

Review of the legality of weapons : a new approach

The SirUS Project

by

ROBIN M. COUPLAND, FRCS, and PETER HERBY

Part I – Abhorrent weapons and “superfluous injury or unnecessary suffering” : a surgeon’s view¹

by **ROBIN M. COUPLAND, FRCS**

Buried or “point-detonating” anti-personnel mines are the only weapons in widespread use which cause specific and severe injury resulting in specific and permanent disability. The treatment of the injury requires, on average, twice as many operations and four times as many blood transfusions as an injury from other weapons. This is a surgeon’s view.

There was no particular point at which I became interested in the global problem of anti-personnel mines; I was just confronted with mine-injured people. From 1987 to 1991, I worked in hospitals set up by the International Committee of the Red Cross on the borders of

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¹ See Robin M. Coupland, “Abhorrent weapons and ‘superfluous injury and unnecessary suffering’: from field surgery to law”, *British*

Medical Journal, Vol. 315, 29 November 1997, p. 1450 (also on BMJ website: www.bmj.com).

Afghanistan and Cambodia, two of the most heavily mined countries in the world. During those last years of the Cold War, the full extent of the impact of mines on whole societies was as yet unknown. New international legislation to ban the devices was not being discussed. I simply found myself dreading the radio call announcing that another mine-injured person was on his or her way to hospital. The dread was generated by the knowledge that my team would be faced with a long and difficult operation which entailed excising large amounts of damaged tissue or amputating a limb. This quickly turned into abhorrence for the weapons which caused such injury as a function of their design. In brief, my own reason for finding these weapons abhorrent was the nature of the injury they caused; it was appalling and somehow excessive.

In 1990, the ICRC was alerted to the development of blinding laser weapons, a development which was founded on the notion that it would be better to blind an enemy soldier than to kill him or her. Expert opinion informed us that even in the best ophthalmological centres there was no effective treatment for laser-induced retinal hemorrhage. Here we had another weapon system which, as a function of its design, would produce a severe permanent disability. (Fortunately, such weapons were banned in 1995; unfortunately, this ban came after the first blinding lasers had been produced.) It was becoming clear to me that however severe the effects of bullets or fragmentation munitions, there existed weapons which were, in some indefinable way, worse. This was the first time I heard of “superfluous injury or unnecessary suffering” — a fundamental concept of international humanitarian law governing weapons. Nobody could tell me what it was, but I was sure I had seen it caused by anti-personnel mines.

The stigmatization of anti-personnel mines as abhorrent and much of the subsequent thrust of the campaign to ban them have quite rightly been based on the argument that they kill or injure both combatants and non-combatants without distinction and continue to do so long after the conflict has ended. However, I urge those who have worked hard on the mines campaign not to lose sight of the nature of the injury as a basis for deeming a weapon illegal. This is important because, if the injury or suffering resulting from a weapon’s nature or technology could be proved to be excessive compared with the military advantage gained from its use, the weapon would be illegal whether the victim was a soldier or a civilian.

Weapon development continues. Other technologies are appearing on the horizon such as beams and waves that could produce certain specific effects on the central nervous system, including depression and convulsions. Do armies really need these? Are they “abhorrent”? What can or should doctors do about them? Lawyers tell me that they cannot give governments and their military advisers a definition of what constitutes “superfluous injury or unnecessary suffering”.

Doctors trying to understand this phrase step into the no-man’s land between the effects of weapons on health and the international law of war. I can see only one way to navigate this no-man’s land, and that is to translate a field surgeon’s concept of abhorrent weapons into a tool which can be used for making a legal determination of whether a specific weapon will inflict “superfluous injury or unnecessary suffering”.

The origins of the SIrUS Project

The medical profession has a responsibility to use health-related data to help the international community define objectively which weapons are inherently “abhorrent” and which weapons cause “superfluous injury or unnecessary suffering”. This was one of the major findings of a symposium on *The medical profession and the effects of weapons*, organized by the ICRC in Montreux, Switzerland, in March 1996.²

The Montreux symposium, which represented the start of the SIrUS Project, addressed this responsibility by drawing together data and expert opinion from the fields of weapons, medical ethics, trauma surgery and law. The project takes its name from that which it seeks to prevent: **Superfluous Injury or Unnecessary Suffering (SIrUS)**. It is an attempt to bring objectivity to the legal notion of “superfluous injury or unnecessary suffering” and so aims to facilitate the review of the legality of weapons.³

A study of the effects of weapons

The group of experts who worked on the SIrUS Project, most of whom were health professionals, collated data relating to the effects of weapons used in conflicts over the last 50 years. These data originated from both military medical publications and the ICRC wound database of

² *The Medical Profession and the Effects of Weapons*, Symposium (Montreux, Switzerland, 1996), ICRC, Geneva, 1996.

³ *The SIrUS Project: Towards a Determination of Which Weapons Cause “Superfluous Injury or Unnecessary Suffering”*, ICRC, Geneva, 1997.

26,636 weapon injuries. In relation to different causes of injury, the following information was retrieved:

- the proportion of large wounds (according to the Red Cross wound classification);
- overall mortality;
- the relative proportions of central and limb injuries;
- the duration of hospital stay;
- the number of operations required;
- the need for and volume of blood transfusions;
- the number of lower limbs amputated among the survivors.

From these data, the expert group found that the weapons which cause injury by explosions or projectiles but which do not target a specific part of the body as a function of their design:

- do not cause a field mortality of more than 22% nor a hospital mortality of more than 5%;
- cause grade 3 wounds (as measured by the Red Cross wound classification) in less than 10% of those who survive to hospital; and
- cause wounds that can be treated for the most part by well-established medical and surgical methods.

High-mortality or large wounds can obviously be caused by legitimate weapons such as rifle bullets and fragmentation munitions under certain circumstances. Whether an individual is wounded slightly or severely, or is killed by such weapons, is determined by the design of a weapon, how it is used and random factors such as his or her proximity to the detonation (of a munition) and the part of the body that is hit. The data in the SIrUS Project about the effects of weapons commonly used in recent conflicts take all these factors into account.

On the other hand, some weapons can be expected to inflict certain effects virtually all the time. These effects result specifically from the nature or technology of the weapon, i.e., they are design-dependent. Examples include: exploding bullets, which are usually lethal or cause grade 3 limb wounds; chemical and biological weapons, which inflict specific diseases or abnormal physiological states; blinding laser weapons which cause specific permanent disability to the eyes and have effects for which there is no proven medical treatment; and “point-detonated” anti-personnel mines, which result in a severe (grade 3) injury to the foot or leg which in turn results in specific disability and disfigurement.

The SIrUS Project has been endorsed by a growing part of the international medical community. In October 1998, the World Medical Association called on all its member national medical associations to endorse the criteria contained in the SIrUS Project. Thirteen national medical associations and 16 other medical institutions had endorsed the SIrUS Project as of April 1999. By doing so, these institutions recognize the validity of the study and recommend that the findings be used when making a determination of which weapons cause “superfluous injury or unnecessary suffering”.

PART II — The ICRC and the SIrUS project

by PETER HERBY

The concept of “superfluous injury or unnecessary suffering”

States have an obligation to review the legality of the weapons they intend to use. This principle, as it applies to new weapons, is enshrined in Article 36 of Protocol I additional to the Geneva Conventions of 1949. One reason that a weapon might be deemed illegal is that it causes “superfluous injury or unnecessary suffering”.

Since the 1868 Declaration of St. Petersburg the principle that the only legitimate purpose of war is to weaken the military forces of an opponent has been an accepted fundamental principle of international humanitarian law.¹ It was established that this purpose would be served by disabling enemy combatants and that it “would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable”.² This principle has been reaffirmed in various international instruments in the form of a prohibition on the use of “weapons, projectiles and material and methods of war of a nature

¹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 1868. Even before 1868, the ancient laws of war in India, Greece, Rome, and the Middle East had prohibited poison weapons because of their excessive effects. The 1863 Lieber Instructions: Instruc-

tions for the Government of Armies of the United States in the Field (General Orders No. 100, of 24 April 1863) also “wholly excluded” this means of warfare on the same grounds.

² St. Petersburg Declaration.

to cause superfluous injury or unnecessary suffering”.³ In 1996, the International Court of Justice stated that this rule constitutes one of the “intransgressible principles of international customary law” and is a fundamental rule to be observed by all States.⁴

Despite the firmly established nature of this prohibition, its application has often been difficult or has not even been attempted due to the difficulty for lawyers, weapon designers and political leaders to determine the degree of human injury or suffering inflicted. Judgements as to whether a specific weapon causes “superfluous injury or unnecessary suffering” have most often been made primarily on the basis of subjective influences, often prompted by generalized public abhorrence of a particular weapon, rather than of an appraisal of whether the weapon’s effects might outweigh military need.

The notion of “superfluous injury and unnecessary suffering”⁵ relates to the design-dependent effects of specific weapons on health. Indeed the prohibition refers to weapons “of a nature to cause”⁶ these effects. Although much of humanitarian law is aimed at protecting civilians from the effects of armed conflict, this rule of customary international law constitutes one of the few measures intended to protect combatants from certain weapons which are deemed abhorrent or which inflict more suffering than required for their military purpose.

All weapons the use of which is already controlled or prohibited under international humanitarian law exceed the baseline of weapon injuries seen in recent conflicts, as described by the SIrUS Project. Had such an approach existed when the problems related to these weapons

³ In the words of Article 35, para. 2, Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). See also the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980.

⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para. 79.

⁵ Both terms are translations from the single French concept of *maux superflus* contained in

the 1899 and 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Article 23 (e). The French text is the only authentic text of the 1899 and 1907 Hague Regulations.

⁶ This term is translated from the original French *propres à causer*. The term was incorrectly translated into the English “calculated to cause” in the 1907 Hague Regulations, which introduced the subjective element of the weapon designer’s intention. This error was corrected when the original “of a nature to cause” was restated in Protocol I of 1977, Article 35, para. 2.

were being discussed, their control or prohibition might have occurred through a more rational and efficient process. Subsequently, consensus on and universalization of the relevant rules might also have been achieved more rapidly.

Weapons, law and health

The ICRC's work relating to chemical weapons early in this century and its more recent work on landmines⁷ and blinding laser weapons⁸ was driven by its concern at their horrific effects on health. The whole body of humanitarian law is based on concern about the effects of certain weapons rather than the specific technologies which cause these effects. The ICRC's support for the SIrUS Project reflects the institution's commitment to a health-based approach to weapons under international humanitarian law.

The ICRC considers that the data provided by the SIrUS Project constitute a tool for determining which weapons may be deemed abhorrent or to be of a nature to cause "superfluous injury or unnecessary suffering". These data do not and will not provide a definition of these concepts.

Use of the findings of the SIrUS Project in weapon reviews would not prevent governments from prohibiting weapons, by treaty, on the basis of other considerations, such as public abhorrence, public interest criteria or the specific effects of a weapon. The proposals would have no effect on existing treaties.

ICRC proposals based on the SIrUS Project

In May 1999, the ICRC convened a meeting of government experts in international humanitarian law and of military and civilian medical experts to consider the proposals contained in the SIrUS Project. On the basis of discussions in this meeting and bilateral consultations, the ICRC made a set of proposals for consideration by the States, the International Red Cross and Red Crescent Movement and other concerned organizations. The proposals below will be contained in a report

⁷ Stuart Maslen and Peter Herby, "An international ban on anti-personnel mines: History and negotiation of the 'Ottawa treaty'", *IRRC*, No. 325, December 1998, p. 693.

⁸ See Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, May-June 1996, p. 272 (with the text of the 1995 Protocol on Blinding Laser Weapons).

on the project to be submitted to the 27th International Conference of the Red Cross and Red Crescent, to be held in Geneva in October-November 1999:

The SirUS Project

The SirUS Project has established that the following effects of weapons on humans have NOT been seen commonly as a result of armed conflicts in the last five decades:

- disease other than that resulting from physical trauma from explosions or projectiles;
- abnormal physiological state or abnormal psychological state (other than the expected response to trauma from explosions or projectiles);
- permanent disability specific to the kind of weapon (with the exception of the effects of point-detonated anti-personnel mines — now widely prohibited);
- disfigurement specific to the kind of weapon;
- inevitable or virtually inevitable death in the field or a high hospital mortality rate;
- grade 3 wounds among those who survive to hospital;
- effects for which there is no well-recognized and proven medical treatment which can be applied in a well-equipped field hospital.

Proposal 1

That States, when reviewing the legality of a weapon take the above facts into account by:

- establishing whether the weapon in question would cause any of the above effects as a function of its design, and if so:
- weighing the military utility of the weapon against these effects; and
- determining whether the same purpose could reasonably be achieved by other lawful means that do not have such effects.

Proposal 2

That the States make new efforts a) to build a common understanding of the norms to be applied in the review of new weapons, and b) to promote transparency in the conduct and results of such reviews.

Plan of action

The ICRC presents the SIrUS Project and the above proposals to the States, the medical community and concerned organizations and individuals as a means of promoting, over time, both debate and consensus on a health-based approach to weapons under international humanitarian law. In so doing, the ICRC invites:

the States to analyse the approach proposed in this paper and to take the available data concerning the nature of injury in recent conflicts into account when determining, as called for under Article 36 of Additional Protocol I of 1977, whether a proposed weapon, by its design, causes effects on health which may constitute “superfluous injury or unnecessary suffering”;

the States to make new efforts a) to build a common understanding of the norms to be applied in the review of new weapons, and b) to promote transparency in the conduct and results of such reviews;

the States, the National Red Cross and Red Crescent Societies and other interested organizations to support the approach taken by the SIrUS Project in their efforts to strengthen respect for the prohibition of weapons which are inherently abhorrent or of a nature to cause “superfluous injury or unnecessary suffering”; such efforts may include public discussion and fora such as the 27th International Conference of the Red Cross and Red Crescent (1999) and the 2001 Review Conference of the 1980 Convention on Certain Conventional Weapons;

national medical associations to consider the contribution medical professionals can make to promoting effective implementation of international humanitarian law through discussion and endorsement of the SIrUS Project;

medical professionals and other individuals concerned with the effects of weapons and armed conflict to promote a health-based approach, including consideration of the SIrUS Project, in professional and public discourse on these issues.



Résumé

Déterminer la légalité d'une arme — une nouvelle approche : le Projet SIrUS

par le D^r ROBIN M. COUPLAND, FRCS, et PETER HERBY

Une règle fondamentale du droit international humanitaire dit qu'il est interdit, au cours des hostilités, d'infliger des «maux superflus» aux combattants ennemis. Sur la base de ce concept, l'utilisation d'un certain nombre d'armes ou de munitions a été interdite au cours de ce siècle, comme les armes chimiques ou, plus récemment, les mines antipersonnel. Toutefois, la communauté internationale n'a jamais adopté de critères qui permettent de décider si une arme ou un type de munition est susceptible de causer des «maux superflus». Le Projet SIrUS, lancé par le CICR, a comme objectif de proposer de tels critères⁹. En se basant sur les résultats d'enquêtes statistiques, le D^r Coupland élabore, dans la première partie de l'ouvrage, les bases médicales qui doivent permettre l'élaboration de critères pour évaluer les effets d'une arme. Peter Herby, quant à lui, retrace le cadre juridique et présente les propositions que le CICR entend soumettre à la XXVII^e Conférence internationale de la Croix-Rouge et du Croissant-Rouge, fin 1999.

⁹ Voir D^r Robin M. Coupland FRCS (éd.), *Le Projet SIrUS – Déterminer quelles armes causent des «maux superflus»*, CICR, Genève, 1998.