

## LAND MINES AND THE 1981 INHUMANE WEAPONS CONVENTION

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### INTRODUCTION

In April 1993, a United Nations World Food Program relief aircraft flying over Angola, was hit by rebel fire. With great skill, the pilot managed to land the aircraft. The crew got safely out of the aircraft. But they then stepped straight onto a land mine, thereby killing the flight engineer and severely wounding the pilot. Incidents such as this one have focused attention on the danger of land mines. Land mines are deployed in about a third of the world's countries. A United Nations publication notes:<sup>1</sup>

Peace has returned to Cambodia after 12 years of war, but Cambodians are still dying or getting their arms or legs blown off at a rate of 200 to 300 per month by some 4 million land mines left behind on the killing fields.

Since Cambodia has a population of about eight million, this means that there is one mine for every two Cambodians. Cambodia's civil war may have been the first war in history where more people were killed by mines than by any other armaments. It has the world's highest rate of amputees.

World Vision, the Christian aid organisation, has been heavily involved in helping Cambodian mine victims. To put the Cambodian situation in perspective, "if Western Europe had a similar rate, it would have 6,275,000 land mine injuries a year – almost the population of Switzerland".<sup>2</sup> Land mines hinder a country which is trying to recover from a conflict and it has been said that "[i]ndirectly, the mines contribute to the impoverishment of numerous rural communities. Much fertile land lies idle because mines are

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<sup>1</sup> Ruel S, *The Scourge of Land Mines: UN Tackles Hidden Peacetime Killers* (1993, United Nations Department of Public Information, New York) 1.

<sup>2</sup> Watkins, "No More Land Mines!" [January 1993] *Together* (Melbourne) 19.

buried in it. They must be removed before truly sound development activities can ever take place".<sup>3</sup>

Cambodian amputees have a limited future. There is no social welfare program to look after them. They are a burden on their families and buildings are not wheelchair accessible. The prevailing religious fatalism in Cambodia means that people hurt by mines are often regarded as being "punished" for sins committed in an earlier life, and so there may be little sympathy for the victims.

The situation in Afghanistan is also grim. It has ten million mines. The International Committee of the Red Cross (ICRC) has reported:<sup>4</sup>

Using current mine-clearing techniques, it would take 4,300 years to render only 20 per cent of Afghan territory safe – a statistic which conveys an immense feeling of helplessness in the face of such an unprecedented disaster.

There are at least 100 million mines deployed around the world in 62 countries. About 800 people a month die because of mines. An important feature of the international humanitarian law of armed conflict is the distinction between combatant and non-combatant. But land mines ignore this distinction. They cannot distinguish between the foot of a civilian peasant and that of a soldier.

Indeed, soldiers are often more fortunate than civilians. Soldiers patrol in groups and so the injury of one person can result in the soldier's quick evacuation to a field hospital. A peasant, by contrast, may have to wait for hours or days before they are located, and then there are far less adequate hospital facilities for them.

Another important feature of the international humanitarian law of armed conflict is the distinction between a state of peace and a state of armed conflict. Land mines, by contrast, are permanent sentries. They remain at

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<sup>3</sup> Ibid.

<sup>4</sup> A Time for Decision, International Review of the Red Cross (November 1993, Geneva) 471.

war for up to about 75 or 100 years – until they rust away, explode or are "de-mined". As the United Nations publication recalls:<sup>5</sup>

From 1945 to 1977, 15 million mines placed in World War II were cleared from Poland, yet 4,000 people were killed there by mines and 9,000 injured over the same period. In Egypt, Libya, Tunisia, the Netherlands and the Russian Federation, mines dating back to the Second World War still endanger civilians.

Indeed, the mines laid in the current civil wars, such as in Cambodia or Afghanistan, by one generation could, in theory, cause injury in the next century among the mine-layers' grandchildren, or even great grandchildren.

Land mines present serious challenges to the international humanitarian law of armed conflict. The object of this article is to examine both the current discussion on the international humanitarian law's response to land mines and the outcome of the 1995-1996 review conference of the treaty limiting the use of land mines.

#### **THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT**

Until recently, this branch of international law has been traditionally divided into two strands. The "Law of Geneva", found in the 1949 Geneva Conventions, has been concerned with the protection of the victims of a conflict and the organisations which look after them, such as guaranteeing the special status of the ICRC. The "Law of The Hague", which is built around the Hague Conventions, has tended to focus on the means and methods of warfare. The distinction between the two strands was never water-tight, and in 1977, with the finalisation of the two Additional Protocols to the 1949 Geneva Conventions, the strands have merged.

Well before the two Peace Conferences at The Hague in 1899 and 1907, there were attempts to restrict weapons. The restrictions took two forms. First, there were bans on specific weapons or projectiles, such as the Roman-Carthage Treaty of 201 BC prohibiting the use of elephants in war, a forerunner of both the tank and the armoured personnel carrier. Poison

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<sup>5</sup> Ruel note 1 at 2.

and the crossbow have also been banned in more recent centuries.<sup>6</sup> The bans were precise and easy to verify. But they were also easy to evade through a change in technology.

Secondly, there was the ban on weapons which caused particular effects. An example was the "dum-dum" bullet, which broke up when entering the body. This resulted in the "exploded wounded" with extensive laceration, which was much more difficult to treat than a wound created by a bullet which remained intact. The Russian Government, whose scientists had invented the "dum-dum" technology, was unwilling to use the bullet itself or to allow another country to take advantage of it. It therefore convened at St Petersburg in 1868 an International Military Commission to discuss how to ban the "dum-dum". The 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 40Q Grammes Weight, noted in its Preamble:<sup>7</sup>

[T]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

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

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

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

In other words, there was a principle whereby the intention should be to kill combatants but not to cause unnecessary suffering. This may seem a macabre distinction but the Europeans last century believed that they were on the verge of a higher form of civilisation, in which warfare was barbaric and was to be avoided as far as possible.

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<sup>6</sup> McKnight A and anor, *The Forgotten Treaties* (1983, Law Council of Australia, Melbourne) 16-17.

<sup>7</sup> Schindler D and anor (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (1973, Henry Dunant Institute, Geneva) 96.

With the advent of industrialisation and larger fighting formations, warfare was now much more destructive. It was no longer seen as something colourful and glorious, but only as a necessary evil to be avoided if at all possible.

The St Petersburg Declaration was therefore written at a time of great interest in limiting the amount of suffering in war. Up to this time, most soldiers who were killed did not die in the battle itself. They died later through wounds sustained in the battle and there were no medical personnel to look after them. Armies gave little or no attention to caring for the wounded. The work of Florence Nightingale (1820-1910) in the Crimea in 1854, alerted the British that more had to be done to look after the wounded.<sup>8</sup>

In 1859, the Swiss banker Henry Dunant (1828-1910) had been caught up in the battle of Solferino, Europe's largest battle since Waterloo. He therefore campaigned for an international organisation to look after the wounded in battles. This campaign led to the creation of the ICRC in Geneva, and the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field in 1864. Meanwhile, across the Atlantic, the United States Civil War (1861-1865) had seen President Abraham Lincoln asking Professor Francis Lieber (1800-1872) to undertake what was the first codification of the law of armed conflict so as to guide the Union forces. Thus, Article 68 of the 1863 Lieber Instructions states that "unnecessary or revengeful destruction of life is not lawful".<sup>9</sup>

The First Hague Peace Conference was convened in 1899 by the Russian Czar to negotiate an end to arms races. The Conference made no progress on disarmament but it did further augment the move towards limiting the use of certain means and methods of warfare. A follow-up Conference was held in 1907 at which some amendments were made to the three 1899 Conventions and it adopted ten new ones.

The Hague Conventions on Land Warfare 1899-1907 contains the following provisions. In Article 22, "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited". In Article 23, "[i]n addition to the prohibitions provided by special Conventions, it is especially forbidden to

<sup>8</sup> The British had not fought in a European conventional war since 1815.

<sup>9</sup> Ibid.

employ arms, projectiles, or material calculated to cause unnecessary suffering."

A major strength which the Geneva Conventions have over The Hague Conventions is that the ICRC has overseen respect for the Geneva Conventions and their periodic revision. By contrast, not a single non-governmental organisation has taken a permanent interest in The Hague Conventions and they have been vulnerable to the whims of governments. Furthermore, there has not been a comprehensive revision of The Hague Conventions since 1907.

In the 1960s, a number of non-governmental organisations, led by the International Commission of Jurists, campaigned for the revision of the four Geneva Conventions of 1949 and the Law of the Hague. Events which were happening, like the guerrilla struggles in Vietnam and Africa, had revealed the limitations of the existing international humanitarian law of armed conflict.<sup>10</sup> The highly publicised conflict in Vietnam had resulted in public concern about napalm and other anti-personnel weapons, particularly mines. In 1974, a Diplomatic Conference was convened in Geneva. At this Conference some nations, led by Sweden, had therefore wanted special attention to be paid to certain specific weapons.

The work of this 1974-1977 Diplomatic Conference resulted in four Additional Protocols to the Geneva Conventions in 1977. For instance, Additional Protocol I dealt with international conflict and Additional Protocol II with non-international conflict. Thus, the actions of people like Florence Nightingale and Henry Dunant, the implementation of the Geneva Conventions, and the introduction of the Additional Protocols have resulted in the extensive medical treatment now available to most combatants.

Ironically, not all military activities are designed to kill people. Indeed, a dead soldier is worth more to the enemy than a badly wounded one. A badly wounded soldier requires medical facilities; a dead one does not. This helps explain the military interest in anti-personnel mines; the greater the amount of harm – short of actual death, the more of a burden the wounded soldier is for the other side. The burden is not just on medical facilities; it is also

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<sup>10</sup> See Suter K, *An International Law of Guerrilla-Warfare: The Politics of Law-Making* (1984, Pinter, London).

disruptive in nature. The wounded soldier has to be removed from the front, thereby exposing other soldiers to hostile fire as they carry their wounded comrade away. This explains why some scientists have been engaged in developing anti-personnel weapons.

In 1974 and 1976, the ICRC organised two meetings of government experts to follow up the ideas of restricting or banning inhumane weapons. But the Geneva Conference did not have enough time to complete the task of creating a new treaty on inhumane weapons and so the work was transferred to the United Nations.

### **THE 1981 UNITED NATIONS CONVENTION ON INHUMANE WEAPONS**

The 1981 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 (the Convention on Inhumane Weapons) and its three Protocols, were the first international arms regulation to be negotiated at a conference sponsored by the United Nations. The Convention entered into force in December 1983 and has 51 parties, including Australia. Its eleven articles provide the legal framework for the three Protocols attached to it and they mostly reflect the standard provisions found at the beginning and end of treaties, such as scope of application, signature, entry into force, review, denunciation and the languages of the text.

Protocol I consists of one sentence, namely, "It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays". This covers weapons made from wood, glass or plastic and they are currently not major items of military hardware.

Protocol II is on the use of mines, booby-traps and other devices. However, Article 1 excludes its application to anti-ship mines at sea.<sup>11</sup> The Protocol has nine articles, and a technical annex containing guidelines on the recording of locations of minefields, mines and booby-traps. Essentially, it provides a prohibition on the indiscriminate use of mines and is designed to protect civilians from mines. Articles 3-5 contain general restrictions on

<sup>11</sup> For an introduction to this aspect of the Law of The Hague, see Levie H, *Mine Warfare at Sea* (1992, Martinus Nijhoff, Dordrecht).

how they may be deployed. Article 6 prohibits the use of certain booby-traps such as weapons which look like children's toys, or the placing of weapons on dead bodies. Article 7 requires the location of minefields, mines and booby-traps to be recorded. Article 8 provides for the protection of United Nations personnel by requiring mines to be removed from areas where such personnel are deployed. And Article 9 provides for international cooperation in the removal of minefields, mines and booby-traps.

Protocol III has two articles which deal with prohibitions or restrictions on the use of incendiary weapons, such as napalm. However, these are restricted but not banned.

Sweden and its allies were disappointed that after so much effort, the only weapons to be banned by the Protocols were the least militarily significant, namely, the non-detectable fragments referred to in Protocol I. Weapons such as mines and napalm were not excluded.

#### **LIMITATIONS OF THE 1981 UNITED NATIONS CONVENTION ON INHUMANE WEAPONS**

Only 51 states have accepted this Convention on Inhumane Weapons. This means that the vast majority of United Nations members, totalling approximately 135 states, is not party to the Convention. It is not entirely clear why states have boycotted the Convention in spite of its conservative nature and severe limitations. For example, in the first instance, the treaty applies only to international armed conflicts. Ironically, the introduction of the "new warfare state"<sup>12</sup> means that most conflicts are now non-international. They also tend to be guerrilla rather than conventional in nature. But most of the provisions of international humanitarian law are based on conventional warfare conditions.

Secondly, the Convention does not restrict sales and it has been reported that some 48 countries produce 340 different types of land mines:<sup>13</sup>

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<sup>12</sup> See Suter K, *Global Change: Armageddon and the New World Order* (1992, Albatross, Sydney) 276-322.

<sup>13</sup> Wright, "Untold misery, by the hour", *The Sydney Morning Herald*, 27 November 1993 at 9.



Italy, China and Russia are the big players. They don't even make huge amounts of money out of these insidious weapons – the worldwide market is worth somewhere between \$75 million and \$300 million, which is less than a single supersonic bomber. A land mine costs about \$10. Still, money's money to a lot of struggling countries. The new Czech Republic banned its flourishing land mine industry. But soon the new bosses got real and the trade is up and running again.

Thirdly, the Convention has no verification system to ensure compliance. And finally, it does not deal with manufacture.

In short, many of the features that are now taken for granted in disarmament treaties, such as the new Chemical Weapons Convention, are absent from this treaty. This is a reminder that while so much attention has been paid to limiting nuclear and chemical weapons, in which great success has been made in recent years, little attention has been paid to limiting conventional weapons.

Mines are but one area in which scientists have made great breakthroughs. For example, one of the major causes of Iraqi casualties in the Gulf conflict arose from new "area impact munitions". From the ground, the effect of this weapon is akin to a giant shotgun being fired directly overhead, launching hundreds of grenades over 60 acres. Practically, an area this size can be devastated every five minutes.<sup>14</sup>

In spite of efforts, the world has made virtually no progress in de-mining, which remains an expensive and labour-intensive exercise. The reason is more money can be made from preparing for war than from restoring the peace.

#### **OPTIONS FOR THE 1995-1996 REVIEW CONFERENCE**

The 1995-1996 Review Conference was preceded by a considerable campaign from non-governmental organisations such as the ICRC, aid groups, war veteran organisations and medical groups.<sup>15</sup> Various

<sup>14</sup> See Rogers P and anor, *A Violent Peace: Global Security After the Cold War* (1993, Brassey's, London).

<sup>15</sup> Non-governmental organisation pressure was manifested in Australia following a change of policy, the result of a change in government in March 1996. The Labor Government opposed a total ban on mines because its military advisers argued that

suggestions were made for strengthening the Convention on Inhumane Weapons but they were all rejected by the Review Conference. It is worth contrasting the Conference's original intentions with what eventually emerged from it.

First, it was felt that there should be a ban on all land mines and public opinion in many countries would support such a move. Practically, this was not politically realistic. If only 51 countries had accepted partial limits on mines, then the number accepting a complete ban would be even smaller. The military would argue that there were times when mines were useful.<sup>16</sup> When deployed away from civilian areas, there could be no military objection to their use. Furthermore, countries had the right to self-defence.

Secondly, it was also felt that land mines should be made more detectable. In reality, mines have changed a great deal since World War II. They are now smaller, lighter, more explosive and hence far less detectable. One suggestion made at the Review Conference was that all mines should contain some metal so that they could be located by metal detectors. As this would make some current mines illegal, it led to the military claiming that such a move would be expensive to implement.

Thirdly, it was argued that land mines should contain some form of self-destruct mechanism which would render them harmless after a certain period. But such mechanisms were much more expensive than the mine itself and there was no guarantee that they would always work. Additionally, this would make many mines in the current stock illegal and they would have to be replaced.

Fourthly, it was thought that incentives should be created to encourage countries to accept the Review Convention. The most obvious incentive would be to limit the sale of mines to those countries which were party to it.

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mines were necessary to be deployed across northern Australia in the event of an Indonesian invasion. The new Liberal Government ignored that assessment and, to the praise of such organisations, said that it would support a total ban on land mines at the resumed Review Conference: see "Downer moves to ban landmines", *The Australian*, 1 April 1996 at 12.

<sup>16</sup> Incidentally, there is some doubt as to the military value of mines: see International Committee of the Red Cross, *Anti-Personnel Land Mines: Friend or Foe?* (March 1996, International Committee of the Red Cross, Geneva).

However, this proposition was rejected because it would have restricted the export market for land mines.

Finally, it was proposed that mine companies should be billed for de-mining. The cheapest mine costs as little as \$3 to buy and as much as \$1,000 to clear. In Cambodia, it takes a team of 20 experts one week to clear an area of jungle the size of two football fields. There is also an immense human cost in de-mining. In Kuwait, 84 foreign and local experts were killed in that activity and 16 experts have so far died in Afghanistan. It could therefore be argued that those who make a profit have a moral obligation to make good some of the damage caused, a principle that is sometimes used in environmental legislation.

### **THE RESULTS OF THE 1995-1996 REVIEW CONFERENCE**

The Review Conference ended on May 3 1996 with agreement on seven major improvements: (1) an extension of Protocol II to apply in both international and non-international armed conflicts; (2) a clear assignment of responsibility for mine clearance to those who lay the mines; (3) a requirement that the location of all mines be mapped and recorded; (4) new protection for humanitarian workers; (5) a prohibition on the transfer of non-detectable anti-personnel mines; (6) a requirement that governments enact penal legislation to punish serious violations of the Protocol; and (7) annual consultations among parties to the Protocol to review its operation.

All of these developments fell far short of what the non-governmental organisations had been campaigning for. As a result, there was widespread criticism of the Review Conference's outcome.<sup>17</sup> For example, it was felt that the poorer armies and guerrilla forces were unlikely to possess the expertise or resources for mine clearance. For the Conference to work, it had to be on the basis of consensus, but it could only go as fast as its slowest participants.

Furthermore, humanitarian considerations gave way to politics. Russia, China, Pakistan were particularly opposed to all of the more ambitious limitations on mines. One fear was that an export ban on this type of weapon would create a precedent for export bans on other types of

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<sup>17</sup> "Mine Bans Under Attack", *The Australian*, 4 May 1996 at 17.

weapons. Even the United States, which has a unilateral ban on the export of land mines and whose first military casualty in Bosnia was caused by a land mine, had problems with a total ban on mines. In fact, the United States is partly responsible for the world's most concentrated mine field, the Demilitarised Zone between the two Koreas.

Looking to the future, the next Review Conference will be held in 2001. In the meantime, it is unlikely the campaign of the non-governmental organisations will be reduced. The mass media coverage of mine casualties, such as those in Bosnia, will also help keep the issue alive. Forty governments now support a total ban on land mines. In September 1996, Canada will host an international conference of these governments and organisations to explore ways of promoting a total ban. Thus, the issue continues to remain on the international agenda.