number of reasons. Mines tend to move, sometimes long distances, over a period of time owing to the effects of weather and soil erosion, and on occasion by the action of animals. This is especially true in the case of scatterable mines. Furthermore, even the most conscientiously maintained minefield record can be subject to human error by soldiers who may be tired or under stress. In non-international armed conflicts, to which the 1980 Convention does not apply, no records will have been kept, no maps made and no warning signs set up, whether through incompetence, lack of discipline or a wish to inflict as many indiscriminate fatalities and injuries as possible on the enemy population.

Article 8. It was felt that there was a need to extend the measures of protection included in this article to organizations other than the United Nations, such as CSCE missions and private demining agencies. In fact, the United Nations itself has acknowledged the necessity of coordinating demining activities, and for that purpose the Department of Peace-keeping Operations, which includes a Mine Clearance Centre, has established a data base to which it welcomed any contributions. Expert reports from other demining organizations pointed out that more often than not mine clearance is an extremely hazardous exercise principally because records are not properly kept, and there are often no maps or signposts. In Afghanistan, for instance, mine-clearance activities have resulted in over 30 deaths and over 45 amputations, and no less than 29 operatives have been blinded.

All these factors render mine clearance expensive, taking into account the high cost of experts' fees, personnel insurance premiums, and such support expenses as medical and casualty evacuation costs. Article 8 should therefore be extended in order to afford protection to third-party missions and logically also to humanitarian organizations working in regions affected by mines.

Article 9, which deals with international cooperation, does not impose an obligation to remove mines, as the words used therein are "*shall endeavour to reach agreement*". Moreover, this agreement relates only to "*the provision*" of such information and assistance as "*necessary to*" remove or render ineffective mines and minefields, and thus in no way imposes a specific obligation to do so. This was recognized as a major shortcoming of the law. Again, this article does not deal with other issues of crucial importance to a mine-devastated country after the cessation of active hostilities, such as repatriation and land reclamation.

IV. Possible arms control measures relating to the trade in mines and their stockpiling

Participants examined various arms control measures such as prohibition of or restrictions on exports, destruction of existing stocks that are incompatible with possible new manufacturing standards, prohibition of the manufacture of certain types of mines in an arms control treaty, and verification measures.

The advantages and drawbacks of measures that could be taken in the shorter term and those that might better be considered as long-term measures were considered separately. Accordingly, the following possible short-term measures were discussed.

1. *Unilateral measures*

a. The significance of the export moratorium on anti-personnel mines that some States have instituted was recognized, although many manufacturers would seek exemptions for certain types, such as self-neutralizing and self-destruct mines and high-tech "smart" mines.

b. It was felt that other States should be encouraged to adopt similar measures. This encouragement should come both from the public and from governments.

The participants discussed the value of a moratorium on exports as setting a standard for State behaviour, focusing world attention on the use of anti-personnel mines and constituting a critical first step towards achieving more far-reaching limitations.

Possible drawbacks mentioned included the questionable impact of such a moratorium on alleviating suffering, the repercussions for domestic producers, the difficulties of verification, and the fact that a moratorium does not eliminate the problem of clandestine export.

c. The possibility was raised of a multilateral voluntary regime along the lines of the Australia Group, which controls exports of dual-use biological and chemical items, and the Missile Technology Control Regime.

The advantage of such a regime would be to regionalize and/or internationalize controls on the export of anti-personnel mines. This type of non-proliferation regime might, however, create North-South friction. Another drawback is that it does not usually comprise a control system and the focus of exports might shift to non-participating States.

All three of the above-described unilateral measures would call for the stepping-up of national control, and the role of customs authorities in this respect was particularly emphasized. The possibility of using independent organizations for such control was also explored.

2. *Multilateral confidence-building measures*

The importance of ensuring openness and transparency was stressed frequently. To this end the following measures were discussed:

a. The exchange of information on production, stocks and exports of anti-personnel mines should be facilitated by the compilation of a register or data base, as has been agreed in recent arms control treaties. Public organizations would have access and be able to contribute to this information. Some participants felt that the need for financial transparency in anti-personnel mine exports was important.

- b. As a follow-up to this information exchange, confirmation visits could be envisaged.
In this regard, the difficulties in reaching agreement on any international mechanism for follow-up control were recognized.

3. *Longer-term arms-control measures*

The participants discussed the possibility in the long term of a multilateral agreement to ban the development, manufacture, transfer and use of anti-personnel mines and the destruction of all existing stocks. The arms control measures indicated below could also apply to an overall ban on certain types of mines and the destruction of stocks that do not comply with new requirements.

The Review Conference of the 1980 Convention was borne in mind throughout the discussion. Some suggested that the review conference mechanism be used for consideration of an overall ban. The overlap between international humanitarian law and disarmament treaties was recognized with regard to the question as to which international forum would negotiate a convention for a comprehensive ban on anti-personnel mines.

It was proposed that non-governmental organizations be allowed to participate in the Review Conference and it was also stressed by some that mine producers should be included in the consultative process.

With respect to an overall ban, it was felt that several issues would have to be examined. The list below should not be considered exhaustive:

- a. Technical definition of what exactly constitutes an anti-personnel mine (or the types of mine to be prohibited), production facility, dual-use components, and mine delivery systems. In this connection the blurring of the distinction between anti-personnel and anti-tank mines needs special attention.
- b. A routine verification regime that would include declarations and inspections.
- c. A special challenge inspection regime.
- d. Destruction of stockpiles within an extremely limited period, and on-site verification of that destruction.
- e. Provisions for sanctions in case of non-compliance.
- f. Strict national legislation and enforcement to support the terms of the multi-lateral agreement.
- g. Allowance for certain permitted purposes, such as research for the improvement of demining equipment and for protection of troops.

It was stressed that as wide an adherence as possible to such an agreement was vital.

The problem of how to deal with continued use, production and trade by non-party States was recognized as potentially serious. Clandestine commerce would still have to be controlled as well. Evidence of illegal arms trading lies in the associated financial dealings, and is often discovered by customs officials. Mines

should bear certificates of origin, and the issuing of false end-user certificates should be a criminal offence. The view was expressed that if it is possible to ban chemical weapons, it should be possible to close loopholes when banning certain types of mines. However, it was considered that attention should focus in the first instance on the supply of mines, since the number of producers of mines, and even of explosives, is fairly limited.

In this context, another issue that the Symposium addressed was that of **collection of information on the trade in anti-personnel mines**. With a view to having States introduce the subject of mines in the Conference on Disarmament, it was felt that public access to information contained in the United Nations Register of Conventional Arms would be helpful, but it was pointed out that this information, submitted by governments, was available to governments only. However, it was possible that governments might eventually agree to make this information available to the public. Non-governmental organizations were a valuable source of information, but governments were unlikely to supply data for a voluntary register. It was also stressed that non-governmental organizations could not obtain information on a country-by-country basis, as the task would be overwhelming, but that some of them could serve as a clearing-house for information from all sources.

V. Information to the public

The Symposium also recognized the crucial importance of **alerting public opinion** in order to increase awareness among the military and governments. This would be an invaluable contribution towards a much-needed change in the law. The need for increased involvement of National Red Cross and Red Crescent Societies and their Federation, as well as United Nations agencies such as UNHCR and UNICEF, was stressed. There was also a constant need to keep the press informed about statistics on injuries caused by mines.

ANNEX II

**SYMPOSIUM OF MILITARY EXPERTS ON THE
MILITARY UTILITY
OF ANTI-PERSONNEL MINES**

One of the recommendations of the April 1993 Symposium was the convening of a meeting of military experts in order to study the military use of anti-personnel mines and possible alternatives.

The ICRC hosted a Symposium for this purpose on 10-12 January 1994. The topics covered were as follows:

The military utility of anti-personnel mines:

- their use across the spectrum of conflict
- their military and cost effectiveness
- their means of delivery
- the military implications of marking/recording minefields.

Alternative systems:

- what alternative systems exist
- whether they meet military requirements
- their likely cost-effectiveness
- any other implications of their use.

Control measures:

- self-destruct versus self-neutralizing mechanisms
- suitable delay times prior to self-destruction or self-neutralization in different scenarios
- the likely cost penalty and whether it can be offset by increased effectiveness
- detectable versus non-detectable mines.

The majority of the participants in this meeting were professional military combat engineers familiar with current tactical doctrine and trends within their own armed forces. They drafted the following report during the Symposium.

RESULTS OF THE SYMPOSIUM*

I. Military utility of anti-personnel mines

(i) Introduction

Mines are used in different types of armed conflict. Accordingly, these weapons are also used in different ways. The experts felt that there was a need to distinguish between conventional warfare, which is generally carried out in international armed conflicts where classical contemporary military doctrine prevails and where trained and disciplined soldiers are engaged, and civil war and counter-insurgency operations, where these conditions are seldom met.

Mines should be distinguished from unexploded ordnance, which was not considered by the experts as it is an entirely different entity. It is nevertheless a dangerous, uncontrollable and long-lived battlefield hazard.

(ii) Conventional situations

Landmines and anti-personnel (AP) mines in particular are to be seen as an integral part of a combined military plan. By combining the effects of artillery, direct fire weapons and electromagnetic warfare with shaping of the terrain through the use of mined obstacles, the maximum synergistic effect is achieved. A combination of AP mines, anti-tank mines and other appropriate weapons systems therefore increases cost-effectiveness over what is achievable if one weapons system is used alone. Mines thus enhance the effectiveness of other weapons systems across the spectrum of military operations and cannot be considered on their own.

Purpose of the use of mines

The military engineer supports his higher commander by altering or moulding the terrain in a manner that is synchronized with the commander's plan for conducting the operation. Mines are used in the defence to deny access to areas, to encourage the enemy to focus its movement into areas where it can be attacked effectively, and to restrict the enemy's mobility while being attacked. Mines are used in the offence to prevent the enemy from manoeuvring through an area to attack the flank of an advancing force and can be used to block an enemy retreat. Furthermore, mines can be used to hinder logistic traffic and create confusion among headquarters elements.

* These are the results of the Symposium as drafted by the military specialists during the meeting.

Military utility and cost-effectiveness of mines

Mines are very effective and efficient. Manpower employed in laying mines produces much more effect on the battlefield than manpower attempting to mould the terrain in other ways. Very little equipment is required in addition to that normally carried by soldiers. The main purpose of mines is to canalize and delay the enemy; but they have the added advantage of inflicting casualties. This inherent ability to inflict casualties also has a powerful demoralizing effect on the enemy soldier. Forces are likely to avoid areas where there is even a reasonable possibility of encountering mines.

There are two basic types of mines. Anti-personnel mines attack the enemy soldier on foot, while anti-tank mines attack mounted enemy and other vehicular platforms such as tanks. The enemy threat usually dictates what type of mine is needed. Anti-personnel mines are used to deny access to friendly positions, to help protect anti-tank minefields from being breached and to attack enemy footsoldiers accompanying mechanized forces through such anti-tank minefields.

Mines can also reinforce existing natural and man-made obstacles. This type of use compels the enemy to deploy multiple means to overcome the obstacle, thus delaying him in his planning and in his ability to overcome the obstacle.

Mines can be emplaced by hand. This is a very slow and deliberate process that offers the possibility of the most accurate recording. Soldiers laying mines by hand can emplace several per hour. The rate for vehicles laying mines by mechanical means is several hundred per hour per vehicle. Anti-tank mines can also be mechanically laid on the ground or even ploughed into the soil. Mines may also be scattered by artillery, aircraft or vehicle; these are known as scatterable or remotely delivered mines. Scatterable mines systems are technically capable of dispensing thousands of mines per hour but usually operate for very short periods of time. Scatterable mines are the most difficult to record and mark.

With the advent of scatterable mines the commander has more flexibility in employing minefields. A force can now employ mines over a greater distance in relatively short periods. It is, of course, still necessary to ensure that mine warfare is synchronized and complementary to other weapon systems on the battlefield. There is also the need to plan the logistics involved. Generally, once authorized by the overall commander, scatterable mines greatly enhance flexibility.

There are certain hazards associated with all minefields. The most immediate is the potential danger to friendly forces. Uninformed individual soldiers can wander into minefields, and routes needed for counterattack or resupply can be closed off by uncoordinated mining. This hazard can increase with the use of scatterable mines if they are not the type that self-destruct or self-neutralize.

Military doctrine requires that landmine warfare operations are highly controlled. Commanders of manoeuvre formations must give positive approval for subordinate units to lay mines. Only commanders have this authority, which is usually held at the formation or general-officer level. Small units may lay command-detonated mines for immediate perimeter security. These will be recovered when the unit moves.

During operations all feasible precautions should be taken to protect civilians from the effects of mines. In particular military units should:

- report intention, initiation and completion of minefields;
- record details of minefields;
- pass records of minefields on to other units that later become responsible for the terrain;
- mark and fence minefields, with the exception of protective minefields and air/ artillery/rocket-delivered minefields.

The experts recognized that in practice precautions may be difficult to take in all circumstances, e.g. in surprise enemy contact or retrograde operations.

In summary, forces that properly integrate mine warfare with other systems to maximize weapons effects are capable of quick, decisive victory. Forces that report and record minefields properly enhance the safety of their own soldiers and of non-combatants.

(iii) Use of mines in internal and unconventional armed conflict

The experts thought that it would be useful to analyse the use of mines by insurgent forces in internal and internationalized guerrilla armed conflict. This analysis also includes the response by conventional forces engaged in counterinsurgent warfare in such situations.

Insurgents

Just as in conventional doctrine troops use mines to stop, delay and create psychological trauma among the opposition, insurgent forces use them to target the opposition not only to weaken its military capability, but also to weaken its economic and socio-political infrastructure.

Insurgents rely on mines to a great degree for the following reasons:

- their limited financial and material resources lead them to place greater reliance on mines; which are relatively cheap and are seen as force and matériel equalizers;
- mines are effective in spreading terror in order to influence the population for political gain.

Insurgent forces have no incentive to use detectable rather than non-detectable mines, as the latter may be perceived as being more effective in further slowing down the opposition military and creating more casualties.

As the availability of funds to insurgent forces is limited, the perceived utility of mines increases and therefore more are used as a substitute for other more expensive systems.

With regard to the means of delivery of mines used by insurgent forces, their typical lack of resources means that they rely on hand emplacement or at most scattering from vehicles. It is highly improbable that they would be able to use artillery or aircraft scattering systems.

With regard to marking minefields, insurgent forces almost never do so as they consider this as risking loss of effect against the opposition military.

On the other hand, they are more likely to keep records of minefields for their own use, but as there is usually a low level of training, expertise and discipline, this is frequently not done. Further, it is questionable whether such forces have an adequate infrastructure for the recording of minefields and the passing on of this information to their own troops or possibly to the civilian population as a warning.

Conventional forces engaged in counterinsurgency

Conventional forces are able to apply conventional doctrine in deploying landmines in counterinsurgency operations to stop, delay and create psychological trauma among the opposition forces. The casualties resulting from the use of landmines are particularly effective as opposition forces lack the medical infrastructure to care for their wounded.

Mines are also used by the conventional military to protect their own positions, as well as national assets and other installations and infrastructure such as power lines, water treatment plants, bridges and airports from interference by guerrilla fighters.

As the level of conflict grows, however, and the insurgents gain increased territorial control, the actual theatre of combat is extended and frequently encompasses the entire national territory. As this situation develops, the use of landmines by the counterinsurgent forces increases. This has the effect of placing economic and socio-political pressure on the insurgent forces, and the large numbers of mines also have dire effects on the local population. This situation is therefore worse for the civilian population than conventional warfare.

II. Alternative systems

(i) Introduction

In order to assess the viability of alternatives to anti-personnel mines, the experts first reviewed the utility of anti-personnel mines and identified alternative military systems. The alternative systems were then assessed against the military attributes of anti-personnel mines. The results of the assessment were incorporated into an evaluation of the general effectiveness and/or contribution of alternative systems in terms of the following:

- a. fulfilment of military requirements
- b. military cost-effectiveness
- c. post-conflict implications.

(ii) Utility of mines

Purpose of laying mines

- Delay the enemy
- Canalize the enemy
- Disrupt the enemy
- Inflict casualties
- Divert enemy resources/effort
- Protect own positions
- Reinforce terrain/obstacles.

Desired military effects of mines

- Psychological effect of maimed casualties
- Surprise the enemy
- Enhance other weapons
- Flexibility of use and application.

(iii) Assessment of alternative systems

The alternatives to anti-personnel mines identified by the experts were assessed in terms of their ability to achieve the purposes of anti-personnel mines. The conclusions are summarized in a Table (see page 177).

Anti-personnel mines

The use of anti-personnel mines calls for considerable resources to procure and store systems, to transport items to the battlefield and then to deploy and arm the mines. These demands are acceptable in view of the ease of deployment and the effects of mines on the enemy.

Anti-personnel mines are very effective in creating delay and in canalizing and disrupting the efforts of the enemy. Military experience is that the use of mines in defence reduces the number of casualties to own troops. Studies and war-game modelling support these findings.

A further important impact of anti-personnel mines is the psychological effect on soldiers of seeing their comrades injured and the logistic burden involved in treating casualties. Particular advantages of anti-personnel mines are that they are not affected by weather, they need no maintenance or logistic support once laid, they are constantly alert and are unaffected by morale. However, the laying of anti-personnel mines must be recorded accurately and the information disseminated widely to prevent own troops taking casualties on their own mines during operations. The major disadvantage of anti-personnel mines is their existence after hostilities and their possible effects on the returning civilian population.

Wire

Some of the effects of mines may be achieved using wire obstacles, but the disadvantages to the military are the costs involved in purchasing and transporting the materials, plus the intensive manpower effort required to build the obstacle. Wire has little impact after hostilities other than a nuisance effect.

Ditches

These can only partly replace mines. They are costly in terms of the time and machine effort required for construction.

Improvised devices

The experts were unanimous in their view that if anti-personnel mines are not available to combatants, the latter will improvise and make alternative exploding devices during hostilities with the armaments and equipment available. The cost of such devices will be greater in terms of the time and manpower required to make and lay them.

Improvised devices will be difficult to neutralize and lift as they will not be of standard design. Military casualties could be higher with "field-made" devices because of the excessive amounts of explosives used (e.g., improvised 155 mm shell mines). The need to construct such devices in the field could, on the other hand, reduce the overall number deployed.

Flooding/mud

Flooding can be highly cost-effective, but it is not reliable or flexible. Moreover, it is very difficult to control and may place the civilian population at risk. After hostilities there could be long-term effects on agriculture, especially when sea-water is involved.

Land force fire

While land force fire can achieve the desired effects of anti-personnel mines, it is costly in terms of maintaining alert troops and the amount of ammunition involved. It is also limited by weather and visibility. Artillery fire can increase the incidence of unexploded ordnance on the battlefield if it is used to compensate for the lack of mines.

Air power

Air-delivered weapons are extremely flexible and have considerable range. However, their accuracy is not sufficiently good for use near to own troops and they are costly in terms of skilled manpower and maintenance. If air-delivered weapons are used to replace anti-personnel mines, the occurrence of unexploded ordnance would increase.

ASSESSMENT OF MILITARY ALTERNATIVES TO ANTI-PERSONNEL MINES

Alternatives	Anti-personnel mines	Wire	Ditches	Improvised devices	Flooding/Mud	Land force Fire	Air power	Novel devices: ¹ infrasound/foam/glue
Attributes								
Delay	2	2	2	2	2	2	2	(1)
Canalize	2	2	2	2	2	2	2	(1)
Disrupt	2	2	2	2	2	2	2	(1)
Inflct casualties	2	0	0	2	0	2	2	-
Divert enemy resources	2	1	2	2	1	1	2	-
Protect own troops	2	1	1	2	1	2	2	1
Reinforce other obstacles	2	2	2	2	2	2	2	1
Surprise	2	0	0	2	0	2	2	2
Force multiplier, e.g. enhance the effect of other weapons whilst enemy is delayed	2	1	1	2	1	2	2	1
Low cost of materials ²	1	1	2	1	1	0	0	0
Minimal manpower required to deploy	1	0	0	0	1	1	0	-
Minimal time required to deploy ³	1	0	0	0	0	0	1	-
Flexibility in battle ⁴	2	0	0	2	0	2	2	2
Reliability in achieving desired effects when required	2	2	2	1	0	1	1	-
Adverse psychological effects of casualties	2	0	0	2	0	1	1	1
General assessment								
Fulfil military requirements	2	1	1	2	1	1	1	-
Military cost-effectiveness	2	1	1	1	1	1	0	-
Serious post-conflict problems ⁵	2	0	0	2	1	1	2	(1)

0 = no; 1 = partially; 2 = yes; - = insufficient information. **NB** The figures given above reflect relative judgements only; they must not be added together for comparison purposes

¹ As there is insufficient information on these possible future systems, any figures given here are based on pure conjecture and may not reflect the real situation.

² Remotely delivered systems and those with SD or SN devices are more expensive to manufacture than the others.

³ Scatterable mines can be rapidly laid, once the delivery means have been made available.

⁴ Scatterable mines can give the military commander great flexibility as to where and when he lays his mines.

⁵ Except for mines that have self-destructed or self-neutralized.

Novel devices

The experts took note of research into new devices, such as glues, foam, infrasound, etc., but had little information on such devices and saw no indication that they would achieve the military objectives of mines. The possible collateral effects of novel devices, such as toxicity and the effect of weather, plus the side-effects of countermeasures, are unknown.

(iv) Conclusions

Having considered alternative systems and analysed their utility and shortcomings, the following assessment was made:

Do alternative systems meet military requirements?

No alternative meets military requirements in the way that anti-personnel (AP) mines do. The improvised explosive device (IED) comes closest to replacing the AP mine. If AP mines were not available, such devices would proliferate. Although there would be fewer of them than AP mines, the casualty effect of each IED could be very great, and post-war problems of clearance would remain.

Military cost-effectiveness

The AP mine is the most cost-effective system available to the military. The alternatives require more resources and are less effective. In particular, land force fire and air power would never be available in adequate quantities and would be extremely expensive. Their effectiveness is also subject to the weather and visibility.

Post-conflict implications

AP mines create the worst post-war effects unless they have self-destructed, self-neutralized or been removed. Massive demining operations are required to render areas safe for the civilian population and for agricultural use. IED would pose a similar problem, although there should be fewer of them. As for air power and land fire, the problem of unexploded ordnance (UXO) would significantly increase, as approximately 20 to 30 percent of the munitions would not function on use. UXO would also have to be removed from the battlefield to make the area safe for civilian use. All other alternatives are safe in this respect as they have practically no post-war implications.

In summary, the military do not regard alternative systems as being viable.

III. Control measures

(i) Introduction

This subject comprises four specific issues that were treated separately by the experts:

- self-destruct versus self-neutralizing mechanisms;
- suitable delay times prior to self-destruction or self-neutralization in different scenarios;
- the likely cost penalty and whether it can be offset by increased effectiveness;
- detectable versus non-detectable mines.

The experts began by observing that mines used in an armed conflict situation cause considerable civilian casualties both during the conflict itself and for many years thereafter. It is regrettable that at times mines are intentionally employed against civilians, even though such use is illegal. The experts then defined the two categories of mines involved.

Anti-personnel mines are small, autonomous, victim-initiated explosive devices, usually designed to wound rather than kill. They may be point detonating, directional fragmentation (e.g. Claymore), or jumping fragmentation mines. They may be scattered from vehicles, artillery or aircraft, or hand-emplaced.

Anti-tank mines are larger, and normally require heavy pressure to set them off, although other means of initiation exist. Anti-tank mines can be fitted with anti-handling devices, designed to deter hand-clearance. They can also be modified and misused so that a man rather than a vehicle can initiate them. This practice was not considered further by the working group because it represented gross and uncontrollable misuse.

(ii) Self-destruct versus self-neutralizing mechanisms

Self-destruct mines (SD) contain an integral system that causes the mine to be spontaneously destroyed at the end of a predetermined period of time.

Self-neutralizing mines (SN) neutralize themselves so that they cannot be victim-initiated after a predetermined period of time.

With SD, there is nothing left after detonation. Therefore, should any mines fail to go off, they can be treated as live and dealt with accordingly. There is some danger when the mines detonate, but this was considered acceptable by the working group. The disadvantage with SN mines is that it is difficult to determine whether the system has functioned or not, resulting in no real danger but necessitating some form of clearance.

(iii) Economic aspects

The experts also discussed the possible reuse of scatterable SN mines for economic reasons, and concluded that this was too dangerous to be a viable option

because failure of the self-neutralizing system might have catastrophic results if the mines were being carried in vehicles or kept in storage bunkers.

(iv) Failure rates

With modern electronic fusing, it should be possible to bring failure rates down to between one in a thousand and one in a million for both SD and SN, and to design the system in such a way that the mechanism becomes harmless after failure. Mechanical pressure fuse systems can use air or gas generators to initiate SD or SN with varying degrees of reliability. In the future, chemical or other forms of degradation may be possible.

(v) Suitable delay times prior to self-destruction or self-neutralization in different scenarios

- a. **The delay time** is the time that a mine is on the ground and active and therefore capable of being victim-initiated. The term "delay time" does not relate to the time a mine can be kept in storage prior to use, nor the time between emplacement and the mine becoming active. After discussion, the experts agreed that the delay time was dependent on the tactical scenario.
- b. **Scatterable mines.** In a tactical situation where scatterable mines are likely to be employed, the majority of military experts felt that at the most a 12-month delay time would be acceptable. This delay time would be programmable at time of launch and would be selected by the formation commander depending on his appreciation of the military situation. This would generally be considerably less than 12 months, but adoption of a compulsory shorter delay time-frame would be militarily unacceptable. This is because should mines be required for longer periods (i.e. up to the full year) they would have destroyed themselves and would have to be replaced at great economic and military cost. A minority of military experts expressed the view that the maximum delay time should not be specified but left to individual nations to decide.
- c. **Hand-emplaced mines.** Hand-emplaced AP mines fall into two categories for the purpose of this paper: those deployed for relatively short periods of time, i.e. tactical; and those needed for an indefinite period of time, possibly many years, i.e. strategic, usually barrier minefields.
 - **AP mines** used in a tactical scenario are not needed for long periods and should be SD with a limited, timed life. They would thus represent a hazard to innocent civilians for only a limited amount of time, even in the event of illegal misuse.
 - **Strategic AP mines** guarding international borders or sensitive military sites will be required to remain active for many years. These cannot SD for military and economic reasons but must therefore always be subject to tight control, recording and marking. This may require international verification systems.

(vi) The likely cost penalty and whether it can be offset by increased effectiveness

It was recognized that any additional feature, such as SD capability, fitted to a mine will cost money without any direct increase in the military performance of the mine. It will, however, allow flexibility in military operations by aiding future mobility. Developments in technology and the inevitable reduction in cost of mass-produced electronics will bring down the cost of SD, but today that cost may be prohibitive to many nations. On the other hand, SD will reduce demining expenses should the mines ever be used in the future. However, as the acquisition costs of a mine system are critical to most nations, the possibility of saving money in the future may not be a compelling argument, particularly if the price is double or triple for a SD mine. Future developments may reduce this cost so as to make SD acceptable to all. Once the heavy initial cost of an electronic fuse is accepted, various features such as SD, SN, etc. are relatively cheap.

The experts did recognize that if humanitarian considerations and the enormous cost of mine removal are considered, a self-destruct capability becomes highly desirable and ultimately cost-effective.

(vii) Detectable versus non-detectable mines

Recent AP mines are made of plastic for cheapness, ease of manufacture and resistance to the effects of weather. Concealment is therefore not the main reason for the use of plastic in manufacture. In certain countries, mine doctrine requires that all anti-personnel mines be fitted with a metallic ring to allow detection by current electronic metal-seeking mine detectors. It is almost inevitable that electronic fuses will be detectable anyway. However, some participants felt that, from an operational point of view, non-detectability by electronic mine detectors played a crucial role in internal conflicts, as detectable mines could be recovered and used by other parties. They also considered that non-detectable mines offered an increased surprise factor. Other participants observed that "non-detectable" mines could be detected by other methods, such as prodding. Where minefields are covered by fire, the value of non-detectability of mines is drastically reduced.

From a humanitarian point of view, detectability by electronic metal-seeking devices is crucial to the whole process of mine clearance, and it was generally felt by the majority of participants that such detectability in mines would have few negative consequences.

(viii) Recommendations with regard to Protocol II of the 1980 Weapons Convention

- a. All scatterable mines should self-destruct; however, it is highly recommended that even in the case of self-destruct mines the general area of their use be recorded in accordance with existing law and military doctrine, and that where possible they be used in fenced or marked areas.

- b. At the end of hostilities, self-destruct times should be declared to all parties, together with all other minefield information.
 - c. For the foreseeable future there will be a military need for some forms of hand-emplaced mines that will not self-destruct, for use in long-term and barrier minefields, but they must be used in tightly controlled circumstances.
 - d. The experts acknowledge that directional fragmentation mines, such as Claymore mines, will not necessarily be fitted with a SD mechanism, because they are principally designed for reuse. It is suggested that jumping mines be either SD or SN after a timed life, as they are too difficult and dangerous to reuse.
 - e. Despite the increased acquisition costs, future AP mines should self-destruct, except in the circumstances already mentioned in these recommendations, thereby reducing the tragic post-conflict toll of human lives and social, economic, medical and mine clearance costs.
 - f. In the future, all AP mines should be detectable.
-

Arguments for restricting cluster weapons: Humanitarian protection versus “military necessity”

by Eric Prokosch¹

Concerned about the terrible toll of land-mine injuries around the world, six organizations issued a call in October 1992 for an international ban on the use, production, stockpiling and transfer of antipersonnel mines.² Other organizations have taken up the call, and the campaign is already having a big impact. One result of the pressure will be the convening, pursuant to a request by France, of a review conference on 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. This renewed interest in controlling indiscriminate and excessively injurious weapons should not be confined to mines but should extend to other classes of modern anti-personnel weapons as well.

The last major attempt at control was in the series of conferences in the 1970s leading to the adoption of the 1980 Convention with its three Protocols. The discussions then were in response to the introduction of new technologies which increased the risk of excessively injurious and indiscriminate effects. In the course of the discussions, Sweden with other countries proposed prohibiting the use of incendiaries, anti-personnel cluster weapons and a series of other munitions. The Convention finally adopted fell far short of the expectation raised by these proposals.

¹ The author wishes to thank Dr. Julian Perry Robinson and Richard Huthrie for their helpful comments on drafts of this article.

² Arms Project of Human Rights Watch and Physicians for Human Rights, *Landmines: A Deadly Legacy*, New York, Human Rights Watch, 1993, Appendix 1, pp. 361-362.

This article examines the case today for restricting the use of a type of munition which was included in the original Swedish proposals: anti-personnel cluster weapons. Other weapons which need to be restricted or banned include anti-personnel mines,³ incendiaries,⁴ blinding weapons,⁵ other directed-energy weapons,⁶ fuel-air explosives, and especially injurious small calibre weapons.⁸

The emergence of modern cluster weapons

Bomb clusters of several types were used in World War II: clusters of incendiary bombs, operating on the principle that a large fire was most likely to result from many small fires; and clusters of fragmentation bombs, used to a limited extent against troops on the ground. The origins of modern cluster weapons can be traced back to a series of developments which began in the 1950s and were linked to the needs, perceived in the Korean war, of a technologically superior army facing a numerically superior enemy. There were three important areas of innovation: technol-

³ *Ibid.*

⁴ Protocol III to the 1980 Convention places severe restrictions on attacks on military objectives located within a concentration of civilians and, in particular, prohibits completely any attacks by air on such objectives. This provision is intended to prevent huge concentrations of civilians being wiped out by fire: the emphasis is on the prevention of indiscriminate effects. Some delegations at the U.N. Conference which adopted the Convention wished also to protect combatants against the cruel burns caused by incendiaries (in the original Swedish proposal, the use of incendiary weapons would have been prohibited completely, except for illuminating devices and incendiary projectiles used exclusively against aircraft or armoured vehicles; see H. Blix, "Current Efforts to Prohibit the Use of Certain Conventional Weapons", *Instant Research on Peace and Violence*, 1974, Vol. 4, No. 1, p. 27). The Conference drafted and sent to the U.N. General Assembly a resolution inviting all governments "to continue the consideration of the question of protection of combatants against incendiary weapons" with a view to taking up the matter at a review conference on the Convention. Y. Sandoz, "Prohibitions or Restrictions on the Use of Certain Conventional Weapons", *International Review of the Red Cross*, No. 220, January-February 1981, pp. 13-14, 17.

⁵ L. Doswald-Beck, ed., *Blinding Weapons: Reports of the Meetings of Experts Convened by the International Committee of the Red Cross on Battlefield Laser Weapons: 1989-1991*. Geneva, ICRC, 1993.

⁶ L. Doswald-Beck and G. C. Cauderay, "The Development of New Anti-personnel Weapons", *International Review of the Red Cross*, No. 279, November-December 1990, pp. 565-577.

⁷ *Ibid.*

⁸ *Ibid.* A resolution was adopted by the U.N. Conference in 1979 which, *inter alia*, appealed to all governments "to exercise the utmost care in the development of small-calibre weapon systems, so as to avoid an unnecessary escalation of the injurious effects of such systems" (Sandoz, *op cit.*, p. 33).

ogies to disperse hundreds of high explosive submunitions of “bomblets” from a single dispenser, along with the associated fusing systems; a decision to reduce the average fragment size, in line with the results of battlefield casualty surveys and laboratory studies of the wounding process; and techniques of controlled fragmentation to ensure that, on explosion, the submunitions would break up into hundreds of fast-moving fragments of the optimal size.

Modern cluster bombs were first used in the U.S.-Indochina war. Compared to the crude World War II bomb clusters, the new munitions embodied a number of advances. Most of the dispensers were streamlined for external carriage on high-speed aircraft; the bomblets were smaller and more numerous, the use of controlled fragmentation made them more effective against more people; and the area coverage was much greater.

The cluster bomb most widely used in Vietnam, the CBU-24, consists of a bomb-shaped metal case, or “dispenser”, containing 640 to 670 round, one-pound (0.45 kg) bomblets, each of which on explosion shoots off several hundred 7/32-inch (5.6 mm) steel balls in all directions. Dropped from an airplane, the dispenser opens in the air, releasing the bomblets which are aerodynamically designed to scatter in a pattern. If dropped in such a way as to place one bomblet per 100 square metres, a single CBU-24 would cover an area of 6.7 hectares, and a B-52 bomber loaded with CBU-24s could spread 25,000 bomblets at 20 m intervals over an area of 2.5 km by 1 km.⁹

So extensively was North Vietnam bombed with CBU-24s that the authorities there claimed the weapon was being used against the civilian population. This was denied by U.S. sources, who said it was being used against anti-aircraft sites, truck parks and other military targets. The charge that villages were being bombed was answered with claims that anti-aircraft weapons were located in villages.¹⁰

Many other cluster weapons were introduced in Vietnam, some as a result of developments going back to the 1950s and others as “quick-fix” adaptations to new battlefield uses. There were various kinds of bomblets—anti-personnel bomblets with delay fuses, anti-personnel bomblets with jungle penetration fuses, anti-tank bomblets, and bomblets with combined effect—anti-tank and anti-personnel, anti-materiel and

⁹ These estimates are from the Stockholm International Peace Research Institute report *Antipersonnel Weapons*, London, Taylor & Francis, 1978, p. 161. They are based on the assumption that a single bomblet has an effective casualty radius of 5 to 10 m, so that effective delivery against personnel would be one bomblet per 100 square metres.

¹⁰ E. Prokosch, “Antipersonnel Weapons”, *International Social Science Journal*, 1976, Vol. 28, No. 2, p. 341.

incendiary, with different bomblets usable interchangeably from the same dispenser. Bomblet-filled warheads were fitted to artillery shells. Cluster technologies were used to sow anti-personnel mines from the air: spherical "Wide Area Anti-personnel Mines" with tripwires, plastic "Dragontooth" mines, and explosive-filled canvas pouches called "gravel mines".

The years since the U.S.-Indochina war have seen the proliferation of cluster weapons technologies in other countries. The technologies themselves have been refined, with "modular", interchangeable systems of dispensers and submunitions, electronic systems for programming the timing of delayed explosions of bomblets, and devices allowing a pilot to select the dispersal pattern of the bomblets. Press reports from conflict areas in different parts of the world speak routinely of cluster bombs being dropped. With the great many wars that have raged in recent years, cluster weapons and the other new anti-personnel weapons have made zones of armed conflict far more dangerous than before for both soldiers and civilians.

Grounds for restricting cluster weapons

In today's world, an outright ban on cluster weapons would clearly be unacceptable to the many nations which now possess these weapons and have either used them or contemplated using them in warfare. What is needed is to find a formula that identifies those weapons which are especially harmful from a humanitarian point of view, and then to build the argument that it is necessary and desirable to bring about an international ban on their use.

In a working paper submitted in 1975 to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Sweden and 12 other countries offered formulas to prohibit the use of cluster weapons dispensing fragmentation bomblets and anti-personnel mines, respectively:

"Anti-personnel fragmentation weapons. Anti-personnel cluster warheads or other devices with many bomblets which act through the ejection of a great number of small-calibred fragments or pellets are prohibited for use".

"Anti-personnel land-mines. Anti-personnel land-mines must not be laid by aircraft".¹¹

¹¹ Document CDDN/IV/201, with addenda and corrigenda, reproduced in *ICRC Conference of Government Experts on the Use of Certain Conventional Weapons (Second Session — Lugano, 28.1-26.2.1976): Report*, Geneva, ICRC, 1976. Annex A.21, p. 199.

The proposal on cluster weapons contained in the first formula had already come under heavy fire at the ICRC Conference of Government Experts on the Use of Certain Conventional Weapons, in 1974, and it did not find its way into the 1980 Convention. The air-delivered mines covered by the second proposal are dealt with in Protocol II to the Convention under the heading of “remotely delivered mines”. The use of such mines under the Convention is not prohibited as in the Swedish proposal but is subject to safeguards which, however, are weakened by several loopholes. The location of minefields is to be recorded, but this requirement applies only to “pre-planned minefields”, leaving open the possibility of sowing quantities of mines in the heat of battle without recording their location (Article 7).¹² Remotely delivered mines are not to be used unless their location can be accurately recorded *or* the mines contain an effective neutralizing mechanism. Advance warning must be given of the delivery of remotely delivered mines which may affect the civilian population “unless circumstances do not permit” (Article 5) — another significant loophole.

In the first of the Swedish formulas just quoted, the reference to “small-calibred fragments or pellets” is useful because it helps to distinguish anti-personnel bomblets from other bomblets, employing larger fragments, which are intended for use against materiel. Even here there may be room for argument: the 5.6 mm steel balls in the CBU-24 bomblets, although primarily anti-personnel, were reportedly effective also in damaging light materiel such as the gasoline tanks of trucks. The word “anti-personnel” does not suffice to define the class of weapons which should be banned. It leaves undecided the fate of combined-effects munitions, and omits weapons which may not be primarily for use against personnel but are nonetheless candidates for restriction on humanitarian grounds.

The problem may be illustrated by reference to two cluster weapons used in the 1991 Gulf war. The JP233 anti-runway cluster bomb, a British weapon, consists of a dispenser loaded with 30 cratering bombs and 215 area denial bomblets. As used in the Gulf war, two dispensers are slung under a Tornado fighter-bomber. Flying at low altitude over an enemy runway, the pilot drops the bombs. The cratering bombs, which are equipped with parachutes, penetrate the runway surface and explode,

¹² Article 7 of Protocol II merely enjoins the parties to a conflict to “endeavour” to record the location of mines and minefields which are not pre-planned.

producing craters, while the area denial bomblets are deployed on legs around the craters. The bomblets are fitted with delayed action fuses with time lapses of reportedly up to 36 hours, during which time the bomblets impede repairs by exploding, damaging vehicles and killing or injuring repair crews.¹³

The degree of risk to civilians from the JP233 would depend on the proximity of airfields to civilian settlements and the risk of errors in delivery, which is relatively small in low-altitude bombing. In view of the specific design objective and high cost of the bombs, it seems unlikely that they would be used against other types of targets. Although in the terms of the Swedish formula this weapon delivers "many" bomblets producing fragments, the risk of indiscriminate use against civilians would appear to be low.

At the other extreme is the Multiple Launch Rocket System (MLRS), a U.S. weapon used for the first time in the Gulf war. The MLRS comprises a 12-tube surface-to-surface rocket launcher, firing one rocket from each tube. The aiming is controlled by a computer and the launcher is mounted on a tracked vehicle, enabling it to be driven away quickly after firing to elude enemy replying fire.

In the version used in the Gulf war, each of the 12 rockets has a warhead containing 644 bomblets, giving a total of 7,728 bomblets deployed when the rockets are fired together. The bomblet has a shaped charge and is designed to be effective against light armour, materiel, and personnel; its destructive power is similar to that of a hand grenade. A salvo of 12 rockets is said to deploy bomblets over an area of 23 hectares at mid-range and almost twice that area at the maximum range of over 30 km.¹⁴ MLRS targets in the Gulf war were reported to include troops, artillery, armour, air-defence systems, combat engineering equipment and command centres.

With its long range and wide area coverage, the MLRS carries an obvious risk of indiscriminate effects. Its targets in the Gulf war may have been military targets in the desert, but it is easy to envision other wars where civilians would be nearby. An area coverage of 20 or even 40 hectares could well be out of all proportion to the actual size of the targets against which the weapon was being deployed, such as an artillery battery. Accuracy of delivery could be another problem: in other wars the MLRS might well be used in situations where no visual observation or other on-

¹³ *Jane's Weapon Systems: 1987-88*, London, Jane's, pp. 822-823.

¹⁴ *Ibid.*, pp. 128-129.

the-spot target designation was possible or where the weapon's computer would not work accurately.¹⁵

Simply on the ground of indiscriminate effects, the MLRS would be a strong candidate for an outright ban on use.¹⁶ But the humanitarian objection to the MLRS is not on these grounds alone. As with other cluster weapons which dispense a great many bomblets or are on a wide scale, the sheer number of explosive bomblets poses a long-term risk to civilian life. Because of manufacturing defects, a certain percentage of bomblets fail to explode and remain on the surface or underground, constituting a mortal danger for soldiers, civilians, livestock and wild animals if they are disturbed even long after the fighting is over. Where the bomblets land on surfaces other than those for which they have been designed — sand, for instance — the rate of unexploded munitions is likely to be higher. These duds are, in effect, unexploded mines more destructive than the smaller anti-personnel mines, yet they are not covered by even the limited protection on the use of mines offered by Protocol II to the 1980 Convention.

Somewhere in between the JP233 and the MLRS is the Rockeye. This Vietnam-era cluster bomb dispenses 247 bomblets, each with a shaped charge warhead which is designed to penetrate armour but will also injure personnel. Huge stocks were on hand when the 1991 Gulf war began, and over 20,000 Rockeyes were reportedly dropped, deploying some 5,000,000 bomblets across the battlefield.¹⁷ Apart from any indiscriminate effects at the time of the attacks, a dud rate of — for example — 5% would result in a legacy of a quarter of a million unexploded bomblets, posing a continued threat to civilian life.¹⁸

¹⁵ Factors which need to be taken into account in assessing the potential indiscriminate effects of a weapon include its area coverage in relation to the areas of likely targets and their proximity to civilians; variations in area coverage and accuracy according to the mode of attack (high-altitude bombing from high-speed aircraft is likely to be less accurate and result in a greater area coverage than low-level bombing from low-speed aircraft); and increases in area coverage when multiple quantities of weapons are used in an attack.

¹⁶ As indicated in the report of the 1976 ICRC Conference of Government Experts on the Use of Certain Conventional Weapons (paragraph 70, p. 120), the Swedish proposal to ban the use of anti-personnel cluster weapons was based both on their indiscriminate effects and on the risk of multiple injury, constituting unnecessary suffering. This latter point was challenged by other experts at the Conference.

¹⁷ W. M. Arkin, D. Durrant and M. Cherni, *On Impact: Modern Warfare and the Environment: A Case Study of the Gulf War*, Washington, Greenpeace, 1991, Appendix A, pp. 3-4.

¹⁸ Rockeye bomblets were the most prevalent forms of unexploded ordnance in Kuwait after the war, according to an official of a company clearing mines there (*Landmines: A Deadly Legacy*, p. 53). According to information presented at the ICRC Symposium on Anti-personnel Mines (Montreux, 21-23 April 1993), the Rockeye bomblets dropped in Kuwait had several different fusing systems which could not be distinguished externally, and the only safe method of disposal was *in situ* demolition.

As its title indicates, the 1980 Convention is based on two principles of international humanitarian law: the prohibition of use of weapons causing superfluous injury or unnecessary suffering and the prohibition of indiscriminate attacks, a principle which in turn is intended to serve the wider goal of protecting civilians from the adverse effects of warfare. The emerging catastrophe of land-mines and the descriptions of cluster weapons above show that several further factors need to be brought into the discussions:

- A temporal factor relating to the lingering risk posed by unexploded munitions.¹⁹
- A quantitative factor: the risk to non-combatants from anti-personnel mines and cluster weapons is aggravated by the sheer quantity of munitions used. As thousands, tens of thousands, hundred of thousands and millions of mines and bomblets are strewn across the land, the number of duds increases proportionally and so does the long-term risk to civilian life.²⁰

¹⁹ As the ICRC stated in a report presented to the Twenty-first International Conference of the Red Cross in 1969, belligerents should abstain from using weapons whose harmful effects are beyond the control, in time or space, of those employing them (Sandoz, *op. cit.*, p. 5). Under Article 51(4) of Protocol I additional to the Geneva Conventions of 1949, attacks which are prohibited as indiscriminate include "those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol". Protocol II to the 1980 Convention attempts to give protection against long-term effects of land-mines by providing for recording and publication of the location of mines and minefields.

²⁰ For example, in Xieng Khouang province, one of the most heavily bombed areas of northern Laos, anti-personnel bomblets were reported to be the most commonly encountered type of unexploded munition after the U.S.-Indochina war. In 1979 the U.S.S.R. initiated an aid programme to clear unexploded munitions from farm land in Xien Khouang province. Over 18 months some 5,000,000 hectares were cleared of 12,700 explosive remnants of many types, with CBU-24 bomblets predominating. (E. S. Martin and M. Hiebert, "Explosive Remnants of the Second Indochina War in Viet Nam and Laos", in A. H. Westing, ed., *Explosive Remnants of War: Mitigating the Environmental Effects*, Stockholm International Peace Research Institute, London and Philadelphia, Taylor & Francis, 1985, pp. 44-47).

William M. Arkin, Director of Military Research of Greenpeace International, has estimated that a minimum of 24,000,000 bomblets and mines were dropped from cluster weapons (artillery, rockets, and cluster bombs) during the 1991 Gulf War. As Arkin has pointed out, estimates of rates of unexploded munitions vary from 2 to 34 claimed by manufacturers to 10 to 2% observed on the ground. A rate of 5%, credible to most experts, would mean that this short war left over a million unexploded munitions. (These figures are from a paper presented by W. M. Arkin at the public session of the NGO Conference on Anti-personnel Mines held in London on 24 May 1993.)

According to information presented at the ICRC Symposium on Anti-personnel Mines in April 1993, one of the companies engaged in explosive ordnance disposal in Kuwait after the 1991 war cleared over 100,000 unexploded submunitions. The company also cleared over 130,000 anti-tank mines and 230,000 anti-personnel mines from conventionally laid Iraqi barrier minefields in Kuwait.

- The factor of cost. As the cost of submunitions is reduced, it becomes easier for armed forces to use more of them.

In weighing humanitarian considerations against military needs, the quantitative and temporal factors should also be taken into account. A purely or primarily anti-tank weapon, for example, would not normally be regarded as a candidate for exclusion on humanitarian grounds. The Rockeye is such a weapon, yet the large number of bomblets poses problems. One of the original rationales for this weapon was the need to compensate for aiming imprecisions in free-fall bombing from modern high-speed aircraft by using an *area* weapon against a *point* target. A jet pilot would have difficulty hitting a tank with a conventional high explosive bomb (so the rationale went), but if 247 bomblets are scattered over an area containing a tank, the chances of a hit are increased. The question that must be asked from a humanitarian point of view is this: is the long-term risk posed by the deployment of 247 bomblets outweighed by whatever probability there is of disabling a tank which may be located in the target area. The same question should be asked about other cluster weapons in relation to the quantities deployed and the targets against which they are directed.

Towards a new logic

The process of deciding on weapons bans has traditionally been thought of as a balancing exercise where humanitarian considerations are weighed against military needs. As outcomes of that process, the 1980 Convention and its aftermath are eloquent demonstrations of its inadequacy.

Taking the Swedish proposal to ban the aerial delivery of anti-personnel mines as a point of departure, the discussions in the 1970s led to agreements on measures with governments and their military forces at the time considered acceptable and even desirable; those measures are contained in Protocol II to the Convention. Instead of the outright ban proposed by Sweden, however, Protocol II imposes safeguards which are full of loopholes, as outlined above. Its provisions for record-keeping, self-neutralizing devices and warnings to civilians are valuable, but they have been widely ignored in practice. The Convention applies formally only to international armed conflicts; and nothing has been done to extend the

application of the Convention and its Protocols beyond the minority of states which have hitherto decided to become party to them.²¹

Ten months before the adoption of the Convention, Soviet forces entered Afghanistan. In the war which followed, huge numbers of plastic PFM-1 anti-personnel mines modelled on the U.S. Dragontooth mine were dropped across the countryside from Soviet aircraft. As a major military power, the Soviet Union had taken part in the conferences in the 1970s and was fully aware of the contents of the 1980 Convention and its Protocols, which it ratified in 1982. Had the original Swedish proposal been adopted and observed, these mines would not have been sown. Today Afghanistan is considered the most heavily mined country in the world.²²

It is understandable that military forces are inclined to resist the adoption of weapons bans: it is natural that they should want to have whatever means will help them to accomplish their missions, and that they should be reluctant to foreclose any options. But military considerations should not automatically prevail. States must not allow their long-term social needs to be outweighed by a short-term perception of military requirements, including such supposed requirements as the use of weapons for "psychological" purposes.²³ The phrase "military necessity"

²¹ As the ICRC noted in a working paper for the group of governmental experts preparing the review conference, "in many respects this Convention has not achieved its aim, not only because it has been insufficiently ratified or implemented, but also because in many ways it does not provide the means needed to prevent the excessive damage that is actually being caused in armed conflicts, the majority of which are non-international. In particular, the Convention relies too extensively on regulating behaviour in relation to the use of certain weapons, which is frequently difficult to enforce, rather than altogether prohibiting the use of certain types of weapons. Further, no parallel measures have been taken in the disarmament context, which are nevertheless proposed in the preamble of the Convention", *Report of the International Committee of the Red Cross for the Review Conference of the 1980 United Nations Convention...*, Geneva, ICRC, February 1994, p. 1.

A step in the direction of enhancing the universality of the Convention would be the adoption by consensus of a U.N. General Assembly resolution affirming that the provisions of the Convention and its Protocols are expressions of customary international law, and urging all combatants in both international and non-international armed conflicts to observe them

²² *Landmines: A Deadly Legacy*, pp. 145, 298-299.

²³ During the 1991 Gulf war, a British army spokesman described the use of the MLRS against Iraqi artillery and said that the allies were attacking Iraq's "will to resist" as much as their weaponry (William Branigin, "Iraqi Losses 'Horrendous,' Official Says", *Washington Post*, 20 February 1991). After the war, a U.S. defence publication reported that according to captured Iraqi soldiers, a volley of bomblet-filled MLRS rockets directed against Iraqi artillery "shut down the operation" of the artillery, "partially because of the

should not be taken to imply that stated military needs must be accepted without question.

Now that the magnitude of the land-mine problems is being recognized and the need for costly and hazardous clearance operations and arduous rehabilitation programme is being faced, the world community is paying a heavy price for its failure to achieve stronger restrictions on the deployment of anti-personnel mines in 1980. This mistake must not be repeated. If further catastrophes are to be prevented, the world's governments should urgently adopt strong restrictions on cluster weapons and the other anti-personnel munitions mentioned at the beginning of this article.

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destruction it caused and partially because of its devastating psychological effects” (“‘Steel Rain’ Shut Down Iraqi Artillery”, *Armed Forces Journal International*, May 1991, p. 37). From a humanitarian perspective, it is doubtful that the inherent damage to civilian life posed by the deployment of a volley of 7,700 bomblets can be justified by the hope of frightening the enemy.

The historical foundations of humanitarian action

by Dr Jean Guillermand

PART II

Humanism and philosophical thought

In addition to the religious motivation, another equally old tradition can be said to have played a part in the emergence of the Red Cross Movement. This involved the perception, by the sole means of human intelligence, of an ideal concept of goodness separate from, and in some cases even opposed to, the consideration of a person's immediate interests.

This idea rarely finds expression in the oldest iconographical and written sources of remote Antiquity, which on the contrary exalt the triumph of brute force in the conduct of human affairs. In this respect, Assyrian methods of warfare and their treatment of the vanquished reached a pinnacle of barbarity which was not, however, confined to ancient history.

Yet even in that dark period of history the first timid manifestations of a humanitarian conscience can occasionally be glimpsed. One of the most significant examples is found in the legend of Gilgamesh, the idealized hero of ancient Mesopotamia later adopted by the Assyrians.

The tale relates the epic feats which Gilgamesh, who is endowed with superhuman strength, accomplishes with the help of Enkidu, his companion and caricatural counterpart. In one episode the hero, having vanquished a giant named Huwawa, shows a surprising willingness to spare his wounded, pleading enemy:

Original: French. See Part I, "The religions influence", in *IRRC*, No. 298, January-February 1994, pp. 42-55.

“Then the heart of Gilgamesh, son of Ninsem, was moved, and to his servant Enkidu he spoke thus:

‘Enkidu, must a captured bird not return to its nest? And must a captured prisoner not return to his mother’s arms?’

Enkidu interrupted him: ‘You yourself, when you are captured, you will not return to your mother’s arms. When were the hands of a prisoner of war ever unbound?’” (*Tablet LB 2110, from the French translation by P. Garelli—Tablets found at Nineveh, in the library of the Assyrian King Ashurbanipal (reigned 668-627 B.C.)*)

Unmoved by his companion’s incongruous exclamation, Enkidu is the one who finishes off the wounded captive. To the people who heard the legend, this probably seemed the normal thing to do.

The first flowering of humanistic thought occurred some centuries later, at the time of what is known as the “Greek miracle”.

From the Archaic Period on, evidence of a rudimentary code of warfare may be found in the gathering of rival peoples around the holiest shrines and the institution of amphictyonies, whose role rapidly expanded beyond their initial duties connected with the shrines themselves. Best known of all is the Delphic Amphictyony, which comprised 12 ethnic communities from the Greek peninsula. The amphictyonic oath, reported by Aeschines in his oration on the “false embassy”, included the promise that “they would raze no city of the Amphictyonic states, nor shut them off from flowing water in war or in peace; that if anyone should violate this oath, they would march against such an one and raze his cities”.¹

The proclaimed brotherhood of the amphictyony did not prevent cruel internecine wars from leaving their mark on Greek history. Excesses were particularly frequent in the fifth century B.C., when the Peloponnesian war pitted Athens’ allies against those of Sparta. Thucydides, who witnessed its early phases, described the ruthless treatment regularly inflicted on the inhabitants of defeated city-states: all men old enough to bear arms were executed and women and children were deported into slavery. Sometimes people were massacred in cold blood, a fate which befell the defenders of Thyrea brought back to Athens in 424 B.C. As for the conditions in which the Athenian aggressors were detained after their failed siege of Syracuse in 413 B.C., they were remembered throughout Antiquity as a symbol of inhuman treatment.

¹ μηδεμίαν πόλιν τῶν Ἀμφικτυονίδων ἀνάστατον ποιήσῃν, μηδ’ ὑδάτων ναματιαίων εἶρξῃν μήτ’ ἐν πολέμῳ μήτ’ ἐν εἰρήνῃ, ἐάν δέ τις ταῦτα παραβῇ, στρατεύσειν ἐπὶ τοῦ τον καὶ τας πόλεις ἀναστήσειν, *The false embassy*, 115.

Thucydides' account nevertheless provides some glimmers of humanity, which are particularly apparent in a debate that took place in 427 B.C. before the Athenian "demos" (Assembly) over the attitude to adopt towards the inhabitants of Mytilene. The latter had taken advantage of the temporary weakness of the Delian Confederacy to free themselves of its tutelage, but the rebellion, which had been fomented by the local aristocracy and received little popular support, had been quickly suppressed by Athens. Two possible courses of action were argued before the Athenian Assembly, the one harsh, the other moderate: to serve as an example, Cleon demanded that all the adult males of Mytilene be put to death, and the women and children sold into slavery; but Diodotus challenged the value of such violent repression, fearing on the contrary that it would lead to a wholesale rejection of Athenian rule. He ended his speech by proclaiming the superiority of intelligence over violence:

"Such a course will be best for the future, and will cause alarm among our enemies at once; for he who is wise in counsel is stronger against the foe than he who recklessly rushes on with brute force".²

Diodotus' opinion won the day. Although the fomenters of the rebellion were punished, the people of Mytilene were spared.

In the realm of ideas the fifth century B.C. also saw the birth of Greek philosophy, which was to provide the foundations of humanism for centuries to come.

The first philosophers, who lived in the outlying city-states of greater Greece, devoted much thought to such subjects as man's place in the world and his attraction to natural harmony.

In the early fifth century, Empedocles of Agrigentum determined that two universal, antagonistic principles were at the origin of the changes which constantly affect all things: the principle of Love (*philotes*) or harmony, and the principle of Strife (*neikos*) or discord. A philosopher should naturally set his mind on understanding the first:

"And among these, the principle of love extends equally as far in every direction: hold it in your mind without letting it blind you. For this principle is innate in every mortal being, the source of kind thoughts and peaceful deeds".³

² Τάδε γὰρ ἔς τε τὸ μέλλον ἀγαθὰ καὶ τοῖς πολεμίοις ἤδη φοβερά· ὅστις γὰρ εὖ βουλευέται πρὸς τοὺς ἐναντίους κρείσσων ἔστιν ἢ μετ' ἔργων ἰσχύος ἀνοία ἐπιών, *The Peloponnesian War*, III, 48.

³ καὶ Φιλότης ἐν τοῖσιν, ἴση μῆκος τε πλάτος τε·
τὴν σὺ νόωι δέρκευ, μὴδ' ὀμμασιν ἴσο τεθηπῶς·
ἦτις καὶ θνητοῖσι νομίζεται ἔμφυτος ἄρθροις,
τῆι τε φίλα φρονέουσι καὶ ἄρθμια ἔργα τελοῦσι,

Poem on Nature, fragment 17.

But it was in fourth-century Athens, during the golden age of Greek philosophy, that humanitarian ideas were truly given substance in the teachings of Socrates and his later disciples, Plato and Aristotle.

Above the world of ideas, to whose heights the mind is able to rise, Plato places the concept of a supreme Good capable of enlightening human intelligence and inspiring it with noble ideas such as justice, to which the dialogue of the *Republic* is devoted. Although for Plato human love stops short of loving one's enemies, he carefully distinguishes among the latter. After Socrates has demonstrated to Polemarchus that there may be friends who are detestable and enemies worthy of respect, Plato has him say:

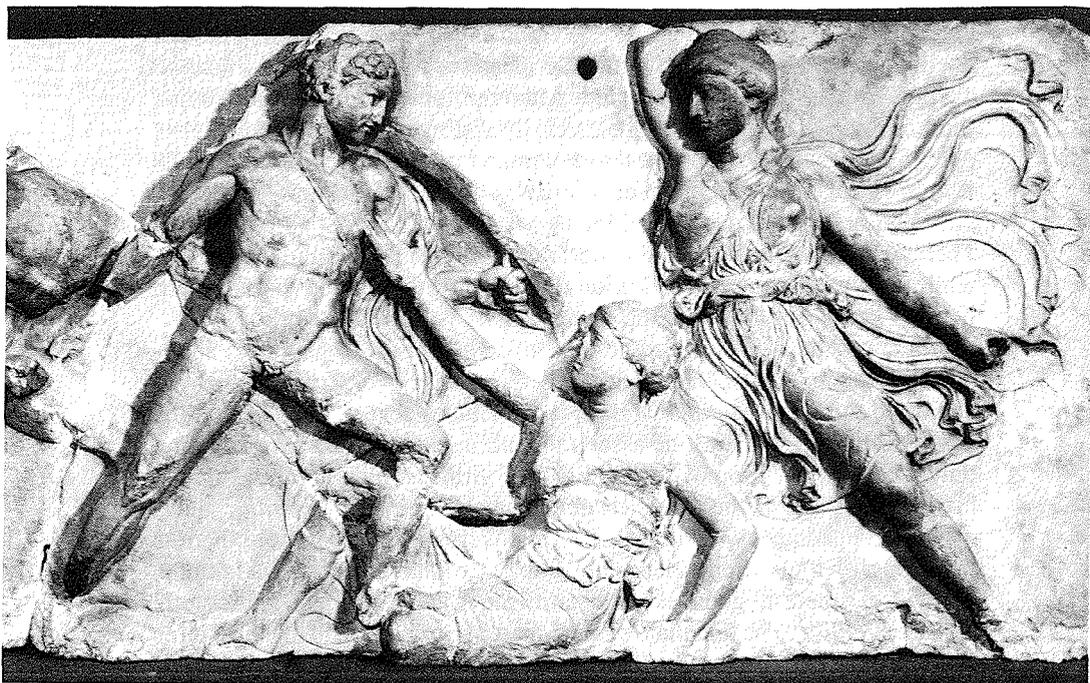
"You order us to add something to what we said at first about the just. Then we said that it is just to do good to the friend and harm to the enemy, while now we are to say in addition that it is just to do good to the friend, if he is good, and harm to the enemy, if he is bad".⁴

On a practical level, Aristotle developed a concept of goodness applicable to the sphere of daily life in the *Nichomachean Ethics*, which he dedicated to his son. In this work, which includes several passages on the nature of human relations, he asserts that all men are bound by a common duty of solidarity. Moreover, in the list of virtues which he draws up for his son's instruction, the lengthiest development is devoted to *philia*, equivalent to Empedocles' *philotes*. The term covers a great deal more than its usual English translation "friendship" implies, for it embraces the additional notions of interest, goodness and altruism. Like Empedocles, Aristotle considers *philia* to be an innate quality shared by all living beings. He turns it into a principle that transcends all others: the principle of universal love.

"Friendship seems to exist naturally both in parent for offspring and in offspring for parent (this fact, which is commonly recognized, holds true not only in the case of man but in the case of birds and the majority of animals as well). And friendship seems to exist naturally between members of the same species: this is especially true in the case of mankind, and this is the reason why in the case of mankind we actually have a special word, 'kindliness', to designate natural friendship — and 'kindly' is in fact used as a term of praise".⁵

⁴ Κελεύεις δὴ ἡμᾶς προσθεῖναι τῷ δικαίῳ ἢ ὡς τὸ πρῶτον ἐλέγομεν, λέγοντες δίκαιον εἶναι τὸν μὲν φίλον εὖ ποιεῖν, τὸν δὲ ἐχθρὸν κακῶς, νῦν πρὸς τούτῳ ὡςδε λέγειν, ὅτι ἔστι δίκαιον τὸν μὲν φίλον ἀγαθὸν ὄντα εὖ ποιεῖν, τὸν δ' ἐχθρὸν κακὸν ὄντα βλάπτειν, *The Republic*, Book I.

⁵ φύσει τ' ἐνυπάρχειν ἔοικε πρὸς τὸ γεγεννημένον τῷ γεννήσαντι καὶ πρὸς τὸ γεννήσαν τῷ γεννηθέντι, οὐ μόνον ἐν ἀνθρώποις ἀλλὰ καὶ ἐν ὄρνισι καὶ τοῖς πλείστοις τῶν ζώων, καὶ τοῖς ὁμοεθνέσι πρὸς ἄλληλα, καὶ μάλιστα τοῖς ἀνθρώποις ὅθεν τοὺς φιλανθρώπους ἐπαινοῦμεν, *Nichomachean Ethics*, VIII, 1, 1155 a).



HUMANITARIAN IDEA FINDS EXPRESSION IN CLASSICAL GREEK PERFECTION

The frieze in Apollo's temple at Bassae, built in the 5th century B.C. at the time of the Peloponnesian wars, depicts legendary battles between Greeks and the Amazons.

This is one of several scenes evoking contradictory sentiments felt by the combatants: a Greek warrior, although himself in danger, refrains from striking another blow at a wounded Amazon pleading for mercy at his feet.

(British Museum)

In Greek society, as in all ancient cultures, the situation of slaves raised a problem with respect to this general principle. In his treatise on *Politics*, Aristotle evades the difficulty by holding that servitude is a normal condition, and even a profitable one for people from uncivilized nations. He leaves open the possibility that feelings *philia* may develop between masters and slaves provided that both are worthy of their role, and even uses this argument to justify wars of conquest:

“And hence the art of war so far as it is natural is in a sense a branch of the Art of Acquisition; for it includes the art of the chase which we are bound to use against beasts and human beings who will not submit to the rule ordained for them by Nature, as war of this kind is naturally just”.⁶

This reasoning marks the bounds of the magnanimity displayed in philosophical humanism: solidarity born of an intellectual process is naturally confined to the community which shares that ideal. The same limitation is found in Plato’s *Republic*. Greek altruistic thought saw one’s fellow men as beings characterized by thought rather than by feeling.

Independently from Greek philosophy, at least at the outset, another, sterner form of humanism developed in Rome. It was also characterized by a certain ideal which exalted courage and virtue more than strength and in which brutal instincts were surpassed. Respect for ill-fated courage, which the Romans themselves had many opportunities to experience in the early chapters of their history, prompted them to treat the vanquished with a certain degree of magnanimity.

Livy thus proudly opens his *History of Rome* with the following statement: “Amongst other things which are the glory of Rome is this, that no nation has ever been contented with milder punishments”.⁷ An abundance of more or less legendary examples from the period of the early conquests are used to support this, in particular the instructions given by Camillus after the difficult capture of Veii in 395 B.C. that the unarmed were to be spared”.⁸

Such precepts were included in a very early code of warfare, *ius fetiale*, whose implementation was entrusted to the *fetiales*, a collegium of 20 priestly officials in charge of examining whether there was a just

⁶ Διὸ καὶ ἡ πολεμικὴ φύσει κτητικὴ πως ἔσται (ἡ γὰρ θηρευτικὴ μέρος αὐτῆς), ἧ δεῖ χρῆσθαι πρὸς τε τὰ θηρία καὶ τῶν ἀνθρώπων ὅσοι πεφυκότες ἀρχεσθαι μὴ θέλουσιν, ὡς φύσει δίκαιον τοῦτον ὄντα τὸν πόλεμον, *Politics*, I, 12.

⁷ “Gloriari licet nulli gentium mitiores placuisse poenas”, I, XXVIII.

⁸ “Ut ab inermi abstineatur”, V, XXI.

(i.e. lawful) cause to declare war, notifying the enemy of Rome's complaints and finally, after 33 days had expired, conveying the Senate's decision to them.

This code of conduct for dealing with other nations in times of war and peace embodied the very spirit of republican virtues and constituted one of the foundation stones on which the greatness of Rome was built. Even the Romans' opponents were impressed by it. The Greek aristocrat Polybius, whose father was a strategist of the Achaean League, had seen his country conquered by the Romans in the second century B.C. and was among the 1,000 hostages carried back to Rome after the decisive defeat at Pydna in 168. Having become the friend of Scipio Aemilianus, the son of the man who had defeated the Greeks, he eulogized the Romans in his monumental *Histories*, which covers the period from the Punic Wars to the conquest of Greece. Deploring the fratricidal wars that had pitted the Hellenistic kingdoms against each other on the eve of the Roman conquest, he compared his countrymen's excessive violence with the magnanimous and more effective treatment he himself had received at the hands of the Romans. Referring to the pointless destruction of towns by the Macedonians, Polybius writes:

"For the purpose with which good men wage war is not the destruction and annihilation of the wrongdoers, but the reformation and alteration of the wrongful acts. Nor is it their object to involve the innocent in the destruction of the guilty, but rather to see that those who are held to be guilty should share in the preservation and elevation of the guiltless".⁹

The remarkable fact is that this lesson in humanism was drawn from the Romans' behaviour by one of their former opponents, more able than they were to appreciate it.

Later, when republican virtues were already on the wane, Cicero continued to extol them most eloquently in his treatise *De Officiis* (On Duties), which, as Aristotle had done for Nicomachus, he wrote for his son Marcus in 44 B.C.

The terms kindness (*beneficentia*), generosity (*liberalitas*) and goodness (*benignitas*) are variously used by Cicero to describe altruistic sentiments, which, however, are somewhat differently construed than in Greece.

⁹ Οὐ γὰρ ἐπ' ἀπωλείᾳ δεῖ καὶ ἀφανισμῶ τοῖς ἀγνοήσασι πολεμεῖν τοὺς ἀγαθοὺς ἄνδρας, ἀλλ' ἐπὶ διορθώσει καὶ μεταθέσει τῶν ἡμαρτημένων, οὐδὲ συναναίρειν τὰ μηδὲν ἀδικοῦντα τοῖς ἡδικηκόσιν, ἀλλὰ συσσωφῆσαι μᾶλλον καὶ συνεξαίρεισθαι τοῖς ἀναίτιοις τοὺς δοκοῦντας ἀδικεῖν, *The Histories*, V, 11.

The basic motivation for these sentiments derives from people's shared membership in the universal community of mankind (*universi generis humani societas*) and the duty of solidarity which ensues. Cicero nevertheless draws up a list of priorities in which fatherland ranks first, family second, and the community of good men (*virī boni*), to whom he feels akin in spirit, third.

This last category may even be extended to include one's enemies, the only people deserving exclusion being those whose behaviour sets them beyond the pale. In wartime, it is legitimate for the vanquished to be treated according to this discriminating factor:

"And when the victory is won, we would spare those who have not been blood-thirsty and barbarous in their warfare. For instance, our forefathers actually admitted to full rights of citizenship the Tusculans, Aequians, Volscians, Sabines, and Hernicians, but they razed Carthage and Numentia to the ground".¹⁰

Within the limits set by a rigorous concept of justice, magnanimity remained the official policy of Rome until it became an empire. As late as the second century A.D. this stance continued to be justified by the philosopher-emperor Marcus Aurelius, a man steeped in Greek culture who wrote, at the end of a series of maxims devoted to human relations in his *Meditations*:

"Ninthly, that gentleness and good humour are invincible, provided they are of the right stamp, without anything of hypocrisy and grimace. This is the way to disarm the most barbarous and savage. A constancy in obliging behaviour, will make the most outrageous person ashamed of his malice. The worst body imaginable cannot find it in his heart to do you any mischief, if you continue kind and unmoved under ill-usage, if you strike in with the right opportunity for advice; if, when he is going to do you an ill turn, you endeavour to recover his understanding, and retrieve his temper".¹¹

This injunction, however, is helpful only to attain the truth, which is the philosopher's foremost concern. It should also be borne in mind that

¹⁰ "Parta autem victoria, conservandi ii qui non crudeles in bello, non immanes fuerunt, ut majores nostri Tusculanos, Aequos, Volcos, Sabinos, Hernicos in civitatem etiam accepterunt, at Carthaginem et Numantiam funditus sustulerunt", *De Officiis*, XI, 35.

¹¹ "Ένατον, ότι τὸ εὐμενὲς ἀνίκητον, ἔαν γνήσιον ἦ καὶ μὴ σεσηρὸς μηδὲ ὑπόκρισις. Τί γάρ σοι ποιήσει ὁ ὕβριστικώτατος, ἔαν διατελῆς εὐμενὴς αὐτῷ καί, εἰ οὕτως ἔτυχεν, πρῶως παραινῆς καὶ μεταδιδάσκεις εὐσυχολῶν παρ' αὐτὸν ἐκείνῳ τὸν καιρὸν, ὅτε κακοποιεῖν σε ἐπιχειρεῖ, *Meditations*, XI, 18.

the man who wrote these lines was also the man who ordered, or at least countenanced, the martyrdom of Bishop Pothinus and of Blandina, a slave, in the amphitheatre of Lyon in 177.

For the Romans, Marcus Aurelius as well as Cicero, the application of the loftiest precepts was always subordinated to the interests and honour of Rome. With the shades and degrees of meaning that might be expected of a nation of conquerors, the altruistic principles proclaimed in the realm of thought met with certain limitations when they were actually applied. The rules that had made the greatness of Rome turned out to be incompatible with the unrestricted practice of magnanimity vaunted by its philosophers.

With its brilliance and its flaws, the humanism of Greece and Rome was eclipsed for several centuries by the barbarian invasions.

It nevertheless enjoyed a remarkable revival when the Arabs, having conquered a great part of the Byzantine empire, discovered Greek literature. In the eleventh century, Aristotelianism regained its place of honour thanks to Avicenna (more, in fact, for the way it explains the world than for its moral teachings) and its influence was later felt on mediaeval Scholasticism in Christian Europe as well.

Graeco-Roman humanism played a particularly important role in the Renaissance, when it was revived throughout the whole of Europe by the elitist community of scholars who belonged to Erasmus' "Republic of Letters" and were distinguished by the fact that they read Greek and Latin authors. The new barbarians were the ignorant, from whom those who were bound by the "Muses' pact" had to keep their distance. In the troubled times of early sixteenth-century Europe such an attitude led to an irenicism far removed from reality. Erasmus went so far as to write in *Querela pacis* (The Lamentation of Peace), published in 1516:

"Any peace, however great its disadvantages, is preferable to even the most just war".¹²

The European humanistic movement later also took an interest in social problems, although it had remarkably little to say on the subject of slavery, a scourge that had reappeared after the discovery of America. In 1625, however, Huig van Groot, better known as Grotius, a Dutch humanist who had been personally exposed to the persecutions which were dividing his homeland, published the first treatise in the field of international law to deal with the problem of war and peace (*De jure belli ac pacis*). Steeped in Greek and Latin literature and a firmly committed

¹² "Vix ulla tam iniqua pax, quin bello vel aequissimo sit potior".

Protestant, Grotius laid the foundations of “natural law” by attempting to reconcile the established rules governing international relations with the duties imposed by charity.

The book’s most original contribution involves an examination of what is permissible in war (Book III, Chapter I, “Quantum in bellum liceat”). The author restates two apparently contradictory principles:

“First, as we have previously said on several occasions, in a moral question things which lead to an end receive their intrinsic value from the end itself. In consequence, we are understood to have a right to those things which are necessary for the purpose of securing a right, when the necessity is understood not in terms of physical exactitude, but in a moral sense (...)

But, as we have admonished upon many occasions previously, what accords with a strict interpretation of right is not always, or in all respects, permitted. Often, in fact, love for our neighbour prevents us from pressing our right to the utmost limit”.¹³

Not content with simply stating these principles, however, Grotius also provides a detailed list of their applications in various situations of conflict. He first points out that the justifications used by military leaders are based on unsound arguments: the law of retaliation, for example, is legitimate only when applied to directly guilty parties, and the use of terror for purposes of intimidation can on the contrary enhance resistance. He then draws up the list of non-combatants who must be spared in all circumstances: women, children, clergymen, farmers, merchants, craftsmen and artists.

First published in Paris, Grotius’ treatise was circulated throughout the whole of Europe. Although it would doubtless be impossible to claim that it greatly influenced the conduct of war in the seventeenth century (the sacking of the Palatinate in 1689 radically contradicted its underlying philosophy) the fact that an increasing number of conventions governing the surrender of fortified towns comprised humanitarian clauses showed at least a certain convergence of ideas. It should nevertheless be borne in mind that such conventions, which were always the result of private

¹³ “Primum, ea quae ad finem ducunt in morali materia, aestimationem intrinsecam accipiunt ab ipso fine: quare quae ad finem juris consequendi sunt necessaria, necessitate sumta non secundum physicam subtilitatem sed moraliter, ad ea jus habere intelligimur (...)

Sed sicut antehac monuimus saepe, non semper ex omni parte licitum est quod juri stricte sumto congruit; saepe enim proximi caritas non permitet ut sumno jure utamur”, *De jure belli ac pacis*, III, 1, 2, 4.2.

arrangements, were left up to the personal magnanimity of military leaders and made no reference to the general principles stated by Grotius.

It was only later that the philosophers of the Enlightenment raised to a universal principle the idea that respect for human dignity must be observed in all circumstances.

The precursor of these philosophers was the English doctor and philosopher John Locke, who in 1690 stated in his *Second Treatise on Civil Government* the principle that every individual has natural rights:

“The state of Nature has a law of Nature to govern it, which obliges every one; And Reason, which is that law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty or Possessions”.¹⁴

Locke’s thoughts are echoed in the Preamble to the American Declaration of Independence, which solemnly proclaims the fundamental rights of the individual:

“We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness”.¹⁵

Likewise, the first article of the universal declaration adopted on 26 August 1789 by the French Constituent Assembly just as solemnly proclaims the fundamental rights of liberty and equality:

“Article 1 — men are born and remain free and equal in rights - Social distinctions may be based only on the common good.”¹⁶

The restrictions to the principle that are implied in the reference to the common good are explained in the 16 remaining articles, which establish the rule of law to guarantee everyone’s best interests. That same criterion alone applies to the use of a police force:

“Article 12 — To guarantee the rights of man and of the citizen a public force is necessary; this force is therefore established for the benefit of all, and not for the particular use of those to whom it is entrusted”.¹⁷

¹⁴ *Second Treatise on Civil Government*, II, 6.

¹⁵ American Declaration of Independence, 4 July 1776.

¹⁶ “Article 1 — Les hommes naissent et demeurent libres et égaux en droits — Les distinctions sociales ne peuvent être fondées que sur l’utilité publique”. Déclaration des droits de l’homme et du citoyen (Declaration of the Rights of Man and of the Citizen).

¹⁷ “Article 12 — La garantie des droits de l’homme et du citoyen nécessite une force publique; cette force est donc instituée pour l’avantage de tous, et non pour l’utilité particulière de ceux à qui elle est confiée”, *ibid*.

In the latter part of the century which saw natural rights defined, American independence and the French Revolution greatly contributed to the dissemination of this concept. Its novelty, and the universal application that it could be expected to have, stemmed from the fact that it was grounded neither on faith nor on rational arguments, but was held to be a self-evident truth.

War, and the often blind violence that accompanied it, represented a challenge to the concept of natural rights. At the very same time as the principles later enshrined in these declarations were being defined, the philosophers of the Enlightenment were led to adopt a position similar to that of the Renaissance humanists in condemning all wars.

Such was the case of Castel de Saint-Pierre, who in 1713 published a work entitled *Projet pour rendre la paix perpétuelle en Europe* (Project for Perpetual Peace in Europe). His only motivation, he writes, was respect for natural law:

“Have I appealed to any other motivation than those provided by nature at the present time?

In exposing these motivations, have I resorted either to the moderation of Socrates or the sternness of Stoic maxims?

Have I even taken into account the fact that Christian sovereigns heed only the teachings of the Gospels? (...)

Let all that I have set before these sovereigns' eyes be remembered, both the undesirable things that are to be feared from the system of division and war and the desirable ones that may be hoped for in the system of perpetual peace, and it will be seen whether they have any need of the miracle of grace to be swayed by my arguments”.¹⁸

Castel de Saint-Pierre's book aroused but little interest, and he himself fell into disfavor in the latter part of the reign of Louis XIV. The sword, however, soon met with a mightier adversary in the pen of Voltaire, whose tales *Comme le monde va* (1748) and *Candide* (1759) caustically expose the horror and absurdity of war, for which even authentic acts of generosity can never truly compensate.

¹⁸ “Ai-je employé d'autres ressorts que les ressorts de la nature tels qu'ils sont aujourd'hui?

Ai-je employé dans mes motifs, ou la modération de Socrate, ou l'austérité des maximes des Stoiciens [stoiciens]?

Ai-je même compté que les souverains chrétiens ne consultent que les maximes de l'Evangile?

Que l'on se souviene de tout ce que j'ai mis sous les yeux des souverains, soit choses fâcheuses à craindre dans le système de la division et de la guerre, soit choses agréables à espérer dans le système de la paix perpétuelle, et l'on verra s'ils ont besoin du miracle de la grâce pour y être sensibles”, Vol. II, *Sixième discours, XVII^e objection*.

In the article devoted to war which he wrote for his *Dictionnaire philosophique* (Philosophical Dictionary)(1764), Voltaire harshly condemns this curse which mankind inflicts upon itself:

“Famine, plague and war are the three most precious ingredients of this vile world.

Under the classification of famine we may include all the unhealthy nourishment we are compelled to resort to in times of scarcity, abridging our life in the hope of maintaining it. In plague we include all the contagious illnesses, which number two or three thousand. These gifts come to us from Providence.

But war, which unites all these gifts, comes to us from the imagination of three or four hundred people scattered over the surface of the globe under the name of princes or ministers (...).

All the vices of all ages and all places put together can never equal the evils produced by a single campaign”.¹⁹

Yet even the talent and verve of a great writer had little effect on the reality of war, which had so far managed to survive the most scathing condemnations.

Locke himself had been aware of the obvious contradiction between his proclaimed principles and the need to ensure society’s survival. If freedom were considered the most precious good, the one from which all others proceeded, then it became legitimate to destroy aggressors in its defence. The notion of just war was no longer grounded on religious or moral considerations, but on the belief that the law of nature was transgressed when men behaved like wild beasts. Just war was thus seen as pertaining to self-defence, to which people may resort when attacked:

“For by the Fundamental Law of Nature, Man being to be preserved, as much as possible, when all cannot be preserved, the safety of the Innocent is to be preferred. And one may destroy a Man who makes War upon him, or has discovered an Enmity to his being, for the same Reason, that he may kill a Wolf or a Lyon; because such Men are not under the

¹⁹ “La famine, la peste et la guerre, sont les trois ingrédients les plus fameux en ce bas monde. On peut ranger dans la classe de la famine toutes les mauvaises nourritures où la disette nous oblige d’avoir recours pour abrégé notre vie dans l’espérance de la soutenir. On comprend dans la peste toutes les maladies contagieuses, qui sont au nombre de deux ou trois mille. Ces deux présents nous viennent de la Providence. Mais la guerre, qui réunit tous ces dons, nous vient de l’imagination de trois ou quatre cents personnes répandues sur la surface de ce globe sous le nom de princes ou de ministres (...)

Tous les vices réunis de tous les âges et de tous les lieux n’égalent jamais les maux que produit une seule campagne”, Livre III, Article “Guerre”.

ties of the Common Law of Reason, have no other Rule, but that of Force and Violence, and so may be treated as Beasts of Prey.”²⁰

To say this, however, was once again to open the door to the very excesses so often committed in the past in the name of self-defence.

Availing themselves of all the expedients offered by Reason — at that time held to be the supreme judge — Montesquieu and Rousseau attempted to solve the contradiction by considering enemies not as wild beasts but as members of a greater entity which was alone to be fought. Both authors make a subtle distinction between the notion of man and that of citizen.

In 1749, Montesquieu thus wrote in *De l'esprit des lois* (The Spirit of the Laws):

“For, from the annihilation of the society, it would not follow that the men forming that society should also be annihilated. The society is the union of men and not the men themselves; the citizen may perish and the man remain”.²¹

In 1762, Rousseau developed the same argument in his *On the Social Contract*:

“Each State can have as enemies only other States and not men, since there can be no true relationship between things of disparate natures (...)

Sometimes a State can be killed without a single one of the members being killed. For war does not grant a right that is unnecessary to its purpose”.²²

Both Montesquieu and Rousseau were thinking in abstract terms. But in the military profession, men who had faced the reality of war made practical proposals to introduce more humane conditions in wartime, for the soldiers and the wounded in particular.

One such man was Emmerich de Vattel, from Neuchâtel, in Switzerland, a counsellor to the Elector of Dresden. In 1758 he published *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des souverains* (The law of Nations, or principles of natural law applied to the conduct and business of nations and of

²⁰ *Second Treatise on Civil Government*, III, 16.

²¹ “De ce que la société serait anéantie, il ne s’ensuivrait pas que les hommes qui la forment dussent être anéantis. La société est l’union des hommes et non pas les hommes; le citoyen peut périr, et l’homme rester”, Livre X, chap. III, *Du droit de conquête*.

²² “Chaque Etat ne peut avoir pour ennemis que d’autres Etats et non pas des hommes, attendu qu’entre choses de diverses natures on ne peut fixer aucun vrai rapport (...)

Quelquefois on peut tuer un Etat sans tuer un seul homme. Or la guerre ne donne aucun droit qui ne soit nécessaire à sa fin”, Livre I, chap. IV, *De l’esclavage*.

sovereigns). Invoking Grotius and the authors of Antiquity, he defines the limits in which force may lawfully be used as follows:

“A legitimate purpose truly gives but the right to use the means necessary to accomplish that purpose (...)

Such is the norm which obtains with respect to the right to kill enemies in a just war. When kindlier means are insufficient to overcome resistance, their lives may rightly be taken (...) But as soon as an enemy surrenders and relinquishes his weapons his life must be spared (...)

Women, children, the disabled elderly and the sick are included among the enemies since they belong to a nation at war with us. But since they are enemies who offer no resistance, we have no right to mistreat them in their persons, to use violence against them and even less to take their lives. Providing it has attained some degree of civilization, no nation exists today that does not recognize the justice and humanity of this precept”.²³

In France, relying on rational arguments alone, Claude-Humbert Piarron de Chamousset, general superintendent of military hospitals and a friend of Rousseau’s, was the first person to propose that military hospitals should be granted a neutral status permanently recognized by international treaty. In his *Mémoire sur les hôpitaux militaires* (Memorandum on Military Hospitals) published in 1757, he writes:

“Humanitarian considerations in general compel me to make an observation on the respect that all nations should have for these hallowed sanctuaries, where the virtuous defenders of their homes and countries seek to heal wounds inflicted for such a noble cause (...)

How many thousands of sick or wounded persons have lost their lives for fear of falling into the hands of the enemy? Evacuations are responsible for the death of countless unfortunate people who might have been saved if they had been left where they were first put (...)

²³ “La fin légitime ne donne un véritable droit qu’aux seuls moyens nécessaires pour obtenir cette fin (...)

Telle est la norme du droit de tuer les ennemis, dans une guerre juste. Lorsqu’on ne peut vaincre leur résistance et les réduire par des moyens plus doux, on est en droit de leur ôter la vie (...) Mais dès qu’un ennemi se soumet et rend les armes, on ne peut lui ôter la vie (...)

Les femmes, les enfants, les vieillards infirmes, les malades, sont au nombre des ennemis puisqu’ils appartiennent à la Nation avec laquelle on est en guerre. Mais ce sont des ennemis qui n’opposent aucune résistance et par conséquent on n’a aucun droit de les maltraiter en leur personne, d’user contre eux de la violence, beaucoup moins de leur ôter la vie. Il n’est point aujourd’hui de Nation un peu civilisée qui ne reconnaisse cette maxime de justice et d’humanité”, Livre III, chap. VIII, *Du droit des nations dans la guerre*.

How is it possible that civilized nations have not yet agreed to consider hospitals as temples to the principles of humanity, to be respected and protected by the victors? (...)

In this century, when enlightened ideas have gained so much ground, we should prove that our hearts and feelings have remained intact. The time has come for all nations to set up a treaty for which humanity pleads".²⁴

Such ideas were in fact more than a century ahead of their time. Although the philosophical movement of the eighteenth century provided a favourable context, the conditions necessary for an international agreement were far from being achieved. To the credit of those times, however, partial progress was made. In 1743, during the War of the Austrian Succession, the Earl of Stair and the Duke of Noailles, two military commanders who were open to new ideas and held each other in mutual esteem, reached a gentlemen's agreement to respect the inviolability of military hospitals. Although the agreement was scrupulously observed throughout the duration of the campaign, a change in commanders brought about its demise.

Humanitarian measures of a more permanent character were unilaterally adopted in various instructions for the treatment of wounded enemy soldiers and non-combatants. During the French Revolution, these concerns were reflected in certain decrees of the National Convention.

The decree of 27 May 1793 pertaining to prisoners contains an article on care for the sick and wounded:

"Art. 26 — Sick or wounded enemy prisoners, whether they are able to walk or not, shall be treated in the military hospitals of the Republic with the same care as that given to French soldiers (...); it is understood

²⁴ "Je crois encore devoir à l'humanité en général, une réflexion sur le respect que les nations devraient accorder à ces asyles sacrés, où le vertueux défenseur de la patrie va chercher la guérison d'une blessure dont la cause est si noble (...)

A combien de milliers de malades ou de blessés la crainte de tomber sous la puissance de l'ennemi n'a-t-elle pas coûté la vie? Les évacuations font périr un nombre infini de malheureux qu'on aurait sauvés, s'ils fussent restés dans le lieu où ils avaient été déposés d'abord (...)

Comment est-il possible que des nations policées ne soient pas encore convenues de regarder les hôpitaux comme les temples de l'humanité, qui doivent être respectés et protégés par le vainqueur? (...)

Dans un siècle où l'on a tant gagné du côté de l'esprit et des lumières, ne devait-on pas prouver qu'on n'a rien perdu du côté du cœur et des sentiments, et le moment ne serait-il pas venu établir parmi les nations une convention réclamée par l'humanité?", *Mémoire sur les hôpitaux... Conclusion.*

that this provision, dictated by a sense of justice and humanity, will likewise be observed by the enemy with respect to French prisoners.”²⁵

Similarly, during the Wars of the Vendée, the decree of 2 August 1793 which ordered that possessions and crops in rebel areas be seized or destroyed also recommended that non-combatants should be charitably treated:

“Article 8 — Women, children and elderly people shall be escorted into the interior of the country, where their upkeep and safety shall be ensured with all due regard for humanitarian considerations”.²⁶

Although these genuine attempts to adopt humanitarian measures were inspired by a lofty ideal, they never led to the envisaged solution of a permanent international treaty. In practice, such recommendations depended for their implementation on the decisions of military leaders and their views on the conduct of operations. It was an area in which the commanders in charge were still grappling with the age-old theory that the balance of power had to be turned to one’s advantage and that this could be done by temporarily sacrificing everything else in an all-out bid for victory.

This state of affairs was illustrated in the Napoleonic Wars and to an even greater degree in the theory of war developed in their wake by the Prussian strategist Carl von Clausewitz. In the opening pages of his treatise *On war*, published in 1832, von Clausewitz boldly proclaims that “in a matter so fraught with peril as war, it is out of kindness that the worst errors are committed” (I, 3, “On the extreme use of force”).²⁷

This contradiction, which had not escaped the attention of the eighteenth-century theoreticians of human rights, continued to prevail in the following century as well, when military leaders imbued with humanitarian ideals once again issued magnanimous instructions banning all unnecessary violence and protecting non-combatants. A number of these have gone down in history, such as the ones given by the Swiss general Guillaume Dufour during the Sonderbund War and those drawn up in 1863 during the American Civil War by Francis Lieber at Abraham

²⁵ “Art. 26 — Les prisonniers ennemis qui seront malades ou blessés seront traités dans les hôpitaux militaires de la République, soit ambulants, soit sédentaires, avec le même soin que les soldats français (...); bien entendu que cette disposition, dictée par la justice et l’humanité, sera réciproquement observée par l’ennemi envers les Français prisonniers”.

²⁶ “Les femmes, les enfans et les vieillards seront conduits dans l’intérieur, il sera pourvu à leur subsistance, à leur sûreté, avec tous les égards dus à l’humanité”.

²⁷ *In so gefährlichen Dingen, wie der Krieg eins ist, find die Irrthümer welche aus Gutmüthigkeit entstehen grade die Schlimmsten, I. 3. Äußerste Anwendung der Gewalt.*

Lincoln's request. Limited in their application, they never acquired a universally accepted status and were unable to prevent outbreaks of unrestrained violence.

The same paradox observed in connection with religious motivations is apparent here as well, as are the same shocking results that ensue when adherence to principles is carried to an extreme: just as the doctrine of love could lead to the cruelty of the Inquisition and the wars of religion, so the defence of individual freedom and human dignity could lead to the revolutionary Reign of Terror.

Because of a relentless logic manifest in human nature, the sincerity and depth of people's commitment to these values are precisely what causes them to sacrifice their own lives and those of others in their name.

The weight of institutional structures set up for reasons of efficiency constitutes an additional problem: in societies founded upon the recognition of absolute principles it is impossible to dispense with measures intended to punish deviations, and such measures necessarily strike individuals.

Beyond doctrines

Although these religious and philosophical doctrines undoubtedly have their own merits as rules of social conduct, the spirit embodied for over a century in the International Red Cross and Red Crescent Movement is based on entirely different principles.

While the Movement's inception may undeniably be traced to the shock experienced by Henry Dunant at the Battle of Solferino on 24 June 1859, others before him had been equally horrified by the sight of suffering on the battlefield, particularly during the Crimean War. Although this had led to campaigns to increase the means available to army medical services, economic constraints and the weight of traditional institutional structures had limited the scope of the hoped-for improvements, as was eloquently demonstrated by the plight of the wounded at Solferino.

The innovation introduced by Dunant was to keep humanitarian activities separate from the vicissitudes of the battlefield by granting the protection of a neutral status, recognized by both sides, to all those who care for the wounded.

This concept represented a departure from standard practice. Until then the organization of care had been entrusted to national medical services, and the application of the term "neutral" to the latter initially met with strong reservations.

Much more was involved, however, than organizing a system for medical care, for Dunant advocated that assistance, determined solely by the suffering of those in need, be given without discrimination. This meant refraining from judging their previous actions and, if necessary, showing the same concern for both tormentors and victims.

The credit for this pioneering concept indisputably goes to Dunant. In the grim wars of the nineteenth century, exacerbated by the growing resources available to the armies of Europe, it was a bold venture.

With no religious motivation, political philosophy or ideology to lend it support, expounded, moreover, by a single man and later by a small committee of five outstanding citizens of Geneva, Dunant's idea came up against the crushing weight of age-old traditions and the temptation for observers to step out of their assigned role and denounce the appalling scenes they witnessed in terms of good and evil.

Even when the generous nature of Dunant's proposals was taken into account, objections were rife.

The first concerned the perilous issue of assisting the enemy in wartime. In the eyes of one's fellow countrymen such assistance to a declared foe, however impartially it was carried out, might seem like treason. Although benevolence is in itself a weapon — an invincible one according to Marcus Aurelius — and violence sometimes produces effects counter to the desired end, such arguments appear weak indeed when viewed strictly in terms of efficiency.

Another serious criticism was directed at the principle of remaining uninvolved in armed conflicts and refusing to condemn men simply because they were enemies, an attitude which could apparently be seen as a form of cowardice.

This point of view was bluntly echoed in *The Bridge on the River Kwai*. When Colonel Saito, a caricaturally portrayed Japanese officer, is presented with the Geneva Convention, he calls it a "code of cowards" and extols the *Yamato* (the Japanese code of warfare), thus expressing a similar opinion to that of Clausewitz on the logic of war.

Appearances notwithstanding, accusations of cowardice were just as unfounded as the first objection. It sometimes requires courage at least equal to that of a combatant to overcome one's natural impulse and respond to evil with good, risking one's life in the process.

Today, when people feel a sentimental attachment, as a matter of principle, to fundamental rights, to refrain from judging situations that give rise to violations of those rights in itself causes surprise and even indignation. Such an attitude may even be mistaken for a form of complacency towards the very people responsible for the suffering which required humanitarian relief.

In the first place, however, the assertion that suspension of judgement constitutes approval may be refuted on purely logical grounds since the reasoning behind it is clearly syllogistic in nature.

But above all, the suspension of all value judgement is a necessary prerequisite for ensuring that non-discriminatory assistance is efficient, and accepted in the first place. In many circumstances it is the only way to gain access to victims and bring them the aid they are waiting for. Such a possibility would be irreversibly compromised if it were accompanied by attempts to interfere in the workings of flawed systems which, by their very nature, are always open to criticism.

This condition is doubtlessly the most difficult for ideologists of any kind to accept. Non-discriminatory assistance obviously does not claim to reform the world or transform society. Its only aim is to gain access to suffering people and offer them as much help as possible.

In view of this — and whereas more spectacular attitudes may have greater public appeal — the lasting response which Dunant's plea continues to arouse in spite of national sensitivities and self-interest is both surprising and heartening to observe.

The ground was certainly favourable. There is little doubt that it had been prepared by nineteen centuries of Christianity and two centuries of philosophical renewal and that, even at an unconscious level, these influences played a role. Yet the response was just as strong in other parts of the world with different cultural backgrounds.

The Movement's universal appeal raises a problem in itself. Those who hold the most optimistic views on human nature will explain it by the fact that a religious conscience and philosophical awareness are innate in all mankind, even where they find no collective expression in Churches and schools of thought.

Others will refer to the progress of civilization, based on an accumulated store of experience and ideas; and others still will see in the mounting confusion in the world the basic cause of a positive reaction. Whatever the explanation may be, the movement set in motion by Dunant definitely calls upon the best in human nature.

At present there is no reason to believe that its end is in sight. In troubled times, when people of good will are pressured to commit themselves to conflicting causes and history proves that even the best intentions may be led astray, the certainty of acting for the good of others continues to exert a powerful attraction. This is why it is so urgent to ensure that the Movement remains true to its spirit and maintains the pureness of purpose that its founder wanted it to have.

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International Committee of the Red Cross

OBITUARY

MAX PETITPIERRE

It is with very great sadness that the ICRC has learnt of the death on 25 March 1994 of Mr. Max Petitpierre, former Federal Councillor, former President of the Swiss Confederation and honorary member of the ICRC. He died at the age of 95.

Born in the Swiss town of Neuchâtel in 1899, Mr. Petitpierre, a doctor of laws, professor of law and barrister, played a prominent role in Swiss politics after the Second World War. In December 1944, at a time when Switzerland was surrounded by danger, he was elected Federal Councillor and subsequently became head of the Federal Political Department from February 1945 to June 1961.

Mr. Petitpierre's great merit is to have broadened the concept of Swiss neutrality by conferring a humanitarian dimension upon it. With the words "neutrality and solidarity", he first created a new state of mind and then initiated a dynamic diplomatic policy to that effect.

He also played a crucial part in the development of humanitarian law. At the end of the Second World War humanitarian law had proved tragically inadequate and it was clear that the Geneva Conventions needed to be revised and extended by a Diplomatic Conference. Mr. Petitpierre convened that Conference in April 1949 and presided with authority and competence over its meetings, which led soon after to the adoption of the Four Geneva Conventions of 12 August 1949. A profoundly humane but realistic person, he never stopped working to develop the law. In his writings he expressed his conviction that "war itself, and not only its effects, should be made more humane, since unfortunately the contradiction between war and humanity has not been overcome by the elimination of war".¹

¹ "A Contemporary Look at the International Committee of the Red Cross", *IRRC*, No. 119, February 1971, p. 77.

After holding office as President of the Confederation in 1950, 1955 and 1960 Mr. Petitpierre, prompted by his desire to help the work of the ICRC, resigned as Federal Councillor in 1961 and agreed to be coopted as a member of the ICRC in 1961. Until 1974 he gave the institution the benefit of his vast legal knowledge, paving the way for a new diplomatic conference on the development of humanitarian law. He also placed his wide-ranging experience in international relations at its disposal and carried out various high-level missions to resolve humanitarian problems, especially in Egypt, during the Israeli-Arab conflict and in Nigeria during the civil war. His clear-sighted analysis of situations with which the ICRC was faced and his astute assessment of how to react in tricky political contexts have helped establish policy guidelines which the ICRC continues to refer to in determining its standpoint and course of action.

The ICRC pays grateful tribute to the memory of Max Petitpierre, who has rendered great service to Switzerland and the Red Cross, and presents its heartfelt condolences to his family and his numerous friends.

**26th International Conference
of the Red Cross and Red Crescent**

(Geneva, December 1995)

In a statement sent out in September 1993, the Standing Commission of the Red Cross and Red Crescent reaffirmed its decision to reconvene the 26th International Conference of the Red Cross and Red Crescent in 1995.

At its meeting on 21 February 1994, the Standing Commission mandated the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies to act as the hosts of the 26th International Conference which will take place in Geneva (International Conference Centre) in the week starting 4 December 1995 for three or four days. The Swiss Federal Council has announced its agreement to the 26th International Conference being held in Switzerland and has pledged a contribution to cover organizational costs.

The members of the Standing Commission also exchanged views on three main items which could be discussed at this Conference:

- ***Respect for international humanitarian law*** (including development and dissemination);
- ***Red Cross and Red Crescent actions*** (Refugees and displaced persons; Co-ordination of humanitarian relief; Development of National Red Cross and Red Crescent Societies);
- ***Statutory matters*** (Election of the members of the Standing Commission, etc.).

The report on the work of the open-ended Intergovernmental Group of Experts, entrusted by the International Conference for the Protection of War Victims (1993) to study practical means of promoting full respect for and compliance with international humanitarian law, is expected to be one of the main working documents.

The *International Review of the Red Cross* is the official publication of the International Committee of the Red Cross. It was first published in 1869 under the title "Bulletin international des Sociétés de secours aux militaires blessés", and then "Bulletin international des Sociétés de la Croix-Rouge".

The *International Review of the Red Cross* is a forum for reflection and comment and serves as a reference work on the mission and guiding principles of the International Red Cross and Red Crescent Movement. It is also a specialized journal in the field of international humanitarian law and other aspects of humanitarian endeavour.

As a chronicle of the international activities of the Movement and a record of events, the *International Review of the Red Cross* is a constant source of information and maintains a link between the components of the International Red Cross and Red Crescent Movement.

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The *International Committee of the Red Cross (ICRC)* and the *International Federation of Red Cross and Red Crescent Societies*, together with the *National Red Cross and Red Crescent Societies*, form the International Red Cross and Red Crescent Movement.

The *ICRC*, which gave rise to the Movement, is an independent humanitarian institution. As a neutral intermediary in the event of armed conflict or unrest it endeavours, on its own initiative or on the basis of the Geneva Conventions, to bring protection and assistance to the victims of international and non-international armed conflict and internal disturbances and tension.

INTERNATIONAL REVIEW

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