Commentary

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Colonel Cameron's paper on the limitations on the methods and means of warfare has raised one of the most profound and recurrent problems in international humanitarian law, the problem of definition. In particular, by focussing on the question of what exactly is meant by the term "methods and means of warfare", as it is used in Protocol I, he has highlighted that question which is critical to the success of the Protocol: whether in times of armed conflict it will prove possible for the parties to Protocol I to agree on the practical application and precise meaning of some of its more important provisions concerning the way in which conflicts are to be fought.

This problem is a significant one, since Protocol I discusses the question of method and means of warfare in a general rather than a specific sense. In other words, it does not prohibit particular weapons but strives rather to limit the use of certain catergories of arms by reaffirming the traditional principles of international humanitarian law: namely, that weapons should not cause unnecessary suffering, nor superflous injury; nor should they be indiscriminate in their effects or involve some degree of perfidy. Protocol I also tends to limit the use of weapons by imposing greater respect for certain categories of persons and/or objects which may be affected by their use.

There are, of course, sound practical and historical reasons why the 1977 Protocols additional to the Geneva Conventions of 1949 do not address themselves to the issue of prohibiting specific weapons. In the first place, general prohibitions on methods of warfare are arguably more effective and certainly more enduring than those which limit the use of specific weapons. The latter can rapidly become outdated and by-passed by technological change — as for example, was the 1907 Hague Regulations' prohibition on the dropping of projectiles and explosives from balloons or "other means of a similar nature". Secondly, the political obstacles in the way of reaching a consensus internationally on the banning of specific weapons are immense. Everyone associated with the revision of the laws of warfare knows only too well how sensitive and politically delicate were the questions concerning the protection of the victims of war and combatant status which were opened, like some Pandora's box, at the diplomatic conference of 1974–77. Questions of weapons control, being intimately linked to issues of national security and super-power politics, are, if anything, more sensitive. Moreover, their technical complexity is such that, had it been attempted to incorporate them in the Protocols additional to the Geneva Conventions, agreement on the Protocols might never have been possible.

For these reasons it was finally decided at the diplomatic conference of

1974–77, after some discussion of the banning of specific weapons,[1] to leave this thorny question to the forum of the United Nations (which has since produced, in 1980, a convention prohibiting or restricting certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects).

The problem with the Protocols' confining themselves to general prohibitions is that inevitably ambiguities and questions of interpretation will arise whenever these prohibitions are applied to any specific context of armed conflict. In addition, the agreement on general prohibitions in Protocol I almost certainly masks hidden and profound disagreements between nations which, though they were submerged in the apparent consensus at the time the Protocols were signed, will re-emerge implacably when a more precise definition of the law is attempted.

There are some commentators, therefore, who would argue that the generality of the prohibitions on methods and means of warfare in Protocol I is a serious weakness. This view is not confined to cynics and those who, for whatever reason, disparage international humanitarian law, but is shared by those with the most intense interest in the law's development. For example, the eminent English commentator, Colonel Draper, wrote in 1977 that

> "It seems unwise to depend upon a device which seeks obliquely to attain what was known in advance could not be achieved directly, i.e., the prohibition of the use of specific categories of conventional weaponry . . . The tacit refusal to include in Protocol I express prohibitions of certain classes of weaponry, including indiscriminate weapons, combined with the overt attempt to secure the same results by severe prohibitions on attacks upon non-military objectives, defined in wide and residual terms, may contain the seeds of the Protocol's failure . . . It appears to be the silent premise of the redactors that what could not be achieved directly might be attempted obliquely".[2]

Whether such pessimism is justified is a question which everyone concerned with the future efficacy of the Protocols must consider. Certainly the 1970s conferences on conventional weapons which culminated in the 1980 Convention seem to illustrate how herculean are the difficulties in the way of applying the general prohibitions of international humanitarian law to particular weapons; and certainly some articles of Protocol I dealing with "methods and means of warfare" are likely to be the subject of conflicting and controversial interpretations when they are tested in a specific context.

Some of these problems of interpretation will be discussed later but for the moment let us focus on the question, raised by Colonel Cameron, of what is meant by the term "methods and means of warfare". Undoubtedly this term appears to have a very wide meaning, such as bombardment (which is discussed in Article 51, paragraph 5, in the context of indiscriminate attacks), but also, to use Colonel Cameron's words, "all strategies and tactics and every other measure which, by the use of manpower and weapons systems an armed force

1. This took place particularly at the Ad Hoc Committee on Conventional Weapons which operated within the conference and met at each session. In between there were Meetings of Experts convened by the ICRC which studied the effects of certain types of conventional weapons and reported back to the Ad Hoc Committee.
2. "The Emerging Law of Weapons Restraint", (1977) 19 Survival 11, 15.

may employ''. Such a definition, however, makes the implications of Protocol I very wide — perhaps wider than was intended by the signatories — and raises some questions about the status of important methods of warfare which have yet to be resolved.

Take, as a first example, nuclear warfare. On a superficial reading of certain articles of Protocol I — in particular, Article 35, paragraphs 2 and 3, which prohibit the use of ''weapons, projectiles and material and methods of warfare of a nature to cause superflous injury or unnecessary suffering'', and ''methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'' — nuclear weapons are obviously proscribed. They are, by any layman's definition, a method of warfare and they will almost certainly be devastatingly indiscriminate in their effects on man and his environment, even if they are used in a so-called ''tactical'' fashion. Yet the record of the diplomatic conference of 1974–77 shows clearly that nuclear weapons are in fact not covered by the Protocols. The ICRC, in introducing the draft protocols which it prepared for the conference, stated that:

> ''Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Protocols the ICRC does not intend to broach these problems. It should be borne in mind that the Red Cross as a whole at several International Red Cross Conferences has clearly made known its condemnation of weapons of mass destruction and has urged governments to reach agreements for banning their use.''

The substance of this statement was endorsed, early in the diplomatic conference, by the Soviet Union, France, Great Britain and the United States, and the latter three explicitly made the point that Protocol I, in their view, related to conventional weapons only. Nuclear weapons, even though they were to be ''governed by the present principles of international law'' (to use the words of the U.S. delegation), were to be the subject of separate international agreements and negotiations.[3]

Some commentators on international humanitarian law have argued that these declarations by the major powers are irrelevant: that since the Protocols contain no explicit exception for nuclear weapons in the text of the rules relevant to the use of weapons, then these rules apply unambiguously to nuclear as well as other weapons. But such an opinion seems to be untenable. As the authors of the definitive text on the Protocols, *New Rules for Victims of Armed Conflict*, state, Article 31 of the 1969 Vienna Convention on the Law of Treaties provides that treaties shall be interpreted in accordance with the plain meaning of terms (a) in their context and (b) in the light of the treaty's object and purpose. Clearly the declarations by the major powers concerning nuclear weapons indicate that for these powers at least (and presumably for other powers since the British and U.S. position was not seriously challenged during the conference) the treaty's object was to regulate the use of conventional weapons only.[4]

In any case, whatever interpretation of this legal point one adopts, the fact

3. Bothe, M., Partsch, KJ., and Solf, WA., *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949* (1981), 188–9.
4. Ibid, 191.

remains that in terms of practical politics, nuclear weapons remain outside the jurisdiction of Protocol I, for the simple reason that the nuclear powers, which are the only powers that count in this matter, insist that they do.

The attitude of the nuclear powers towards this question is not surprising, given that no power in the past has been willing to renounce the use of a weapon which is likely to prove of vital significance in any future conflict. But the fact that nuclear weapons are excluded from the methods and means of warfare proscribed by the Protocols can only be considered regrettable so far as the public credibility of international humanitarian law is concerned. If the very weapons which to the ordinary man seem to be quintessentially indiscriminate and needlessly destructive are not governed by Article 35 of Protocol I, then inevitably some degree of public scepticism about the Protocols will arise.

A second anomaly in the Protocols, if the terms "methods and means of warfare" is interpreted in its widest sense, is the status of naval and economic warfare. Article 49, paragraph 3 of Protocol I (which forms part of that Section of the Protocol concerned with general protection for the civilian population against the effects of hostilities) states that the provisions of the Section

> "apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air."

This article presumably excludes from the Protocol's jurisdiction one method of warfare which, as it has been practised in the past, has been often indiscriminate, submarine warfare. In the two world wars belligerent submarines attacked shipping without warning, regardless of whether it was carrying civilian or military personnel or cargo, and regardless of whether the military advantage gained by such attacks was commensurate with the incidental loss of civilian life. How many civilians thus lost their lives in these two conflicts is difficult to say, but the ICRC estimates that in the Second World War alone, some 15,000 prisoners of war and civilian internees were sunk at sea as a result of submarine and air attacks on the vessels which were carrying them to their place of internment.[5]

Nonetheless, despite the toll of civilian lives which unrestricted submarine warfare has exacted in the past, this method of warfare is almost certainly not governed by Protocol I, in view of Article 49, paragraph 3. Its legal status remains unchanged — though what this may be is of course a matter for continuing debate[6] in the aftermath of the judgment of the International Military Tribunal at Nuremburg on the commander-in-chief of the Geman U-boats, Admiral Karl Doenitz. Though Doenitz was condemned for the U-boats' attacks on neutral shipping and for the declaration of sink-at-sight zones, his sentence was not "assessed on the grounds of his breaches of the international law of submarine warfare" because the British and Americans had, on their own admission, practised a similar form of unrestricted submarine warfare.[7]

5. *Report of the International Committee of the Red Cross on its Activities during the Second World War*, vol 1 (1948), 320.
6. For discussion of this question, see Weiss, CJ, "Problems of Submarine Warfare under International Law", (1967), 22 Intermural Law Rev 136–51.
7. Smith, BF, *Reaching Judgment at Nuremberg* (1977), 263.

The impact of the Protocols on the status of blockade is slightly more problematical. Like unrestricted submarine warfare, blockade is a method of warfare which in the past has often been indiscriminate and, in addition, it has affected civilians on land as well as at sea. Moreover, in the two world wars particularly it has imposed considerable hardship and even starvation on all members of the enemy population, civilian and combatant alike. It would therefore appear to be in conflict with Article 48 of Protocol I which states that

> "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

Moreover, in so far as blockade denies food and the necessities of life to civilians, it is *prima facie* contrary to Article 54 which prohibits the starvation of civilians as a method of warfare.

Yet, despite these prohibitions which would apparently require some modification in the future practice of blockade, it is clear from the record of the diplomatic conference of 1974–77 that this body of law remains largely unchanged by the Protocols. Indeed, Committee III, which was responsible for drafting the articles concerned with the general protection of the civilian population, explicitly stated that this was the case. It was not the Committee's intention, given the time available to the diplomatic conference, to revise the law of armed confict at sea or in the air, and the words "on land" and the second sentence of Article 49 were included specifically to limit the jurisdiction of the Section which followed. The decision to do this was not, it should be said, a unanimous one initially, since several delegates on Committee III wished to delete the words "on land" from Article 49 and widen the implications of Protocol I, but after considerable discussion this issue was finally resolved in favour of the narrower interpretation.[8] Consequently, whatever the contradictions between blockade and the humanitarian principles expressed in the Protocol, the law governing this method of warfare remains apparently unchanged.

It is, however, possible that the practice of blockade will be affected by Section 2 of the Protocol which deals with relief operations. Article 70 states that, if the civilian population in any territory under the control of a Party to the conflict, other than occupied territory, is not provided with supplies essential to its survival then relief operations should be undertaken on its behalf, "subject to the agreement of the parties concerned in such relief operations". Clearly this article, if applied in the spirit which the diplomatic conference intended, will mean some relaxation in the practice of blockade in the future, since the article imposes a moral obligation on belligerents to allow the passage of relief supplies even to enemy populations, a concession which has rarely been made by maritime powers in the past. It is, however, possible that, rather than do this, belligerents will seize upon the qualification in Article 70 which makes relief operations dependent upon their agreement. Although this was intended by

8. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Geneva (1974–1977) (1978), vol XV, 236, 272, 279.

Committee II, which drafted the article, as a compromise — and a somewhat reluctant one — between the demands of humanitarianism and the rights of sovereign states,[9] it may also be taken as a loophole which desperate belligerents may exploit to their strategic advantage. If they do this, then the impact of Protocol I on the future practice of blockade will indeed be slight.

A third method of warfare for which the implications of the protocols are problematical is guerilla warfare. There is no doubt that certain articles of Protocol I — again those which are found in Section I of Part IV — are in conflict with the tactics and strategies which are intrinsic to guerilla warfare. The obligation to distinguish between civilian and military objectives (specified in Article 48), for example, will be tortuously difficult to maintain in many guerilla conflicts. Not only is there the vexed question of how guerillas can be distinguished from the civilian population, given that their uniforms and methods of bearing arms are usually covert, but the political objectives of such a conflict make the distinction between civilian and military seem, to many of the participants, an artificial one. To a guerilla, intent on destroying the political system of his opponent, the local mayor, the school teacher, the civil servant, though all technically civilian personnel, are quite legitimate targets. Indeed, if recent experience in Zimbabwe is any guide, this attitude is characteristic of counter-insurgency operations also.

The difficulty of regulating guerilla warfare was obviously one of the major preoccupations of the diplomatic conference of 1974–77, and by creating Protocol II and by extending the definition of combatants in Protocol I, the signatories did begin to grapple with some of the thorny questions which this, the most prevalent form of modern warfare, raises. But so far as the actual methods and means of guerilla warfare are concerned, there are many questions which remain unexplored and unresolved.

The problems discussed so far are those which arise if one interprets "methods and means of warfare" in its widest and, possibly, its more controversial sense. Yet if we narrow our focus and examine those means of warfare to which Protocol I indisputably applies, then certain problems of interpretation still remain.

For example, there is no doubt that Protocol I applies to conventional weapons which are "of a nature to cause superfluous injury or unnecessary suffering" (Article 35, paragraph 2). But what exactly does this phrase mean? What are "unnecessary suffering" and "superfluous injury"?

At the Lucerne conference of government experts held in September–October 1974 to consider the use of certain conventional weapons, it was widely agreed that the correct legal test for "unnecessary suffering" required a comparison between the suffering inflicted by a particular weapon and the military advantage expected to be gained from its use — in other words, the notion familiar to international humanitarian law of proportionality.[10] But both "suffering" and

9. The views of Committee II, as expressed by the delegate of the Federal Republic of Germany, were that the qualification in Article 70 was not intended 'to imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.' Ibid, vol XII, 336–7.

10. Robblee, PA Jr, "The Legitimacy of Modern Conventional Weaponry", (1976) 71 Milit Law Rev 119.

"military advantage" are highly subjective terms. The latter, for example, cannot be confined to the physical effects and destructive capacity of a weapon alone but must take into account such factors as the cost of producing the weapon, the cost, and availability and effectiveness of alternative weapons, and the impact of the weapon's use on the morale of one's own and enemy troops. The last of these factors particularly is inherently unquantifiable. The notion of "unnecessary suffering", on the other hand, must include some consideration of the medical effects of a weapon: the painfulness of the injury it inflicts, the degree of disability and the incidence of permanent damage or disfigurement it causes, the feasibility of wounds being treated on the battlefield, the strain that such treatment may impose on the medical facilities available at the scene of the conflict, and so on.

The difficulty of reaching any consensus on such matters is complicated by the lack of agreed factual data concerning the effects of some modern weapons. As the conference which culminated in the 1980 Convention on conventional weapons discovered during the 1970s, this is an acute problem. The experts could not agree, for example, on the impact of small-calibre projectiles on the human body: whether it was their velocity or other factors, such as the angle of yaw, the angle of incidence, the projectile geometry or spin-rate, which in fact determined the cruel severity of the wounds they inflicted. In the absence of any agreement on these technical details, the 1980 conference did not produce a protocol on small-calibre weapon systems, but instead passed at its first session a resolution inviting governments to carry out further research on the subject 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".[11]

The experience of the 1980 conference in fact seems to confirm the pessimism of the Professor of International Organisation at the University of Florence, Antonio Cassese, who, in 1976, questioned the value of international legal rules which invoke the notion of "unnecessary suffering". Writing about Article 23(e) of the Hague Regulations, which condemns weapons apt to cause unnecessary suffering, he maintained that no common consent on the meaning of this norm has emerged from either the military manuals of the world's armed forces or the practice of States since 1907. Instead, Article 23(e) has played a normative role only in extreme cases, such as when the weapon is so manifestly cruel that no-one can deny that it causes unnecessary suffering, or when evidence can be produced of gross, repeated and large-scale violations of the principle.[12] Whether Article 35 of Protocol I, which is the heir to Article 23(e), will be condemned to play a similar role in the future is a question which only the experience of war will resolve.

Another issue which is likely to provoke considerable controversy when the provisions of Protocol I are applied in practice is aerial bombardment. The complexity of this subject is forbidding and the diplomatic conference of 1974–77 is only to be congratulated on its attempts to regulate a practice which

11. Sandoz, Y, "A new step forward in international law: Prohibitions or restrictions on the use of certain conventional weapons", International Review of the Red Cross, no 220 (January-February 1981), 14.
12. "Means of Warfare: The Present and Emerging Law", (1976) 11 Rev Belge Dr Int 145.

has been the cause of so many civilian deaths in the last sixty years. Nonetheless, the fact remains that those articles in Protocol I which deal with aerial bombardment are in certain respects ambiguous. Perhaps this is inevitable, given the difficulty of marrying humanitarian impulse and military necessity in such a contentious area of warfare, but the efficacy of Protocol I may well suffer as a result.

For example, Article 51, paragraph 2, prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population". A strict interpretation of this sentence, so the Swede, Hans Blix, has argued,[13] might maintain that attacks which have terror as their secondary purposes are permissible. In fact, the above sentence is an elaboration or duplication of the general ban on attacks on civilian populations which opens paragraph 2 ("the civilian population, as such, as well as individual civilians, shall not be made the object of attack"), but the difficulty remains that the intention of the belligerent carrying out the bombing is important in assessing the legality or otherwise of his actions. As the experience of the Second World War showed, when the British justified their bombing even of Dresden on the grounds that they intended to hit military objectives, such a crack in international humanitarian law can in time become a chasm.

An even more delicate area of interpretation, so far as aerial bombardment is concerned, is paragraph 5(a) of Article 51. This defines as indiscriminate — and hence prohibited — "an attack by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects". The critical words in — and some would say the Achilles' heel of — this paragraph are "clearly separated and distinct", since what these terms will mean in the operational context will undoubtedly be a matter for dispute. What distance is required between military objectives for them to be "clearly separated" from each other? Can military objectives which are indisputably distinct and separate be attacked if the weapons used against them have effects which extend across the distance between them? This is a matter of considerable importance given that the 1980 Protocol on incendiary weapons prohibits the use of air-delivered incendiary weapons against military objectives located within a concentration of civilians, but excludes from its definition of "incendiary weapons", munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect (for example, armour-piercing projectiles, fragmentation shells and explosive bombs).

Other questions which have been raised about Article 51, paragraph 5(a), are the criteria by which the terms "clearly separated and distinct" are to be judged. If military objectives are separated and distinct on the ground, but, because of camouflage, weather or the altitude of the attacking aircraft, indistinct from the air, then what yardstick is to be used to judge whether they can be attacked legitimately? — the perspective from the ground, or from the air? If the former, then does this not discriminate against those powers which have low-technology air forces and which lack sophisticated munitions such as heat-seeking and

13. "Area-Bombardment: Rules and Reasons", (1978) 49 BYBIL 46.

infra-red tracking missiles? Is it realistic to expect such powers to accept legal standards which in effect force them to renounce the only bombing they can practise? Will they do this when confronted with an enemy which, because of its superior technology, can bomb more accurately — and hence legally? Should there in fact be lower expectations about the standards expected of low-technology nations?

Such questions may seem unduly mischievous but there is no doubt that sceptics amongst the armed forces question the feasibility of Article 51 and doubt whether it will in fact act as a restraint on belligerents' military operations. To quote H. de Saussure in the 1979 *Annals of Air and Space Law:*[14]

> "History shows the area bombing in Europe and Asia in World War II and in North Vietnam have established the repetitive practices necessary for the formation of customary law. In the normal course of events, customary law will not yield to superseding treaty rules unless those rules have overwhelming community support. I do not believe such a consensus for pinpoint bombing has yet occurred. Nor do I believe those states who profess agreement with the new standard for pinpoint bombing will themselves live up to its exacting standards, under all circumstances. Protocol I is by and large clear and realistic. It should materially advance a more humanitarian rule of law in armed conflict. However, in one of the most important segments of modern day use of force, the role of air power for long distance air raids, it fails to display the practicality that could induce belligerent compliance without sacrificing air operational necessity."

The problem de Saussure raises is not new. There has always been a tension between the demands of "practicality" and idealism in the development of international humanitarian law and every major innovation of the law in the past has had to strike a difficult balance between the two. Whether this balance has been successfully maintained in the case of Protocol I and its limitations on methods and means of warfare is a question about which there will inevitably be much debate. For every de Saussure who believes the pendulum has swung too far in the direction of humanitarianism there will undoubtedly be an idealist for whom the demands of military necessity have been given too much weight. Which of them is right? It may seem a glib answer — but only time will tell.

14. "Belligerent Air Operations and the 1977 Geneva Protocol I", (1979) 4 Ann Air & Sp Law 459–481.