XV. Use of Force and War

Weapons of Mass Destruction—Prevention of Proliferation—New Australian Legislation

The following is the text of the second reading speech by the Minister for the Environment, Senator John Faulkner, explaining legislation to strengthen Australian law to prevent the proliferation of weapons of mass destruction (Senate, *Debates*, 9 November 1994, p 2691):

> The Weapons of Mass Destruction (Prevention of Proliferation) Bill 1994 will assist the Government in ensuring that Australia is fulfilling its treaty obligations and its citizens do not contribute to the proliferation of weapons of mass destruction in any part of the world.
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> Controlling weapons of mass destruction is one of the most important security challenges facing the post-Cold War world. The issue is a high foreign policy and defence priority for the Government. International recognition of the horrific results of the use of weapons of mass destruction (nuclear, biological and chemical weapons and their missile delivery systems) and concerns over the destabilising impact of the proliferation of such weapons have resulted in several major achievements in addressing this problem. Of greatest importance are the multilateral treaties either banning or restricting the proliferation of such weapons, principally the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention and the Chemical Weapons Convention (which is not yet in force).
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> In addition to these global treaties, and reinforcing their objectives, are other measures which have been taken to stem proliferation of weapons of mass destruction (WMD). In concert with other similarly-minded countries, the Australian Government has maintained a range of export controls aimed at preventing the transfer, directly or indirectly, of goods and technology, which could be used in the development of WMD, to programs known to be or suspected of posing a WMD proliferation risk. These controls were developed by international export control regimes of which Australia is a member—the Nuclear Suppliers' Group and the Zangger Committee (nuclear), the Australia Group (chemical and biological) and the Missile Technology Control Regime (missile delivery systems).
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> Australia's export controls on goods (including technology in a tangible form) are covered by the Customs Act 1901 through the Customs (Prohibited Exports) Regulations. Exports of dual use materials and technology (equipment and technology which have both commercial and military uses) are controlled under a series of these Regulations.
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> It is not possible to identify and describe (for regulatory purposes) all items that might be used in a WMD program. Some items may be identified but, because of their widespread commercial application, it would be impracticable to control them under the Customs Regulations: once in Regulations, all exports of these items would require a permit, which would create an unnecessary

administrative burden on the licensing authority as well as for industry. However, the Government would still want to have the authority to stop such items from being exported to a destination considered to be a WMD proliferation risk.

The Customs Regulations also cannot control the supply of goods and technology by an Australian overseas or the provision of services or other assistance to a WMD program. Services or assistance could for example take the form of a consultancy contract to provide technical, operational or management advice to a WMD program; financial assistance; brokering the supply of materials; or specialised training. It would also cover the transmission of information by telephone, fax and other forms which cannot be covered under the Customs Regulations.

A number of similarly placed countries have responded to this problem by the development of the "catch-all" or "safety-net" provisions as an element of the barriers to WMD proliferation, for example the United States and Germany. Although it can take different forms, essentially it works in two ways: it puts an onus on a person not to export goods or provide a service or other assistance intentionally or recklessly to a WMD program. It also provides the Government with a mechanism to prevent the export of goods or the provision of a service or other assistance to an actual or possible WMD program. While there is a wide range of goods and services that can be used in a WMD program which have legitimate commercial uses and are not specifically controlled under existing legislation, it would be inconsistent with Australia's strong support for the international non-proliferation regimes and strong opposition to WMD proliferation for the Government not to have all necessary authority to prevent the provision of goods and services to WMD programs.

This is not a theoretical problem for Australia. There have been several cases in recent years where Australian companies have inadvertently become involved in activities which could have assisted WMD programs, and these activities were not specifically covered by Australia's existing non-proliferation legislation. Fortunately the companies involved were cooperative and ceased the activities in question when the Government informed them of its concerns. We cannot, however, conclude from the positive outcome in those cases that this will always be the case in the future, particularly in the face of the possible financial inducements on offer from those associated with WMD programs. Hence the need to provide clear legislative backing for the Government's comprehensive WMD non-proliferation policy.

The prohibitions under the bill would apply where the person involved knows of or suspects the connection with a WMD program. The bill provides for a Ministerial certificate to be issued prohibiting relevant activities in cases where government authorities are aware of the risk of the potential contribution to a WMD program, but the exporter is not aware of the connection or has ignored or not appreciated warning signs. An important element of the bill is the provision for a mechanism to be established for companies and individuals to obtain written guidance from the Government on the risk (or not) of a particular planned transaction contributing to a WMD program.

This legislation is not meant to be the prime or sole barrier against possible Australian assistance to the proliferation of WMD. The Customs Regulations, information programs and persuasion will continue to serve an important function. The legislation would be used only when other measures fail or are

unavailable. It would also serve to underline again the Government's clear commitment to prevent Australian assistance to proliferation of WMD.

Comprehensive Nuclear Test Ban Treaty—Progress towards Achievement

Further to discussion of progress towards a CTBT in previous volumes of the *Aust YBIL* (see *Aust YBIL* 1994, vol 15, p 687), the following is the text of a question without notice and answer given by the Foreign Minister, Senator Gareth Evans (Senate, *Debates*, 4 May 1994, p 196):

> Senator West—My question is directed to the Minister for Foreign Affairs. I ask: what are the prospects of concluding a comprehensive nuclear test ban treaty, and how is Australia helping? Will China's reported intention to resume nuclear testing in the near future jeopardise the CTBT negotiations? Will Australia make representations to China on this matter?
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> Senator Gareth Evans—The government believes that the prospects for concluding a comprehensive nuclear test ban treaty are now very positive. All the nuclear weapon states are committed to negotiation of such a treaty and negotiations on it commenced in January at the conference on disarmament in Geneva. Negotiations are making steady progress on both the core articles of the treaty and the technical aspects—the difficult ones of verifying compliance. The Australian delegation, as with the chemical weapons exercise before it, has played a very active role in advancing these negotiations. We have tabled a complete draft treaty as a reference point for the conference in developing agreed treaty language.
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> United States leadership in this matter has also been extremely important, with the US delegation in Geneva playing a very constructive role. President Clinton announced on 14 March that he had decided to extend for another year the US moratorium on its nuclear testing program until September 1995. I have written to Secretary of State Christopher welcoming that decision, and certainly it has been very important in creating the right atmosphere for these negotiations to proceed. It is also the case that France and Russia are maintaining their testing moratoriums. I am particularly pleased about that and about the extension of the US moratorium, in so far as they occurred notwithstanding China's resumption of testing in October last year.
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> On the subject of China, it has said that it remains committed to the negotiation of a test ban treaty by 1996. We have, nonetheless, heard reports that China has announced that it will again resume nuclear testing shortly. We hope there is no substance in those reports, but we cannot be sure of that. We have been urging China to join the other weapon states in a moratorium on its national programs. We, and many other countries, protested China's last nuclear test in October last year. We continue to urge China to refrain from further testing. I raised the issue just a few weeks ago in Beijing with Qian Qichen, the Chinese foreign minister, and will continue to do so.
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> The commitment of the international community to a comprehensive test ban treaty is demonstrated by the fact that, at the last UN General Assembly last year, a resolution calling for such a treaty was, for the first time, passed not by a majority vote but by consensus. As lead sponsor of that resolution, we were delighted to secure for it a record number of co-sponsors—the highest in the UN General Assembly's history: 156 co-sponsors of that resolution.

> Early conclusion of a comprehensive test ban treaty will, of course, directly help prevent the proliferation of nuclear weapons, which remains our other major objective in the nuclear area. As a step toward nuclear disarmament by the nuclear weapon states, it will certainly improve the prospects for indefinite extension of the nuclear non-proliferation treaty at the extension and review conference scheduled for April and May next year.

Continued Nuclear Testing—Australian Attitude

In continuation of previous policy (see *Aust YBIL* 1994, vol 15, p 690), the Foreign Minister, Senator Gareth Evans, in answer to a question on notice re-stated Australian opposition to the continuation of nuclear testing in the Pacific (Senate, *Debates*, 19 September 1994, p 952):

> Under present circumstances, French nuclear tests conducted in its Pacific territories do not formally contravene the South Pacific Nuclear Free Zone (SPNFZ) Treaty. France has not signed the Protocols to the Treaty, as Australia and other South Pacific Forum countries have urged it to do. Protocol One would give effect to Treaty provisions within French territories in the nuclear free zone and in particular to Article 6 of the Treaty, which obliges parties to prevent and discourage nuclear testing within their territories by any State. Protocol Three of the Treaty further obliges Nuclear Weapon States not to test any nuclear explosive device anywhere within the zone. Until France does sign the Protocols, the SPNFZ Treaty has no legal jurisdiction over French nuclear testing within French territories in the South Pacific. That said, resumed French testing would clearly run contrary to the whole thrust of the SPNFZ Treaty and to South Pacific opposition to testing in the region. It was for this reason that at the South Pacific Forum meeting in Brisbane this year, Australia and other Forum countries again called on France, the UK and the US to accede to the Protocols of the Treaty as a demonstration of their commitment to nuclear non-proliferation and a ban on testing.

Chemical Weapons Convention—Australian Ratification

In completion of the process of conclusion of the CWC for Australia (see earlier steps in the *Aust YBIL* 1994, vol 15, p 696), the following is the text of a press release issued by the Foreign Minister, Senator Gareth Evans, on 7 May 1994:

> The Minister for Foreign Affairs, Senator Gareth Evans, announced today that Australia had ratified the Chemical Weapons Convention (CWC).
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> Australia's instrument of ratification was deposited with the United Nations Secretariat in New York as Depositary to the Convention on 6 May 1994. Australia becomes the sixth country to ratify the Convention. The CWC will enter into force 180 days after it is ratified by 65 countries.
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> "Our ratification ensures that Australia will continue to play a leading role in international efforts to put in place a global ban on chemical weapons. Ratification underlines Australia's strong commitment to the abolition of this complete category of weapons of mass destruction," Senator Evans said.
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> "It is vital that other signatory countries work quickly to complete their requirements to ratify the CWC, to bring the Convention into force as soon as possible. Australia looks forward to the full implementation of all of the obligations assumed by CWC States Parties, and universal participation in the new disarmament regime by the international community."

Australia's ratification of the CWC follows the enactment on 25 February 1994 of the *Chemical Weapons (Prohibition) Act 1994,* which implements the CWC's obligations for Australia.

The CWC was opened for signature in January 1993 after approximately twenty years of international discussions and negotiation, and was signed for Australia by Senator Evans. Australia worked actively, particularly during the final stages of the negotiations, to conclude the Convention. 157 countries have signed the CWC. The five other countries which have ratified the Convention are Fiji, Mauritius, Norway, Seychelles and Sweden. International preparations for the CWC's entry into force are being developed by a Preparatory Commission located in The Hague, the Netherlands. The Organisation for the Prohibition of Chemical Weapons, the international organisation which will be responsible for the Convention, will also be headquartered at The Hague.

The CWC will ban the development, production, acquisition and stockpiling of chemical weapons. It also requires countries with existing stockpiles of these weapons to destroy them. Extensive procedures to ensure Parties to the Convention comply with their obligations were agreed as a key elements in the regime. In addition to the security benefits from the abolition of a class of weapons of mass destruction, the CWC is also expected to facilitate the development of chemical trade and industry.

The second reading speech explaining the Chemical Weapons (Prohibition) Act, referred to in the above press release, was included in the *Aust YBIL* 1994, vol 15, p 700.

Nuclear Material—Handling in Australia

In the course of an answer to a question on notice the Foreign Minister, Senator Gareth Evans, gave the following details of the procedures for handling of nuclear material under Australian domestic law (Senate, *Debates*, 19 September 1994, p 956):

In Australia, under the Nuclear Non-Proliferation (Safeguards) Act 1987, permits are required for the possession or transport of significant quantities of nuclear material and associated items. Exports of nuclear material and associated items are controlled through a permit system under the Customs (Prohibited Exports) Regulations to ensure that the Government's safeguards conditions are fully met. The Australian system does not distinguish between individuals and corporations except in the form of the penalties applied for non-compliance...

In the case of nuclear material which is never imported into Australia, the nuclear material would be subject to the national export control regime of the exporting state. The material would be subject to IAEA safeguards in the importing country, as an NPT Party. In the case of supply from or through Australia, the nuclear material would be subject to the provisions of the Nuclear Non-Proliferation (Safeguards) Act 1987 and the Customs (Prohibited Exports) Regulations. In the case of undeclared or smuggled nuclear material such activity would also be subject to normal customs surveillance and interdiction. The Government is considering the introduction of legislation in the area of non-proliferation which would have extra-territorial effect.

The Laws of Armed Conflict—Australian Implementation

The following is the text of the greater part of an address given by the Legal Advisor B in the Department of Foreign Affairs and Trade, Mr Chris Lamb, to the Chief of Staff Exercise on 27 June 1994 in Townsville, giving an outline of the laws of armed conflict, and of the steps which the Australian authorities have taken towards their improvement and enforcement:

> ...As you would be aware, the Laws of Armed Conflict are a major body of rules and practice governing the humane conduct of armed conflict. This body of rules and practice has existed and evolved across civilisations, without geographical limitation, for thousands of years.[1] As Frits Kalshoven has stated in the International Committee of the Red Cross publication *Constraints on the Waging of War:*
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> > even in a distant past, military leaders sometimes ordered their troops to spare the lives of captured enemies, treat them well, spare the enemy civilian population, and often upon the termination of hostilities, belligerent parties agreed to exchange the prisoners in their hands. In the course of time, these and suchlike practices gradually developed into a body of customary rules relating to the conduct of war; rules, that is, which parties to an armed conflict ought to respect even in the absence of...an agreement to that effect.[2]
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> Kalshoven records that for a long time the scope and content of these customary rules of warfare remained "somewhat elusive and uncertain".[3] It was only in the second half of the nineteenth century that the customary laws of war began to be codified into particular, binding, multilateral agreements.[4] The first detailed and systematic attempt to codify the Laws of Armed Conflict occurred at the Hague Peace Conference of 1899. This Conference succeeded in adopting the text of a Convention with Respect to the Laws and Customs of War on Land with annexed Regulations.[5] Since that time most of the fundamental customary laws of war have now been recorded in international agreements, whether styled as declarations, conventions or protocols.[6]
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> Today the primary source for the Laws of Armed Conflict are the Geneva Red Cross Conventions. These instruments consist of four Conventions signed at Geneva on 12 August 1949:
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> - The Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (Convention I);
> - The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II);

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1 See generally Kalshoven F, *Constraints on the Waging of War*, International Committee of the Red Cross, Geneva, 1987, pp 7–8; Ahlstrom C, *Casualties of Conflict: Report for the World Campaign for the Protection of War Victims* (1991).

2 Ibid, p 7.

3 Ibid, p 13.

4 Roberts A and Guelff R, *Documents on the Laws of War* (1989), p 3.

5 Ibid, p 35.

6 Ibid, pp 1–22 provides an excellent overview of the development and sources of the laws of armed conflict.

- The Geneva Convention Relative to the Treatment of Prisoners of War (Convention III); and
- The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV).

Each of these Conventions contain a number of "Common Articles", so called because they are found in identical terms in all four Conventions.

The four Geneva Conventions have been supplemented by Additional Protocol I relating to the Protection of Victims of International Armed Conflicts and Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts, both of which were opened for signature in Geneva on 12 December 1977.[7] Since the principal concern of this Exercise is the obligations of land commanders in international armed conflicts I will not be making further mention of Additional Protocol II. I will, however, need to return later in this address to the unfortunate fact that modern conflict realities are such that non-international conflict has had such an impact on command responsibilities that Wavell's concepts of gallantry need elaboration and improvement.

The four Geneva Conventions apply in their entirety to all conflicts between States parties to the Conventions (Common Article 2). In addition, they are widely regarded as encapsulating customary international law and, as such, apply regardless of whether or not an individual state has actually become party to the Conventions. Additional Protocol I has not achieved universal adherence (although over one hundred states are now parties). Nevertheless, Australia together with the bulk of the international community believes that the essential terms of the Protocol should be regarded as reflecting customary laws of armed conflict, and as such should be universally respected.[8]

By virtue of Article 1(4) of Protocol I, the four Conventions also apply in full to armed conflicts in which peoples are fighting against colonial domination (i.e. wars of national liberation), alien occupation or racist regimes in the exercise of their right of self determination.[9]

Apart from the Geneva Conventions and Additional Protocols, other significant agreements setting out the Laws of Armed Conflict include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[10] the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environment Modification Techniques (ENMOD) [11] and the

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7 The Geneva Conventions and Protocols are printed and distributed by the International Committee of the Red Cross. For other official sources of the Conventions see 75 UNTS, Aust TS 1958, No 21, NZTS 1963, No 3, UKTS 1958, No 39 and the Schedules to the *Geneva Conventions Act* 1957 (Cth); for the Protocols see Aust TS 1991 Nos 29 and 30, 16 ILM 1391, 72 AJIL 457.

8 I note I have not referred to the status of Additional Protocol II here because my allotted topic is limited in its scope to international armed conflicts.

9 As embodied in the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. This provision was intended to provide protection to liberation movements in some parts of Africa and the Middle East. A consequence of the provision is that national liberation forces are able to enjoy prisoner of war status.

10 Aust TS 1984 No 21; UNTS 249 at 215; Cmd 9837.

11 Aust TS 1984 No 21; UNTS 1108 at 151; 16 ILM (1977) at 88–94.

1980 United Nations Convention on Certain Conventional Weapons—often known as the Inhumane Weapons Convention but principally known for its Land Mines Protocol.[12]

Read together, the Conventions I have just described run to hundreds of pages and articles, some of a complex and highly technical nature. It would be an impossibly difficult task to outline in detail the contents and effect of each of these Conventions. I have thus had to be both ruthless and discerning in my approach. I thus propose concentrating focus in the remainder of this address on three particular issues:

- firstly, a description of the fundamental rules of Armed Conflict and the broad obligations imposed on land commanders under the Laws of Armed Conflict;
- secondly, an account of the steps Australia has taken to implement the Laws of Armed Conflict and the impact these measures have on Australian Land Commanders; and
- finally, a description of recent developments in the international approach to the Laws of Armed Conflict of concern to Australia.

To turn to the first issue, as the distinguished New Zealand lawyer, Sir Kenneth Keith, has noted, while the Laws of Armed Conflict may appear complex—as something for the chancery lawyer to "unravel"—the central principles that underpin these laws "are in fact clear and capable of application in the midst of an armed conflict".[13] Various commentators have sought to enunciate these central principles, but, appropriately, the best summary of them has been prepared by the guardians of international humanitarian law, the Geneva Red Cross Conventions and their Protocols, the International Committee of the Red Cross (ICRC).[14] In a document entitled "Fundamental Rules of International Humanitarian Law" the ICRC encapsulates the broad principles underpinning the Laws of Armed Conflict in the following seven, simple and abbreviated rules:[15]

1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and physical integrity. They must in all circumstances be protected and treated humanely without any adverse distinction.

2. It is forbidden to kill or injure an enemy who surrenders or is *hors de combat*.

3. The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. This protection also covers medical

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12 The full citation for the Convention is the 1981 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 Aust TS 1984 No 6, ILM 19 at 1523.

13 Keith KJ, "The Present State of International Humanitarian Law" (1985) 9 *Aust YBIL* 13 at 14.

14 See Partsch KJ, "Armed Conflict, Fundamental Rules" in Bernhardt (ed), *Encyclopedia of Public International Law: Volume 3: Use of Force* (1982). See also the *Basic Rules of the Geneva Conventions and their Additional Protocols*, International Committee of the Red Cross (1983, reprinted 1987), p 7.

15 These rules are not in themselves law. They capture the broad principles that underpin the laws of Armed Conflict. See Partsch, ibid.

personnel, establishments, transports and equipment. The emblem of the red cross or red crescent is the sign of such protection and must be respected.

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They must be protected against all acts of violence and reprisals. They will have the right to correspond with their families and to receive relief.

5. Everyone is entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such, nor civilian persons, shall be the object of attack. Attacks must be directed solely against military objectives.

Napoleon urged aspiring commanders to "read and re-read the deeds of the Great Commanders" arguing that this "is the only way to learn the art of war".[16] Today, it would be apt to add that aspiring commanders should also "read and re-read" the ICRC's Fundamental Rules of International Humanitarian Law and the 1949 Geneva Conventions and 1977 Protocols. This is because the Geneva Conventions and Additional Protocol I,[17] bind all commanders and individual soldiers in the armed forces of any State engaged in international armed conflicts, regardless of whether or not they have been instructed in the Laws of Armed Conflict.

Indeed, the Geneva Conventions and Additional Protocol I single commanders out for special treatment. Thus, for example, Article 1 common to the four Geneva Conventions and Article 1(1) of Additional Protocol I each provide that States party to these instruments "undertake to respect and to ensure respect for" the instruments "in all circumstances". It is widely accepted that this means that commanders of forces engaged in military operations have a legal responsibility to ensure that the Laws of Armed Conflict contained in the relevant instrument are respected and enforced in all circumstances.[18] To this end, the Geneva Conventions and Additional Protocol I each provide that instruction in the relevant Laws of Armed Conflict must be included in military training and, in effect, that every commander holds full responsibility for the proper implementation of Law of Armed Conflict training within his or her sphere of responsibility.[19]

Similarly, Article 87 of Additional Protocol I provides, in effect, that commanders have a personal responsibility to ensure that all members of the

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16 Cited in Grabsky P, *The Great Commanders* (1993).

17 This is because of the universal application of the Geneva Conventions and Additional Protocol I. Additional Protocol II is not covered, as the allotted topic for this address is limited to international armed conflicts.

18 De Mulinen F, *Handbook on the Laws of War for Armed Forces* (1987), pp 61–78.

19 Ibid.

armed forces under their command are aware of their obligations under the Geneva Conventions and Protocol I, commensurate with their level of responsibility, and that all necessary measures are taken to prevent violations of these laws.[20] Where a breach of the Conventions or Protocol I occurs the commander is obliged to suppress and report the violation and, where appropriate, to initiate disciplinary or penal actions against the violators. Article 86 of Protocol I provides, in turn, that a commander is to be held accountable by a State if he or she fails to act to prevent a breach of the Geneva Conventions or Protocol I which the commander knew, or had information which should have enabled him or her to conclude, that the breach was to occur.[21]

The provisions I have just cited are a representative example of the responsibilities imposed on commanders pursuant to the Geneva Conventions and Additional Protocol I. The references are by no means exhaustive. They merely serve to illustrate the significant nature of a commander's obligations under the Conventions and Protocols and, consequently, the importance of commanders being aware of these obligations.

When we speak, however, of the obligations and responsibilities of commanders and soldiers the questions, of course, arise: "How are these obligations and responsibilities to be enforced?", "What mechanisms will ensure that soldiers are accountable for their actions in armed conflicts?". These questions are not new. Similar issues have troubled statesmen, historians, philosophers and commanders for centuries. Unfortunately, to draw on the words used by Allan Rosas in his article on "International Monitoring Mechanisms in Situations of Armed Conflict", we have not reached the stage where principles of decency will be universally respected simply because it is the decent thing to do.[22] The Geneva Conventions and Additional Protocol I must thus be backed up by a system of sanctions and punishment.[23]

At present, the enforcement of the Geneva Conventions and Additional Protocol I is a matter which the Conventions and Protocols essentially leave to States parties. Thus, each of the four Geneva Conventions and Additional Protocol I contain provisions requiring States to enact any domestic legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, "grave breaches" of the Convention or Protocol, examples of such breaches being the wilful killing of protected persons, torture or inhumane treatment, wilfully causing great suffering or serious injury to protected persons, and the extensive destruction and appropriation of property not justified by military necessity (see for example Article 50 of Convention I).[24] States are also required to search for persons alleged to have committed "grave breaches" and to bring such persons (regardless of nationality) before their own courts or hand them over to another State party for trial.

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20 Ibid.

21 Ibid. The so-called "Yamashita principles".

22 Bloed A et al (eds), *Monitoring Human Rights in Europe* (1993), p 245.

23 Ibid. As Thomas Hobbes bluntly put the matter in 1651 in his seminal work *Leviathan, or the Matter, Form and Power of a Commonwealth Ecclesiastical and Civil*, "covenants, without the sword are but words of no strength to secure a man at all".

24 See eg, Convention I, Article 49; Convention II, Article 50; Convention III, Article 129; Convention IV, Article 146 and Additional Protocol I, Article 85.

State responsibility for enforcement is an important issue, to which I will return later.

In addition to these provisions, Articles 88 and 89 of Additional Protocol I require State parties to provide mutual assistance in criminal prosecutions involving breaches of the Conventions and Protocol I and to co-operate in situations where there are serious violations of the Conventions or Protocol I.

With these obligations in mind, it is valuable to note some of the steps Australia has taken to implement the Laws of Armed Conflict and to describe, briefly, the impact these measures have on Australian Land Commanders.

Australia's formal obligations derive from the fact that Australia is a party to all four Geneva Conventions of 1949, the two Additional Protocols of 1977, the 1954 Hague Convention, ENMOD, and the 1980 Convention on Certain Conventional Weapons. Beyond this, Australia is a strong supporter of the universality of application of the rules of armed conflict and their substance as binding law.[25] The nation's commitment to the domestic implementation and dissemination of the Laws of Armed Conflict is further demonstrated by the Chief of the Defence Force's recent decision to extend training in the Laws of Armed Conflict to all Australian service personnel. This decision builds on an earlier decision to train all members of the Australian Army in the Laws of Armed Conflict.

Australia thus takes its obligations to further the law, and to ensure the application of the rules in the Geneva Conventions and Protocol I, very seriously indeed. Australia moves from this position to seek the same sincerity of adherence from all other countries, and to work with the ICRC and other governments towards this end.

In accordance with the enforcement provisions in the Geneva Conventions and Protocol I, the Australian Government has enacted legislation to give domestic legal effect to Australia's obligations under the Conventions and Protocols. The most important piece of legislation is the *Geneva Conventions Act* (as amended since 1957). Among other things, this Act provides for life imprisonment as the maximum penalty for an offence involving the wilful killing of a person protected by the Geneva Conventions or Additional Protocol I (Section 7(4)(a)). Offences involving other "grave breaches" of the Convention or Protocol I are punishable by up to 14 years imprisonment (Section 7(4)(b)). Breaches of the Geneva Conventions and Protocol I also provide a basis for the prosecution of war criminals. Australia has thus enacted the *War Crimes Act* , as amended since 1945, to enable the prosecution of war criminals domestically. Both the *Geneva Conventions Act* and the *War Crimes Act* operate extra-territorially according to their tenor. Australian service personnel can thus be prosecuted in Australia under these Acts for violations of the Geneva Conventions and Protocol I committed in the course of operations overseas.

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25 It is worth noting that Australia has also made a declaration pursuant to Article 90(2) of Additional Protocol I recognising the competence of the International Fact-Finding Commission constituted under Article 90(1) of Additional Protocol I to enquire into any facts alleged to be a grave breach of the Geneva Conventions and Protocols or other serious violation of the Conventions or Protocols and to facilitate through its good offices the restoration of an attitude of respect for the Conventions and Protocols.

Quite apart from these pieces of legislation, I understand the Australian Defence Force regards respect for the Laws of Armed Conflict as a matter of order and discipline. Additional mechanisms for the enforcement of the Laws of Armed Conflict in respect of Australian service personnel are thus provided for under the *Defence Act 1903*, the *Defence Force Discipline Act* 1982 and other sources of military law.

The result is that Australian land commanders and service personnel are not only trained in the Laws of Armed Conflict but also enter into operations with firm, international and domestic legal requirements to comply with these laws. These obligations are supported by severe sanctions for non-compliance.

Needless to say, in this environment the role of the military lawyer has become increasingly important within the Australian Defence Forces. He or she is required to advise Australian commanding officers on the detail of their obligations under the Laws of Armed Conflict and, as appropriate, to synthesise these laws into a body of operations law which provides succinct but clear instructions to Australian Land Commanders.

I do not want to dwell further on the role of the military lawyer or the impact of the Laws of Armed Conflict on Australian Land Commanders and land operations. These are issues which will, no doubt, be fleshed out in some detail over the next three days by other speakers.

I would thus like to use the remaining time available to me to describe current international developments relating to the Laws of Armed Conflict.

In a recent address at the Australian Defence Force Academy, the Australian Minister for Foreign Affairs and Trade, Senator Gareth Evans QC, recounted that, "like millions of other news viewers around the world", he had recently watched media footage which depicted two soldiers emerging from a "burning, shell-ravaged building in Bosnia-Herzegovina".[26] Senator Evans described the events that ensued in the following terms:

"Clearly without weapons...their arms held high in the air, [the two soldiers] walked towards their waiting captors when, without warning, a volley of shots rang out—and the two surrendering soldiers fell dead."[27]

As Senator Evans went on to note in his address, "this is a chilling, brutal and extreme event".[28] Sadly however, events of a similar nature are becoming increasingly a part of international armed conflict[29] across the globe, a notable example being the conflict in the former Yugoslavia.

Tragically, such events merely serve to highlight the fact that in recent years there has been an alarming decline in the effectiveness of, and international respect for, the Laws of Armed Conflict.

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26 Opening Address by Senator the Hon Gareth Evans QC, Minister for Foreign Affairs, at the Australian Defence Force Academy and University College, University of NSW Conference "Prisoners of War, Prisoners of History: Captivity and Internment in Recent Conflicts 1939 to the Present", Canberra, 12 May 1994, p 1.

27 Ibid.

28 Ibid.

29 Again, I refer specifically to international armed conflicts here because non-international armed conflicts are not included in my speaking topic.

This intolerable state of affairs represents a serious threat for the international community. Traditionally, the Laws of Armed Conflict have provided a last measure of humanity and decency in the horror and chaos of armed conflict. The threat to the Laws of Armed Conflict posed by acts of the sort just described is thus a threat to all humanity. It was the magnitude of this threat which led Senator Gareth Evans, the Australian Minister for Foreign Affairs, to offer the following comments on the situation the world now faces in his book *Co-operating for Peace*:

> There should be universal adherence to both the Conventions and the Protocols. In peace-time states must ensure familiarity with this body of law among their military through active programs of legislation, education and training. There should be universal acceptance of the International Fact-Finding Commission to enquire into all allegations of violation of the Geneva Conventions. The international community must be prepared to pursue measures to strengthen the effectiveness and deterrent value of the Conventions.[30]

The present definition of a war crime and the concept of individual responsibility for grave breaches of the Geneva Conventions and Additional Protocol I are safely entrenched in international law. However, as I described earlier, while the Geneva Conventions and Additional Protocol I define offences, the vital task of enforcing compliance with the Conventions and determining penal sanctions for breaches is left to individual states. Where a state is not prepared to take responsibility for violations of the Laws of Armed Conflict, or to hold its soldiers accountable for war crimes, the result can be "crime without punishment".

Confronted with this problem, the international community has recognised that there is an urgent need for it to rethink its approach to the enforcement of the Laws of Armed Conflict.

On 25 May 1993 the United Nations Security Council established by Resolution 827 an ad hoc International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. This Tribunal will have jurisdiction to try persons who have allegedly committed "grave breaches" of the Geneva Conventions and Additional Protocols in the former Yugoslavia since 1 January 1991. Resolution 827 is binding on all Member States of the United Nations (including Australia). Consequently, all Member States will be required to co-operate with the Tribunal in its investigations and prosecutions, including by surrendering suspected offenders for trial by the Tribunal, if requested. The Australian Government has introduced legislation into Parliament which, when enacted, will enable Australian law enforcement authorities to co-operate with the Tribunal.

The establishment of the Yugoslav War Crimes Tribunal is an important step in the right direction. The geographical and temporal reach of the Tribunal is, however, limited.

Senator Evans has thus recently suggested that "to be credible and effective" in dealing with breaches of the Laws of Armed Conflict "the international

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30 Evans G, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond*, (1993), p 43.

community must now consider, rather more seriously than it has over the decades since Nuremberg, the establishment of an international court with universal jurisdiction to try war crimes, as well as a supporting independent prosecuting authority". Senator Evans has also noted "that the International Criminal Court presently being proposed by the International Law Commission could take on this function".

I should add that Australia has been a consistent supporter of the creation of an international criminal jurisdiction covering crimes of this nature, ever since the Nuremberg days. It is only now, with the end of the Cold War, that it has proved possible to bring rational appreciation of normal rules of law to bear on crimes of the kind that Senator Evans and tens of millions of television viewers are now seeing on their screens nearly every day.

Australia is, however, following closely the elaboration of international criminal law procedures applicable to war crimes and crimes against humanity. A question yet to be dealt with clearly is the extent to which the Security Council of the United Nations should need to treat crimes of this nature as threats to international peace and security—as was the case with the decision to create the International Tribunal for Former Yugoslavia. While lawyers would probably agree that a properly functioning International Criminal Court, with its own Statute agreed by Member States, is the optimal solution, we can understand why the Security Council is now considering whether it should invoke its own criminal sanctions procedures for Rwanda. We are watching these developments with great interest.

But there are, of course, other steps that must be taken to enhance respect for the Laws of Armed Conflict. Criminal sanction is a last resort which can only become appropriate when events prove that governments and their military establishments have failed to discharge their obligations towards humanity.

Enhancement of respect must be accompanied by a renewal of work on the understanding, and dissemination, of just what the law and its obligations entail. Thus, high-level delegations from 160 states, including Australia, attended the International Conference for the Protection of War Victims in Geneva in August 1993. The Conference was convened by the Swiss Government, but preparatory work was undertaken in close cooperation with the International Committee of the Red Cross, with it being clearly understood that the outcomes would contribute to the rules and laws managed for the world by the ICRC.

The main objective of the Conference was to demonstrate governmental concern at the suffering so obviously being caused, daily, by disregard for the Laws of Armed Conflict and to reiterate the need to respect, and where necessary strengthen, these laws. After careful debate on the issues, delegations joined together to make a final declaration defining clearly matters of extreme concern and alerting all belligerents to the need for scrupulous adherence to the Laws of Armed Conflict. The declaration also contains a request for the Swiss Government to convene an open-ended group of experts to recommend practical measures for promoting respect for, and compliance with, Laws of Armed Conflict. This report will be a substantial item on the agenda of the 1995 International Conference of the Red Cross and Red Crescent Societies, a conference which will arguably be the major event of this decade in the affirmation of the rules of international humanitarian law.

Australia has worked closely with the Swiss Government and the ICRC to find ways of ensuring that the War Victims Declaration does indeed give birth to practical recommendations. Among our preoccupations have been the importance of ensuring that the Declaration is seen as having world-wide application, and that its fundamental principles are accepted—welcomed—by governments and peoples in the Asia-Pacific region. Australia consistently works to ensure that the main instruments of international humanitarian law are seen in this region as having the global and all-pervading character that is essential to their implementation.

Switzerland has begun a program of preparation for the meeting of the Experts Group on the War Victims Declaration, and we are fortunate to have with us a distinguished representative of the Swiss Army—Major General Carlos Vincenz—who will, I understand, outline the Swiss Government's efforts in the address he is to present later today.

Since the conclusion of the War Victims Conference the Australian Government has taken several steps to follow-up on specific issues raised in the Final Declaration of the Conference.

Thus, for example, the problems posed by the widespread and indiscriminate use of anti-personnel mines are a major theme in the Declaration. As I have noted, Australia is a party to the 1980 Convention on Certain Conventional Weapons, Protocol II to which imposes limited restrictions on the use of land mines. At the 48th Session of the United Nations General Assembly Australia and most other states party to the Convention co-sponsored a resolution endorsing the holding of a Conference to review the Convention, with particular reference to the Land Mines Protocol. The work on the review of the Convention has now begun, and the third session of the experts group charged with making recommendations will convene in Geneva in August.

Australia has sought to consult with regional countries on issues to be furthered in the expert group and, although it is too early to say exactly how the review will conclude, the following main issues have been centres of debate:

- the need to ensure that restrictions on the use of mines, booby traps and other devices are equally applicable in international and non-international armed conflict (following the precepts of Common Article 3 to the Geneva Conventions);
- the need to ensure that definitions, particularly of remotely deliverable and scatterable mines, are adequate in terms of modern technology;
- the importance of defining verification and compliance regimes so that all governments and defence forces can have trust in the universality of respect for the restrictions they accept for themselves;
- the issue of whether restrictions on use can be meaningful, or trustworthy, without parallel controls and restrictions on manufacturing, trading and stockpiling.

The work is also moving towards defining requirements for all mines, or at least all anti-personnel mines, to contain a self-destruct or self-neutralisation device, and a passive self-deactivation capacity, and to be made of detectable materials.

I should observe that there have been a number of calls to the expert group, including from the President of the International Committee of the Red Cross, for a ban on the use of anti-personnel mines. These calls are a perfectly

understandable response to the carnage that mines are causing around the world, and to the fact that the continued illegal laying of mines in areas of civilian concentration is killing and maiming innocent and defenceless people, all the time. The tenor of debate so far, however, indicates that the review process will concentrate on dealing with restrictions rather than bans, and that bans will continue to be reserved for booby traps of the type already defined in the Land Mines Protocol.

It is the hope of participating expert group delegations that the review will be completed in 1995, and that the result will be a significant advance on current international law on weapons whose impact on civilian populations, especially women, children and other particularly vulnerable people, is so severe.

At the same time, responding to the call of the General Assembly and to the vital importance of achieving universality of respect for fundamental international humanitarian law, Australia is making extensive representations in South East Asia and Pacific Island capitals encouraging governments to accede to the Convention and to take part in the review process. These representations will intensify as the review of the Convention proceeds, and it is our earnest hope that all regional countries will attend the governmental review conference itself in 1995 with the intention of making a strong and verifiable law with a real protecting strength.

Similarly, the problems posed by attacks on United Nations peacekeepers are a significant theme in the declaration of the War Victim's Conference. The Australian Government has strongly supported a joint New Zealand and Ukraine initiative in the United Nations for the development of an International Convention which will create a system of individual and internationally applicable criminal responsibility for attacks on United Nations personnel. The work of the ad hoc Committee established to carry forward this endeavour is progressing well and it is now conceivable that a Convention could be ready for adoption by December. This would, however, constitute something of a record for a multilateral convention, and perhaps a more cautious estimate would allow a further year for the negotiations.[31]

There are many dimensions to the work now being undertaken internationally to develop and enhance respect for international humanitarian law. In almost all respects, these dimensions are fuelled by the unquestionably legitimate revulsion caused by pictures of modern conflict, brought into homes around the world by television every day and taken from there to governments by non-governmental organisations and a multiplicity of civilian groups. It is fair to say that this revulsion is equally strongly felt by members of armed forces, none of whom are immune from the savagery which they see as misrepresenting the noble purpose of national defence as it is taught to them in every military academy.

Australia has traditionally listened carefully to voices of reason. There are extensive consultations now in progress with non-governmental organisations, academics, military lawyers, government officials and service personnel with the aim of demarcating legitimate military purpose and then defining crime. The

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31 See generally, Thwaites MJ, "The Draft Convention on the Safety and Security of United Nations and Associated Personnel" in *Proceedings of Second Annual Meeting 1994*, Australian and New Zealand Society of International Law, 27–28 May 1994.

convening by Switzerland of the War Victims Conference in 1993 was a particularly valuable reminder of the duty of governments to join to rebuild a commitment to the rules of armed conflict, but it must be followed by work in each country, and in each region of the world, on real implementation and dissemination measures.

To this end, in December 1993 the Australian Department of Foreign Affairs and Trade convened a Round Table meeting in Canberra to specifically discuss, with interested parties, the Asia-Pacific regional follow-up to the War Victims Conference. It was attended by representatives of Australian government departments, the armed forces, the Red Cross and the Swiss Government, and by an observer from the New Zealand High Commission.

The major outcome of the Round Table meeting has been the Australian Red Cross's decision to convene, in conjunction with the Australian Defence Studies Centre, Canberra, a three day "Second Regional Conference on Humanitarian Law". This Conference will follow on from the work of the First Regional Seminar on Humanitarian Law held at the Australian National University in Canberra in 1983.

The Second Regional Conference will be held at the Australian Defence Force Academy in Canberra, from 12 to 14 December 1994.

Using the Declaration of the War Victims Conference as a base, the Regional Conference will identify and explore priority issues in the field of the Laws of Armed Conflict, such as the question of enforcement, the contribution of the Laws of Armed Conflict to peacekeeping and peacemaking, the relationship between the various international humanitarian law conventions and the existing norms of international humanitarian law, de-mining, the problem of sexual violence and crimes against women and children generally in armed conflict situations, the protection of cultural property and the environment, refugees, and mechanisms for improving the plight of prisoners of war. It will engage speakers and panels representing the different military and cultural traditions in the region, and bring them together with a wide range of other academic, Red Cross and civilian experts with a real contribution to offer.

The convening of the Regional Conference has excited a good deal of interest in international circles, and it is already clear that both Switzerland and the ICRC see it as having the potential to provide a strong regional base for contributions to the major global meetings to follow in 1995.

In this sense, the Regional Conference will develop ideas and recommendations which can be fed into the work of the open-ended group of experts established pursuant to the Declaration of the War Victims Conference. It will also provide a regional view for inclusion in the work on the Land Mines Protocol, and it will contribute to work under way in UNESCO towards the review of the 1954 Convention on Cultural Property. Ultimately, the results deriving from this process will be brought to the 1995 International Conference of the Red Cross and Red Crescent Societies. and then, where relevant, to formal treaty making procedures.

Clearly, the Regional Conference will be constrained in what it can achieve by the fact that it will run for a relatively short period. This issue was tackled at the December 3 Round Table. A novel solution discussed in some detail at the meeting was that the Conference might be used as a vehicle to establish a number of part-time regional working groups. These groups could focus on the

application of the Laws of Armed Conflict to a particular issue or set of issues raised at the War Victims Conference.

Each Working Group could contain government, military and non-government representatives from various regional countries and would be based in different parts of the region. The various working groups would meet from time to time both individually and collectively and/or correspond periodically. The work of the groups could continue into 1995 and beyond, and cover the broad range of issues raised in the War Victims Declaration. In this way the Regional Conference could provide an additional long-term framework for the promotion of international humanitarian law in the Asia-Pacific Region and internationally.

Work has recently been completed on the preparation of the agenda for the Conference, and a copy is available for each participant in this Exercise. The Organising Committee (chaired by the Australian Red Cross) is now approaching distinguished persons throughout the Asia-Pacific to speak at the Conference, and I would be glad to make sure that all those present today who wish to be kept abreast of planning will receive information as it is updated..

Much of what I have described might easily be seen as inferring that commanders are failing in their duty to law and humanity. I must state clearly that this is not at all what I mean to say.

The reality is that the main impetus for the redevelopment of so much of international humanitarian law comes from spread of the cancer of armed conflict launched by undisciplined, even ungoverned, armed groups, many of which have only civilian targets as their goals. The 1994 *Human Development Report*, published by the United Nations Development Program, shows that of 82 definable armed conflicts in the last three years (conflicts reported as resulting in 1000 or more battle fatalities), 79 were non-international in character. Even more startling is information in the Report which shows that at the beginning of this century about 90% of war casualties were military, while today around 90% are civilian.[32]

From these dramatic statistics it is possible to suggest that the greatest problem faced is not in improving dissemination and work among regular armed forces, it is in finding ways to introduce rules to those whose training is wholly outside the rules-based systems which have sent each and every one of us here today.

The task, therefore, which faces all governments and all armed services is to ensure that no child grows up without some understanding of fundamental rules and responsibilities of human behaviour, and knowledge that these rules and responsibilities also apply to situations of armed conflict. I'm afraid that until something is done about the spread of weapons, some very sophisticated, to people outside formal armed forces, the task of a commander is even more onerous. The task includes community responsibilities and public education, and extends to close cooperation with civilian non-governmental organisations to ensure that all potential commanders, whether in regular forces or not, know both the rules and the penalties for criminal behaviour...

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32 UNDP, *Human Development Report 1994*, p 47.

International Humanitarian Law—Need for Better Enforcement

In pursuance of a theme which the Australian authorities have emphasised in recent times (see *Aust YBIL* 1994, vol 15, p 675), the following is an extract from a speech made by the Foreign Minister, Senator Gareth Evans, on 15 May 1994 at a Conference at the Australian Defence Force Academy in Canberra, on "International Humanitarian Law: A Time for Action":

> The obscene acts we are witnessing in the world's all too many zones of conflict are crimes of universal jurisdiction and yet, in most instances, they are crimes without punishment. There is thus a glaringly urgent need for the international community to rethink its approach to the enforcement of international humanitarian law. The present definition of a war crime and the concept of individual responsibility for grave breaches of international humanitarian law are firmly established in international law, but the crucial tasks of enforcing compliance and determining penal sanctions are left to individual states. The simple and sad fact of the matter is, however, that in past and present conflicts states have consistently shown a lack of preparedness to take such responsibility or to hold their troops accountable for war crimes, even when those violations have been as obvious and as flagrant as those we have seen in Uganda, Iraq and the former Yugoslavia. The record since 1939 illustrates that the key issues of captivity and internment have never been dealt with adequately.
>
> The deliberate and systematic nature of many of the breaches we are presently seeing demands that every member of the international community cooperate in the development of mechanisms to provide a solution. The United Nations Security Council's decision to establish an ad hoc International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, represents one positive and practical response. But everyone would do well to bear constantly in mind that crimes against humanity are an ugly, and growing, phenomenon occurring in territories across the globe, not just in the territory of the former Yugoslavia.
>
> To be credible and effective in dealing with crimes against humanity, the international community must now consider, rather more seriously than it has over the decades since Nuremberg, the establishment of an international court with universal jurisdiction to try war crimes, as well as a supporting independent prosecuting authority. The International Criminal Court presently being proposed by the International Law Commission could take on this function. The Australian Government for one supports the establishment of such a single international criminal court over the creation of a multiplicity of ad hoc tribunals, even though it could be some time before offenders can be brought before such a court. And we will be working with the International Law Commission to ensure the early adoption of a Statute for the Court and to ensure wide adherence to it.
>
> But there are, of course, other and more immediate steps that can be taken to breathe new life into the international humanitarian law regime and build greater recognition of the laws of war. One such necessary step was taken recently when the international community convened the International Conference for the Protection of War Victims in Geneva last August, which was attended by 160 states, including Australia. In our assessment, the conference achieved its key objectives of raising the level of consciousness of the suffering caused by

violations of international humanitarian law, and reiterating the need to respect and, where necessary, strengthen that law.

On the last day of the Conference, the delegates issued a final declaration reminding all belligerents of their obligation to adhere scrupulously to international humanitarian law, condemning the torture and execution of prisoners of war, and reaffirming that the mistreatment of prisoners of war represents a grave breach of international humanitarian law. The declaration also called on the Swiss Government to convene an open-ended group of experts to study ways to promote respect for, and compliance with, international humanitarian law and to prepare a report for submission to states in the context of the 1995 International Conference of the Red Cross and Red Crescent Societies.

At the War Victims Conference, Australia and a number of other countries argued that, unless there was effective follow-up, the declaration's capacity to promote and enhance international humanitarian law could be lost. The Swiss Government and the International Committee of the Red Cross (ICRC) have subsequently begun a campaign to sensitise governments to the importance of alleviating the suffering of war victims. This campaign will include efforts to encourage states to provide humanitarian educational programs and courses for armed forces personnel and to do more to bring their domestic laws into line with international humanitarian law. The Swiss Government and the ICRC hope that the campaign will serve to maintain the international community's focus on the plight of war victims in preparation for the first meeting of the open-ended group of experts, which will be held in Geneva in September.

I personally reaffirmed to ICRC President Sommaruga, when I met him last September, the Australian Government's willingness to support this follow-up, and I have also made my position known on many occasions about various aspects of humanitarian law, most recently at a Conference on Landmines here in Canberra last November, and at a conference of the Medical Association for the Prevention of War in March.

My response flows naturally from Australia's long and committed support for international humanitarian law. This support is illustrated by our early ratification of all four Geneva Conventions of 1949 as well as the two Additional Protocols, and by our enactment of legislation to give domestic legal effect to Australia's obligations under them. The most important piece of legislation is the Geneva Conventions Act 1957 which provides, in part, for life imprisonment as the maximum penalty where an offence involves the wilful killing of a person protected by the Geneva Conventions or Additional Protocol I. Offences involving other grave breaches of the Convention are punishable by 14 years imprisonment.

This commitment to international humanitarian law is further demonstrated by the Australian Defence Force's recent decision to extend training in international humanitarian law to all members of the Force. I understand that this training will focus on the treatment of prisoners and relations with civilians in a zone of occupation.

Following this address, the Legal Advisor B in the Department of Foreign Affairs and Trade, Mr Chris Lamb, in the course of remarks at the Second Regional Conference on International Humanitarian Law (Canberra, 12–14 December 1994) suggested that part of the problem springs from the lack of one instrumentality charged with responsibility for development and implementation of humanitarian law for the victims of armed conflict:

> In approaching those sorts of questions, one of the things that we all looked at: there is no institution at which these things can be discussed...
>
> We also have to think about the role of bodies like the United Nations High Commissioner for Refugees...But UNHCR looks after refugees who have fled from a conflict. There's been some need to do some redefinition, for I guess you could say internal purposes, of what that means, to be a refugee, because many of the people who have fled from a non-international conflict to another part of their own nation state are not, technically, refugees within the meaning of the 1951 Convention. We have to look at a whole new category, with millions or tens of millions of people in it, who need the assistance of the international community if they are able to function as sane and responsible members of the community on this planet.
>
> And somebody has to pay. And somebody has to find a forum in which it can be discussed.
>
> I think that one of the things that many of us felt at the War Victims Conference was the desperation about the failure—I have to say this rather harshly—the failure of the United Nations as an organisation to take up this issue.
>
> It is dissipated into different places—there's the ICRC doing its work, there's the International Federation doing its work, a large number of non-governmental organisations do powerful and prominent things in particular conflict situations. UNHCR comes and does what it can to alleviate the problems of people who have fled. The UNDP in many cases comes to help also with the resettlement of people after they get back home. But there is nowhere where the issue is addressed as a concrete issue. That's the problem, and it will come up later as other people speak at this Conference.
>
> The United Nations, in its system, has developed functional commissions in the Economic and Social Council arena which look at narrow problems of human rights. In the disarmament fabric of the United Nations there is the discussion of issues that concern the disarmament work, and that has bearing as well, of course, on humanitarian law, although like human rights it's not the same. The UNHCR, at its meetings, discusses elements that relate to refugee law, and good work is done, especially now, in the context of the Decade of International Law, on those issues of refugee law, but they're not the same, either, as International Humanitarian Law.
>
> But there is nowhere in the system where there is a thoroughgoing and productive discussion of humanitarian law. I say productive, because although there are resolutions adopted each year in the General Assembly in the Sixth Committee about the need to ratify the Conventions and the Protocols, they're pro forma discussions that take place there.
>
> One thing which I think we need to take back is something which seeds into all of our own societies in this Asia-Pacific region, the need for governments and

non-government organisations to link, join hands and find a way to erect a structure which makes it possible to discuss coherently the problems that war victims face, both as a result of immediate deprivation and as a result generations later of lasting deprivation, because that's the problem that we're going to have to confront and that our grandchildren will have to confront as well...

Inhumane Weapons Convention—Land Mines

The following is an article which appeared in the periodical *Insight* of the Department of Foreign Affairs and Trade (26 September 1994), written by Genevieve Hamilton of the Department, setting out the Australian position on work within the framework of the 1980 Convention on Certain Conventional Weapons (often known as the Inhumane Weapons Convention) on further steps for the control of land mines:

An intergovernmental Experts Group has begun work in Geneva to prepare proposals to strengthen the 1980 Convention on Certain Conventional Weapons (CCW), particularly in relation to the use of landmines.

Australia's objectives include extending the application of the Convention to internal conflicts incorporating production and trade restrictions to help enforce compliance with and encourage accession to the rules on the use of mines as well as explicit verification and compliance provisions.

Australia also proposes that all mines should be detectable and that anti-personnel mines should be fitted with a self-neutralising or self-destruct mechanism. Despite their geographic isolation, Australians are particularly concerned about this issue. In its history, members of Australia's armed forces have lost their lives or become permanently injured by landmines. In more recent years, Australia has been involved in peacekeeping and mine clearance operations, seeing at first hand the enduring devastation caused by mines to civilians and to the development of entire countries.

Australians pay special attention to the effects of landmines in their own region. Their effect on the consolidation of peace in Cambodia is a special case in point, and in this context it is worth noting that United Nations Secretary-General's special representative for human rights in Cambodia, Justice Michael Kirby of Australia, said in referring to his conclusions and recommendations on landmines and peacekeeping: "No study of human rights in Cambodia can ignore the deadly peril of landmines. King Sihanouk recently appealed to the combatants to stop importing and laying these mines, They cost $US15 to install and $1000 to remove. They take a daily toll on the right to life and the right to movement. But more fundamentally, they destabilise Cambodian society which has, with Angola, the distinction of the highest level of war-caused amputees in the world. The international community cannot just ignore this problem. This report on Cambodia provides graphic illustration of the urgent need to respond".

The widespread use of anti-personnel mines in conflicts such as that which occurred in Cambodia has led to a humanitarian, economic and social crisis of massive and unacceptable proportions. This has global consequences, not only by the death and injury of individual civilians, including children, but also because the interests of each country in the international community are affected by the economic problems, refugee movements and consequent security tensions caused by mines.

The basic premise of this Experts Group should be that the injury of civilians by landmines is absolutely unacceptable. The basic goal should be the elimination of such injury, with the deliberate targeting of civilians being identified, again, as a criminal act. The outcome of the Group's work must be to eliminate such injury as much as is possible.

Australia would like the experts to consider strengthening the commitment of the international community to helping the de-mining of countries which right now suffer from this problem. This can be done at a unilateral level. For three and a half years, Australia participated in mine clearance in Afghanistan and has announced a contribution of $1 million and personnel to the Cambodian Mine Action Centre and the Australian Minister for Defence, Robert Ray, has foreshadowed increasing this commitment substantially.

Australia has two main objectives in relation to the 1980 Convention. Firstly it wants to see a far greater number of states become parties. Those states which have signed should certainly ratify at the earliest possible time. They are in principle bound by the Convention. However, universal adherence to a weak convention would be of dubious benefit. Secondly there is a need therefore to strengthen the rules of the Convention and international law.

The current mines problem can be traced to three types of cause:

- mines being used deliberately against civilians or against civilian areas;
- mines, though directed at armed forces, being used indiscriminately near civilian areas, their location not marked and their removal hindered by lack of records; and
- the use of mines which are difficult to detect and which remain active well beyond their intended operational life.

It is illegal under the Convention deliberately to target mines at civilians. The problem of indiscriminate use can be tackled by critical examination of the recording and mapping provisions, the provisions dealing with cooperation with de-mining, including exchange of records, and the provisions concerning the laying of mines in or near areas containing civilian concentrations or civilian objects. The provisions on remote delivery of mines should be compared critically with the analogous provisions on bombardment in humanitarian law instruments. The inherent design of the landmine must also be looked at—landmines must be made of materials which are easily detectable. They should incorporate mechanisms to ensure they self-destruct or self-neutralise at the earliest possible time.

The current landmine problems are mainly attributable to non-international armed conflict. Insurgent forces in particular are attracted to the use of landmines because they enable them to control much greater areas of territory than they would be able to with the limited number of personnel, financial resources and sophisticated weapons at their disposal. Government experts must be concerned about this. Australia will not otherwise be able to claim that is has seriously tackled the problem of landmines.

It is essential to take an arms control perspective as well. The existing mines problem is almost entirely caused by mines which have been traded. It is a somewhat new proposition for the international community collectively to restrict the manufacture and trade in conventional weapons through a Convention. It is logical though that a landmine which cannot be used because it does not comply with the specifications of the Convention should not be

manufactured or sold. Similarly, if the state which seeks to use mines is not prepared to become a party to or does not comply with the Convention, that state should not be able to import mines and national defence exports policies should be examined in this light.

Australia is conscious that it is difficult to enforce international humanitarian laws. It is also difficult to enforce arms control agreements, especially when they involve a small, technologically simple item such as a landmine. That should not deter Australia from strengthening of the rules.

1954 Protocol for the Protection of Cultural Property in the Event of Armed Conflict

The following is the text of a question on notice and answer by the Foreign Minister, Senator Gareth Evans, in the House of Representatives on 24 March 1994 on Australian consideration of the above Protocol (House of Representatives, *Debates*, 24 March 1994, p 2221):

Mr Barry Jones asked the Minister representing the Minister for Foreign Affairs, upon notice, on 21 February 1994:

(1) Which (a) permanent members of the UN Security Council and (b) members of NATO have not yet ratified the (i) Convention and (ii) Protocol for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954).

(2) Which departments have considered ratification of the Protocol since the answer to question No. 1738 (Hansard, 3 November 1992, page 2503) and with what outcome.

Mr Bilney—The Minister for Foreign Affairs has provided the following answer to the honourable member's question

(1)(a)(i) and (ii) China, United Kingdom, United States of America.

(1)(b)(i) and (ii) Canada, Denmark, Iceland, Portugal, United Kingdom, United States of America.

(2) The question whether departments have considered ratification of the 1954 Protocol since the answer to question No. 1738 depends on policy developments in other portfolios.

I understand that the former Department of the Arts, Sport, Environment and Territories and the former Department of Administrative Services and the Arts have considered ratification of the Protocol. The Department of Communications and the Arts has advised that no action has been taken to pursue ratification of the Protocol as the required resources have been committed to other priorities.