Commentary

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Introduction

First I would like to congratulate my distinguished colleague, Colonel Cameron, on his excellent paper, which we are now discussing together in this Seminar.

I only received this paper in Jakarta in January, so I did not have much time to study it thoroughly. But still I will make some comments on it.

As we know, in recent years violence has become a general phenomenon of our world, our society today. In our daily life we see an increase in violent attacks on fellow beings. This undermines the security and public order. And in international relations we will be concerned with "warfare" or "armed conflict" questions as particular forms of world public violence. In this connection our purpose here in the Seminar is to describe some aspects of attitudes in recent years with respect to the development of international humanitarian law applicable in armed conflicts. In his paper, Colonel Cameron uses the terminology "the law of armed conflict". The terminology "the law of war" is more traditional. But why does Colonel Cameron use that terminology "the law of armed conflict"? Of course, he said:[1]

> "The law of armed conflict (in the past more usually known as the law of war) is that part of international law which regulates the conduct of armed hostilities".

I support the use of this terminology, while it has a wide sense. We acknowledge that the scope and function of the law of armed conflict applies to, not only declared wars, but also any armed conflict. In the Military Law School at Jakarta (Indonesia) we do use the terminology "the Law of Armed Conflict" in our lectures in that School, but we, in Indonesia, still also use the term "the Law of War".

I will now submit some thoughts on the limitations on methods and means of warfare described in Colonel Cameron's paper.

The limitations of acts in warfare

As mentioned before, we use here the terminology "the law of armed conflict" as part of international law. It regulates the conduct of armed hostilities and also protects the victims of armed conflicts. So the law of armed conflict imposes limitations on acts in warfare. Colonel Cameron classifies these limitations on the belligerents on the basis of Professor Schwarzenberger's analysis of the principles of the law of war to differentiate between lawful and unlawful objects of warfare *ratione loci, instrumenti vel personae.*[2]

1. Above p 247.
2. Schwarzenberger, G, *A Manual of International Law*, 6th ed (1976), 163.

I agree with his classification but wish to raise issues with respect to three matters:

(a) the use of weapons;
(b) protection of the combatants and other armed fighters;
(c) protection of the civilian population and civilian objects.

(a) *The use of weapons.*

The primary principle of the law of armed conflict is incorporated in the Hague Rules of 1899/1907 which provides in Article 22:

> "The right of belligerents to adopt means of injuring the enemy is not unlimited"

I agree to accept this article as a basic rule, although it is rather ancient. Nowadays we see more and more new weapons being used in armed conflicts. Can we apply this article to these new weapons? Similar to Article 22, we find Article 35.1 of Additional Protocol I to the Geneva Conventions of 1949, adopted in 1977, which reads:

> "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited."

These rules impose restrictions on the belligerents when committing cruel acts or causing unnecessary suffering to the armed forces or civilians and civilian population of the adverse Party. During the conflict the belligerents have to act on the principles of chivalry and humanity. What we see now are belligerents' acts of disproportionately and indiscriminately killing or wounding treacherously members of the armed forces or civilians. It should be noted that this principle of restriction of violence is based not on "the necessities of war", but on the need of civilization and the interests of humanity.

These acts are regulated by the law of armed conflict, e.g. the law of The Hague and the law of Geneva and also other international provisions which indicate the limitations on the Parties to the conflict in using force in armed conflicts.

In connection with Article 22 we have also Article 23 (e) that prohibits the use of "arms, projectiles, or material calculated to cause unnecessary suffering". This is a humanitarian principle and as a norm of the customary international law it is also recognized in the Declaration of St Petersburg of 1868,[3] that provides:

> "in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity."

Besides Article 23 (e) we also have Articles 25 and 27 of the Hague Rules as limitation provisions in warfare. Article 25 prohibits the use of whatever weapons or means in an attack or bombardment of towns, villages, dwellings or buildings which are undefended. Here we use the principle of distinction between combatants and civilian population, and between military objectives and other objects. During the Humanitarian Conference in Geneva this Article 25 was elaborated on by Protocol I, Article 59 which reads:

> "1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.
>
> 2. The appropriate authorities of a Party to the conflict may declare as a

3. Text in Schindler and Toman, *The Laws of Armed Conflicts* (1973), 96.

> non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party."

And Article 27 of the Hague Rules deals with the obligation of the attacker during an attack and bombardment as follows:

> "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, ..., provided they are not being used at the same time for military purposes."

This is a plea to the belligerents to make a distinction between military objectives and humanitarian objects. This article also imposes on a belligerent or the inhabitants to indicate these objects during peace time by visible sign, that "is the duty of the besieged to indicate . . . buildings or places . . ., which shall be notified to the enemy beforehand".

During World War II practices of indiscriminate warfare like bombardments from the air on civilian populations or unfortified cities by all the belligerents were acts of terror and violations of the law of armed conflict.

The bombardment of London by Germany in 1940, and the atomic attacks on Hiroshima on 6 August 1945 and on Nagasaki on 9 August 1945 were pure indiscriminate or coercive warfare and they inflicted the greatest possible harm upon the civilian population. These weapons are doubtless blind; or, at least, referred to as "blind" — or "mass destruction" weapons — as there is a greater likelihood that they will have indiscriminate effects. Of course, strictly speaking this is a misnomer; weapons are blind by definition, and it is the user who must provide the eyes.[4]

So we can see that developments in military technology, resulting in the use of these weapons, could bring the end of civilization, even of the whole of mankind. The demand of humanity and future generations should officially prohibit permanently the use of these "dubious" weapons. For this purpose we have to support the original UN Resolution 1653 (XVI) of 24 November 1961,[5] that:

> "any state using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization".

(b) *The protection of the combatants and other armed fighters.*

In Colonel Cameron's paper,[6] we meet some humanitarian principles on the conduct of war, e.g. concerning the protection of the combatants as stated in the Preamble to the Fourth Hague Convention of 1899/1907 respecting the laws and customs of war on land. This principle, the so-called "de Martens clause",[7] reminds the belligerents to carry out this provision: "the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

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4. Kalshoven, F. *The Law of War* (1973), 37.
5. SIPRI, *The Law of War and Dubious Weapons* (1976), 51.
6. Above p 250.
7. Schindler and Toman, op cit, 64.

This principle is also stated in the Preamble to the Declaration of St Petersburg of 1868, which provides:

> "That the only legitimate object . . . during war is to weaken the military forces of the enemy . . . That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable".

This last provision limits the use of weapons which cause disproportionate suffering to armed forces or civilians. The principle of distinction is very important in the law of armed conflict included in the Law of The Hague. The Hague Rules and other international provisions, e.g. General Assembly Resolutions 2444 (XXIII) of 19 December 1968 and 2675 (XXV) of 9 December 1970 regulating the protection of combatants and the civilian populations provide:

a. that it is prohibited to launch attacks against the civilian population as such;

b. that a distinction must be made at all times between combatants and civilian population and between military objectives and civilian objects;

c. that it is prohibited to use, or limits are placed upon the employment of, certain methods and means of warfare.

It is easy enough to assert, but it was more difficult to provide for, the distinction between combatants, partisans or resistance fighters in many European countries during World War II and in also colonial countries during independence wars, where such persons were not protected. A similar problem arises with a combatant in an occupied territory. He is not protected and when he is captured, he is not entitled to be treated as a prisoner of war.

This problem is dealt with in Article 4A.(2) of the Third Geneva Convention of 1949 and also in Article 44.3 and 4 of the Protocol I of 1977 which provided that the members of the resistance movements or guerilla fighters, operating in occupied territory, would be entitled to prisoner of war status under the same conditions as the army, the militias and volunteer corps (Article 1 of the Hague Rules).

(c) *The protection of the civilian population and civilian objects.*

One of the principles of the law of armed conflict is to make a distinction between combatants and the civilian population, according to the four Geneva Conventions of 1949. The Fourth Convention regulates the protection of civilians in time of war. This protection of civilians was elaborated on in the Humanitarian Law Conference in Geneva. It gives the customary principle of distinction in Article 48 of the Protocol I as the "basic rule", which reads:

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives".

This protection is a principle of immunity of the civilian population. The civilians shall enjoy general protection from dangers arising from military operations. The civilians shall not be made the object of attacks, acts or threats of violence against them. The concept of "military necessity" can not be claimed

as a defence for violating the law of armed conflict, e.g. torturing or killing prisoners of war.

The concept of "coercive" warfare against civilians we saw in World War II as a form of warfare in which the heaviest explosives were dropped on large cities, in Germany (Berlin, Hamburg and Dresden) and Japan (Tokyo, Hiroshima and Nagasaki).

By systematic bombing of Japanese cities, sometimes in a single raid, more than 80,000 inhabitants were burned to death, especially in the atomic-bomb attacks on Hiroshima and Nagasaki.[8]

Here was exhibited, in this type of war, that weapons, particularly "blind" weapons, might be used to destroy a military target while at the same time destroying a large city or even a large part of a country. In order to protect the civilian population or the whole civilization, we hope belligerents do not carry out "total" or "coercive" warfare. On this question we understand why Schelling is very concerned for the protection of the civilian population and says:[9]

> "In the present era non-combatants appear to be not only deliberate targets but primary targets".

For this purpose we have to support the prohibition of the use of these "dubious" weapons to spare mankind or civilization today.

In civilized nations, we acknowledge that the law of armed conflict requires that the belligerents limit the methods and means of warfare. Notwithstanding the fact that we live now in this violent world, Pictet still expects that "Der Humanitätsgedanke verlangt nach einer Beschränkung des Krieges" (the concept of humanitarianism demands a limitation of war).[10]

And we hope that it will come true.

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8. SIPRI, op. cit. 22.
9. Ibid, 23.
10. Pictet, *Die Grundsätze des humanitären Völkerrechts,* International Review of the Red Cross 1966, 199.