

THE PRINCIPLE OF SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING

*From the Declaration of St. Petersburg of 1868
to Additional Protocol I of 1977*

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On the 100th anniversary of the Declaration of St. Petersburg, the *International Review of the Red Cross* devoted to this important first document of the law of war an article examining the relation between the notion of the “legitimate object” of war as defined in the Declaration and the means of warfare used, whose lawfulness was declared to be limited by their conformance to that legitimate object and by their necessity. Since 1868 the law of international armed conflicts has been supplemented by Protocol I additional to the Geneva Conventions of 1949, which enlarged on the central point of the Preamble to the Declaration of 1868 — i.e. the concept of “*maux superflus*” (“superfluous injury or unnecessary suffering”); although it was not formulated as such until 1899 in Article 23 *e*) of the Regulations respecting the Laws and Customs of War on Land, it may, as we shall demonstrate, be traced back to the Declaration’s Preamble.¹ Protocol I broadened the concept’s scope of application to include methods of warfare, but it also and above all introduced a new rule of considerable import by narrowing the definition of military objectives that may lawfully be attacked.

¹ In the English translation of the Regulations of 1899 “*maux superflus*” was translated by “superfluous injury”; in the 1907 revised version this was replaced by the term “unnecessary suffering”. Since 1977, however, “superfluous injury or unnecessary suffering” has been generally adopted as a more adequate translation and it has been used throughout this article except where quoted documents provide a different translation or where otherwise specified. (For the author’s discussion of the difficulty of translating “*maux superflus*” into English see below, section I, B.) — Translator’s note.

In this article we propose to examine the development of this general concept, properly termed the principle of superfluous injury or unnecessary suffering.

I. THE ORIGIN AND DEVELOPMENT OF THE PRINCIPLE OF SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING

It is commonly acknowledged that the importance of the Declaration of St. Petersburg lies not in its provisions, which stipulate that Contracting Parties shall “renounce (...) the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances” and are now considered out of date, but in its preambular paragraphs, which have lost none of their value:

“On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St. Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the Undersigned are authorized by the orders of their Governments to declare as follows:

Considering:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the 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;

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

It must first be observed that the notion of unnecessary suffering, to which certain governments and the majority of writers wish to reduce the Declaration's scope, renders only half of the intended meaning of the fourth preambular paragraph since it does not convey the clearly ex-

pressed idea of unnecessary deaths. Likewise, the expression "calamities of war" in the first preambular paragraph goes beyond the notion of unnecessary suffering. Finally, it should be noted that the memorandum of the Russian Imperial War Minister read by the Chairman of the Conference and annexed to Protocol I of the military conferences held in St. Petersburg contains the following two sentences:

"The parties at war may tolerate only those calamities which are imperatively necessitated by war. Any suffering or damage that would not have the sole result of weakening the enemy is unjustified and must in no way be permitted".²

The first sentence makes it clear that the notion of the necessities of war is to be understood as the essential condition for acts of violence to be considered lawful, a meaning which is only implicit in the Preamble of 1868.³ The second sentence broadens the notion of unnecessary suffering to include that of damage.

In many respects the Brussels Conference of 1874, which was also convened by the Russian government, must be seen as a follow-up to the Conference of 1868. The proceedings of this conference, which resulted in a Project of a Declaration encompassing all the rules pertaining to the law of war on land, indicate that certain expressions appearing in the Preamble of 1868 may, and even must, be interpreted as they were six years later by men who shared similar ideas. It is remarkable to note that these two documents were not the work of a diplomatic conference but of a Military Commission.⁴ It would therefore be difficult to term them "idealistic".

A quarter of a century later, that 1874 Project of an International Declaration concerning the Laws and Customs of War provided the basis

² "Les parties belligérantes ne doivent tolérer que les calamités qui sont impérieusement nécessitées par la guerre. Toute souffrance et tout dommage qui n'auraient pas pour seul résultat d'affaiblir l'ennemi n'ont aucune raison d'être et ne doivent être admis d'aucune manière." (Annexe au Protocole I des Conférences militaires tenues à Saint-Petersbourg, "Mémoire sur la suppression de l'emploi des balles explosives en temps de guerre", *Nouveau Recueil général des traités...*, Vol. XVIII, Göttingen, 1873, p. 460.)

³ Concerning this point see below, part II, C, a.

⁴ Noting that "among the 32 members of the Conference, 18 were military men, 10 were diplomats and 4 were legal experts and senior officials with no connection to the military and diplomatic professions", G. Rolin-Jaequemyns acknowledged that the results of the Conference had allayed the fears that such unequal proportions between the various professions had initially caused him. "Chronique du droit international 1871-1878", *Revue de droit international et de législation comparée*, VII, 1875, pp. 90-91.

for the Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention of 1899; their basic provisions were repeated in the Regulations annexed to the Convention of 1907 and have acquired the status of customary law. Article 13 *e*) of the Project expressly forbids "the employment of arms, projectiles or material calculated to cause unnecessary suffering, as well as the use of projectiles prohibited by the Declaration of St. Petersburg of 1868".⁵ In the French version, although not in the English one, this paragraph thus replaced, or rather corrected, the notion of unnecessary suffering by using the term "*maux superflus*", which conveys the further notion of superfluous deaths expressed in the fourth preambular paragraph of the Declaration of 1868. At the same time the drafters of the Project were wrong to suggest that the Declaration of St. Petersburg could be reduced to its provisions. The error was inconsequential, however, since it was corrected in Article 23 *e*) of the Regulations of 1899 and 1907, which gave to the fourth preambular paragraph of the Declaration of 1868 the form in which it entered positive law and obtained the status of a principle of customary law.

Although not directly related to our topic, another idea recorded in the Acts of the Brussels Conference deserves, we believe, to be mentioned. In the instructions which Baron Jomini, the Chairman of the Military Commission, had received from the Russian government and which specified the aim and scope of the Project of a Declaration, the two basic ideas of the law of war are referred to: the necessities of war and "the joint interests of humanity" ("*les intérêts solidaires de l'humanité*"), an admirable expression recalling the "imprescriptible rights of humanity" ("*droits imprescriptibles de l'humanité*") used by Baron Jomini in another document.⁶ In our opinion, it may legitimately be asked whether such formulations do not express the true foundation of the law of war more accurately than can be done by citing the notion of human rights, since it is well known that this notion has in recent years been the object of not completely unjustified criticism.

⁵ "(...) l'emploi d'armes, de projectiles ou de matières propres à causer des maux superflus, ainsi que l'usage de projectiles prohibés par la Déclaration de St. Pétersbourg de 1868".

⁶ *Actes de la Conférence de Bruxelles de 1874 sur le Projet d'une convention internationale concernant la guerre*, Paris, Ministère des Affaires étrangères, Documents diplomatiques, 1874, pp. 4 and 48 respectively.

II. ARTICLES 23 (e) OF THE HAGUE REGULATIONS AND 35 (2) OF ADDITIONAL PROTOCOL I

The prohibition on inflicting superfluous injury or unnecessary suffering, the principle of which is contained in the Preamble to the Declaration of St. Petersburg and clearly set forth in the 1874 Brussels Project of a Declaration, entered positive law through Article 23 *e*) of the Regulations Respecting the Laws and Customs of War on Land annexed to the 1899 Hague Convention No. II, whose wording was largely adopted in Article 23 *e*) of the Regulations annexed to the Fourth Hague Convention of 1907:

"In addition to the prohibitions provided by special Conventions, it is especially forbidden (...) e) To employ arms, projectiles, or material calculated to cause unnecessary suffering".⁷

From its original form as a preambular paragraph in the Declaration of 1868, the principle thus became a rule ranking equally with the other prohibitions stated in Article 23 *e*), all of which, however, are specific in nature. From both a theoretical and a formal point of view, this flaw was corrected in Article 35 (2) of 1977 Additional Protocol I, which conferred an independent status on the principle expressed in 1899 and 1907 by designating it as a "basic rule", by adding the words "methods of warfare" to the text of Article 23 *e*) and by replacing the expression "calculated to" by "of a nature to" — although in French the corresponding expressions ("*propres à*" and "*de nature à*") have exactly the same meaning.

To interpret this basic rule, it must thus be determined what methods or means of warfare are involved, what the text means by "injury or suffering" and what is to be understood by the qualifying terms "unnecessary" and "superfluous".

A. "Methods and means of warfare"

In the first place it should be noted that Article 23 *e*) of the Hague Regulations and Article 35 (2) of Additional Protocol I prohibit the use of methods or means of warfare whose use is not prohibited by other rules

⁷ "Outre les prohibitions établies par des conventions spéciales, il est notamment interdit (...) e) D'employer des armes, des projectiles ou des matières propres à causer des maux superflus".

of the law of war, all of which are concerned with military objectives as defined in Article 52 (2) to be examined below.⁸

The means referred to in the rule are limited neither to weapons in the technical sense nor to "material". On this particular point the Protocol's wording is not rigorously consistent or exact. Although Article 35 (1) and (3) refers to "methods or means of warfare" and Article 36 to "means or method of warfare", Article 51 (4) *b*) and *c*) uses the expression "method or means of combat". The general term "means" is better suited to encompass the meaning of the words "arms, projectiles and material" used in HR, Article 23 *e*), and PI, Article 35 (2), since it may be understood to refer to any device, whatever it may be, capable of inflicting superfluous injury or unnecessary suffering. By its very nature, such a rule needs to be interpreted with future developments in mind. In this regard PI, Article 36, pertaining to "the study, development, acquisition or adoption of a new weapon, means or method of warfare" is particularly relevant.

Although the status of HR, Article 23 *e*), as a rule of customary law is well established, the use of the term "methods of warfare" in PI, Article 35 (2), introduces a new element which at present has only the status of a treaty rule. While this rule derives from the principle expressed in HR, Article 23 *e*), international legislation was required to make it a rule of positive law. The same observation applies to all the rules which, whether or not they are explicitly based on the principle stated in Article 23 *e*), prohibit the use of certain means of warfare considered to be of a nature to cause superfluous injury or unnecessary suffering.

In PI, Article 35 (2), "methods of warfare" is to be understood as the mode of use of means of warfare in accordance with a certain military concept or tactic. The new prohibition relates to this concept or tactic as such, and not to the use of the particular means by which the method of warfare is applied, unless those means themselves are forbidden. PI, Article 54 (1), prohibits "starvation of civilians as a method of warfare". This new rule constitutes an application neither of the principle formulated in HR, Article 23 *e*), nor, despite the use of the expression "method of warfare", of PI, Article 35 (2), but of the principle of the immunity of civilian populations. It is clear from this example, however, that the notion of "method of warfare" is independent of the lawful or unlawful nature of the means by which the method is put into effect. Concerning "methods of warfare", the rule is directed not only at military strategists but at political leaders as well.

⁸ The Hague Regulations of 1899 and 1907 and Additional Protocol I will henceforth be abbreviated HR and PI respectively.

B. “Injury or suffering”

The above preliminary observation on the means referred to in HR, Articles 23 *e*), and PI, Article 35 (2), applies to “injury or suffering” as well: excluded from the former — or rather included, although their inclusion was needlessly repetitive — are the means specified in other rules based on the principle of the immunity of the civilian population, civilians and civilian objects, and on this principle’s two corollaries: the principles of discrimination and proportionality.

The debate on the question of what is to be understood by “superfluous injury or unnecessary suffering” has been distorted from the outset, and continues to be so, by the way the term “*maux*” has been translated in the English and German versions of the authentic French text. Whereas as early as 1874, in Article 13 *e*) of the Brussels Project of a Declaration, the expression “*souffrances inutiles*” used in the fourth preambular paragraph of the Declaration of St. Petersburg was, as we have pointed out, replaced by the concept “*maux superflus*”, the English and German translations of the Brussels Project and of Article 23 *e*) of the Hague Regulations of 1899 and 1907 use such various terms as “unnecessary suffering” (1874), “superfluous injury”, “*unnötigerweise Leiden*” (1899), “unnecessary suffering”, “*unnötig Leiden*” (1907). Although the said texts are not the authentic version, these mistaken translations of the term “*maux*” in Article 23 *e*) — a term which conveys the meaning of the notion expressed in the Preamble to the Declaration of 1868 and in Article 13 (e) of the 1874 Project of a Declaration — have had a dominant influence on the doctrinal interpretation of Article 23 *e*) by English- and German-speaking writers. The difficulty of translating the term “*maux*” into English and German may explain but in no way justify the inexactitude of the translations quoted, which retain only the meaning of suffering conveyed by the term “*maux*”, thus failing to render the additional meanings of superfluous deaths, on the one hand, and material damage on the other.

In the English version of Protocol I, which is not a translation, this mistake was corrected as far as the language allowed by using the term “superfluous injury or unnecessary suffering” to convey the meaning of “*maux superflus*”. However, the official German — or more precisely German, Austrian and Swiss — translation worsened the error of 1899 and 1907 by translating the expression used in the English document by “*überflüssige Verletzungen oder unnötige Leiden*”. The notion of material damage which the word “injury” conveys is thus absent from the German translation of PI, Article 35 (2), and it is likewise doubtful whether the expression “*überflüssige Verletzungen*” may be understood to encompass

the idea of superfluous deaths. Finally, the German expression may prove to be difficult to apply to the specific effects of new means of warfare resulting from advances in science and technology. German-speaking countries, all of which have ratified Protocol I, are of course bound not by the translation but by the authentic text of the document to which their signatures are affixed.⁹

Without taking the qualifying word “*superflus*” into account, the variously rendered term of “*maux*” used in HR, Article 23 *e*), and PI, Article 35 (2), must be understood as referring first of all to any assault on the life or physical and mental integrity of persons who, according to the customary rules of the law of war and Additional Protocol I, may lawfully be the object of acts of violence if such acts are lawful in themselves. In the second place, the same term may be applied to damage caused to physical objects. As we have already seen, the notion of damage, as applied to that of “*maux superflus*”, was discussed in the debates that led to the adoption of the Declaration of St. Petersburg. Neither the text of PI, Article 35, nor that of Article 36 pertaining to “new weapons” imply that the rules set forth in the two articles, including Article 35 (2), refer solely to methods and means of warfare directed against combatants. Finally, the rule of Protocol I representing by far the most important application of the principle formulated in Article 35 (2), i.e. the second sentence of Article 52 (2), prohibits attacks against objects which constitute genuine military objectives but do not answer to the definition of lawfully attackable military objectives (see below, part III).

C. The notion of “superfluous injury or unnecessary suffering”

a) The qualifying terms “superfluous” and “unnecessary”, added to “injury” and “suffering”, indicate both the characteristic which renders

⁹ The only rule explicitly based on PI, Article 35 (2), is the prohibition of the use of “any booby-trap which is designed to cause superfluous injury or unnecessary suffering”, a provision set forth in Article 6 (2) of Protocol II annexed to 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 of 10 October 1980. In the French version of this document the expressions “*blesures inutiles*” and “*souffrances superflues*” are appropriately used, as is the expression “designed to” instead of “of a nature to”. The third preambular paragraph of the Convention, whose text is based on that of PI, Article 35 (2), refers to the rule stated therein as a “principle”. Although it makes no allusion to this rule, the single article constituting Protocol I annexed to the Convention and stating that “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” may also be considered to be based on PI, Article 35 (2).

use of the methods and means of warfare referred to in HR, Article 23 *e*), and PI, Article 35 (2) unlawful, and the *ratio* of the prohibition. These terms immediately give rise to the following question: superfluous or unnecessary in relation to what? The question provides its own answer: in relation to what is necessary. But such an answer again raises the question: necessary to or for what? To establish the meaning of the expression "superfluous injury or unnecessary suffering" and thus define the scope of this basic rule, it is thus essential on the one hand to understand the meaning of the word "necessary" that is implicit in it, and on the other hand to attempt to define the criterion whereby the lawfulness or unlawfulness of the methods and means of warfare referred to HR, Article 23 *e*), and PI, Article 35 (2), are assessed.

To answer these questions it is necessary to refer to the Preamble to the Declaration of St. Petersburg and to the 1974 Brussels Project of a Declaration, or, more specifically, to the preliminary debates on the latter document. The draft presented by Russia to the Conference of 1874 includes a sentence that precisely conveys the meaning of the concept of "military necessity" as expressed in the Preamble to the Declaration of St. Petersburg and is the best formulation of the notion - or rather the principle - of necessity in the law of war. In the section entitled "General principles", the Russian draft defines the role of military necessity in the following terms:

"3. — To achieve the object of war, every means and method conforming to the laws and customs of war and justified by the necessities of war are allowed".¹⁰

The expression "object of war" (in French "*but de la guerre*") recalls the same term to be found in the second preambular paragraph of the French text of the Declaration of 1868. On this particular point, the development of the law of war has not followed the terminology used in the Declaration of St. Petersburg or in the quoted paragraph from the Russian draft of 1874. The notion of "object of war" (expressed thus or in similar terms) has been abandoned in international law because the fact that its meaning may be indefinitely extended makes it an entirely unsuitable point of reference for what belligerents and third-party States

¹⁰ "3. — Pour atteindre le but de la guerre, tous les moyens et toutes les mesures, conformes aux lois et coutumes de la guerre, et justifiés par les nécessités de la guerre, sont permis." A. Mechelynck, *La Convention de la Haye concernant les lois et coutumes de la guerre sur terre d'après les Actes et Documents des Conférences de Bruxelles de 1874 et La Haye de 1899 et 1907*, Ghent, 1915, p. 24.

must consider as lawful or unlawful in the conduct of war. Just like the related idea of “cause”, the notion of “object” is therefore irrelevant to the law of armed conflicts.¹¹ The same observation applies to values, a notion often associated with that of “cause” and which, as a point of reference, is by definition discriminatory and essentially incompatible with the basic principle of the equality of belligerents before the law of war.

The merit of the quoted paragraph from the Russian draft lies in the fact that it highlights the normative role of the notion or principle of “military necessity”, a term which in legal doctrine has replaced the expression “necessities of war” while retaining the same meaning. The paragraph states that for means and actions to be lawful, it is not enough for them to be in accordance with the rules of the law of war; their choice and the use made of them must also be justified by military necessity. By virtue of PI, Article 52 (2), this stipulation also applies to military objectives. The principle of military necessity thus serves as a further compulsory limitation, in addition to that of the rules of the law of war themselves.

It is instructive not merely from an historical point of view to compare the above paragraph from the Russian draft of 1874 with the article on the same subject in the Instructions for the Government of Armies of the United States in the Field, prepared in 1863 by the jurist Francis Lieber after the beginning of the American Civil War.

“Art. 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”.

The difference between the two texts is quite clear. The American formulation implies, indeed prescribes a line of thought in complete reverse to that on which the Russian draft is based. In Lieber’s text the reasoning proceeds as follows: 1) Is a certain specific means or measure indispensable — or, to be more precise, considered as such by the military leaders in charge — for securing the ends (object) of war (disregarding all considerations pertaining to the question of the lawfulness of these ends in themselves, an issue which was not as important then as it is

¹¹ Cf. the last preambular paragraph of Protocol I: “*Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict (...)*”.

today)? 2) If the answer is yes, then it must be determined whether that means or measure is allowed by the relevant rules of the law of war.

The positive law of armed conflicts recognizes the concept of military necessity only in a special sense that is quite different from that of a restrictive principle, i.e. military necessity allowing derogation from a rule. Using various expressions meant to convey different degrees of gravity, such as “necessity”, “absolute necessity”, “imperative necessity”, “military necessity”, “important” or “inescapable military necessity”, some treaty rules allow for situations in which a belligerent may, exceptionally and only within the limits of what the invoked situation of necessity requires, refrain from observing the prohibition or prescription that otherwise applies. This possibility, which is strictly confined to those provisions that explicitly allow for it, is obviously excluded as regards all the specific rules based on the principle expressed in HR, Article 23 *e*), and PI, Article 35 (2). Military necessity understood in this sense raises no problem either in theory or in practice.

In the commentary on its draft articles on “State responsibility”, the International Law Commission, discussing Article 33 (“State of necessity”) of the provisional text, devoted two paragraphs to a third acceptance of the concept of necessity, one not recognized in international law. “In relation to [the rules of the law of war] (...)”, states the Commission, “what is involved is certainly not the effect of ‘necessity’ as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather the effect of ‘non-necessity’ as a circumstance precluding the lawfulness of conduct which that rule normally allows. It is only when this ‘necessity of war’, the recognition of which is the basis of the rule and its applicability, is seen to be absent in the case in point, that this rule of the special law of war and neutrality must not apply and the general rule of the law of peace prohibiting certain actions again prevails. (...) The Commission does not believe that the existence of a situation of necessity of the kind indicated [i.e. “the object of which is to safeguard the vital interest of the success of military operations against the enemy and, in the last resort, of victory over the enemy”] can permit a State to disobey one of the above-mentioned rules of humanitarian law [applicable to armed conflicts]. (...) even in regard to obligations of humanitarian law which are not obligations of *jus cogens*, it must be borne in mind that to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a

principle which is in absolute contradiction with the purposes of the legal instruments drawn up".¹²

However closely connected they may be, the principle of superfluous injury or unnecessary suffering and the notion, or principle, of military necessity in the sense of an additional limitation are not identical. Besides the fact that the notion of superfluous injury or unnecessary suffering has been part of the codified law of war for almost a century, whereas no instrument explicitly mentions the notion or principle of military necessity in the sense of a limitation, the two notions are also different in the following respect: whereas a specific rule based on HR, Article 23 *e*), or on PI, Article 35 (2), must be applied automatically and to the letter in every case to which it pertains, the principle of military necessity may be applied according to circumstances. In other words, the principle of superfluous injury or unnecessary suffering was established, once and for all, when it was adopted as a law, and the relevant rule must be applied even in those cases where use of the means to which it refers would obviously not cause superfluous injury or unnecessary suffering. The notion or principle of military necessity, on the other hand, is applied by specific acts and decisions taking the particular circumstances of actual situations into account.

For the same reason, it would be wrong to think that the basic rule stated in PI, Article 35 (2), is related to the principle of proportionality. Such an interpretation is also wrong for two other reasons. In the first place, the term "principle of proportionality" is generally reserved for evaluating whether the proportional relationship between the indirect losses and damages suffered by civilians ("collateral damage", in military terminology) and "the direct and concrete military advantage anticipated" is lawful with respect to a given attack — or, according to the interpretations given to PI, Article 51 (5), by certain Western States, with respect to "an attack considered as a whole, and not only isolated or particular parts of the attack". This proportional relationship is a lawful one and the attack does not come under the provisions prohibiting indiscriminate attacks (Article 51 [4] only when "the incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof" would not be "excessive in relation to the concrete and direct military advantage anticipated". Secondly, in the case of HR, Article 23 *e*), and PI, Art-

¹² *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2: Report of the International Law Commission to the General Assembly on the work of its thirty-second session (A/CN.4/SER.A/1980/Add. 1 (Part 2)), p. 46, paras. 27 and 28.

icle 35 (2), which apply to suffering or injury inflicted on combatants and damage to material military objectives, the very idea of proportionality is irrelevant: the rule adopted by international law-making bodies that the suffering, injury or damage likely to result from a certain means or method of warfare is “unnecessary” and “superfluous” absolutely prohibits any recourse to that means or method, and hence excludes any evaluation of the proportional relationship between the suffering, injury or damage that would be caused if it were used and “the concrete and direct military advantage” that might be “anticipated”.

The question of a criterion remained. Although that of the “object” or “ends” of war had rightly been abandoned, the law of war had not replaced it by another concept. However, whereas this had not been considered an omission when the Hague Regulations of 1899 and 1907 were drafted, it proved to be one during the two World Wars. The omission was repaired in the Additional Protocol of 1977 by the introduction of the concept of “concrete and direct military advantage” (Article 51 [5, b]) or “definite military advantage” (Article 52 [2]). As we have just seen with regard to Article 51 (5, b) and as will be shown even more clearly below in discussing Article 52 (2), the meaning and role of this concept is diametrically opposed to the notion of “object” or “ends”.¹³

b) As for the meaning of the terms “unnecessary” and “superfluous” in connection with “injury” and “suffering”, it is necessary to set aside interpretations based either on the presumed evil intentions of potential infringers of HR, Article 23 *e*) or PI, Article 35 (2), or on the results of such persons’ acts as seen in terms of their military usefulness. While the first category comprises interpretations associating the notion of superfluous injury or unnecessary suffering with sadism, cruelty and inhumanity, the second includes interpretations which emphasize what are held to be the irrational and counterproductive aspects of using a means prohibited by HR, Article 23 *e*).

In reply to the latter type of interpretation, based on the association of the two words “uselessly” and “sufferings” in the Preamble to the Declaration of 1868, it may be pointed out that when applied to the concept of superfluous injury or unnecessary suffering the qualifying notion of their uselessness does not necessarily mean “without military

¹³ The two references to the notion of “military advantage” are not equivalent. In particular, they are different with regard to their respective functions.

usefulness or rationale". The use of a means prohibited by HR, Article 23 *e*), or of a method of warfare contrary to PI, Article 35 (2), may indeed provide a belligerent with a military advantage of a tactical or strategic nature which in certain cases may have a decisive influence on the outcome of the conflict. In this connection, the mistaken opinion of a number of legal experts and military experts, according to whom all the rules of the law of war serving to govern the lawful use of violence may be assimilated to the military doctrine known as "economy of means", must be refuted. Such an opinion is wrong from both a logical and a philosophical point of view as well as in fact. What distinguishes the rules of the law of war is that they demand a sacrifice from the belligerents by requiring them to forgo an advantage that a State which observes a given rule would in fact be in a position to obtain if it infringed that rule, and that it cannot obtain by resorting to another available means considered lawful. In logic and in fact, the law of war and the economy of means principle are diametrically opposed, since these two categories of thought and action have different purposes. Whereas the military principle aims at limiting a belligerent's own losses (in men, material, resources and money), the law of war - especially in those rules based on the principle of superfluous injury or unnecessary suffering and on the notion of military necessity as defined above — aims at limiting the losses and damage inflicted on the enemy.

c) As for those factors which define the unnecessary or superfluous character of suffering or injury, it should be noted that they may be either quantitative or qualitative in nature. The Preamble to the Declaration of St. Petersburg took both aspects into consideration: the qualitative one in the idea of "useless sufferings" and the quantitative one in the idea of superfluous deaths. However, it should also be observed that when the quantitative aspect is taken into consideration in the law of war it takes on a qualitative character, since it must be judged on the basis of legal criteria in order to be made the object of a rule. In HR, Article 23 *e*), the two aspects are merged in the notion of "*maux superflus*" (incompletely translated in that document first by "superfluous injury" and then by "unnecessary suffering"), which, because it is a normative notion, is essentially a qualitative one.

The motivations for the basic rule stated in PI, Article 35 (2), have given rise to the opinion that it should be considered unlawful to resort to means or methods of warfare that continue to produce harmful effects after hostilities have ended, thus affecting, strictly speaking, not the "civilian population" of the State against which they were used, but its

entire "population" at a time when the latter has ceased to be an enemy.¹⁴ On this particular point it may be argued that the principle of superfluous injury or unnecessary suffering has a direct application, since it prohibits the adoption and implementation of strategies - of "methods of warfare" - that aim specifically at weakening an enemy State beyond the duration of a conflict by targeting objectives whose destruction is calculated to cripple that State's ability to achieve economic and industrial recovery when it is no longer an enemy. However, there is no need to invoke the principle of superfluous injury or unnecessary suffering to point out that such a strategy is unlawful: a great number of the attacks which would serve to carry it out are explicitly prohibited by PI, Article 52 (1) and (2).

III. ARTICLE 52, PARAGRAPH 2, OF PROTOCOL I

a) Authors have not called sufficient attention to the far-reaching scope of PI, Article 52 (2), which reads as follows:

"Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".¹⁵

¹⁴ Cf. the second sentence of PI, Article 55 (1), prohibiting "the use of methods or means of warfare which are intended or may be expected to cause such damage [wide-spread, long-term and severe] to the natural environment and thereby to prejudice the health or survival of the *population*" - and not of the *civilian* population.

¹⁵ The concept of "military advantage" was first referred to in the 1923 Hague Draft Rules of Aerial Warfare, formulated by a Commission of Jurists which had been set up in accordance with a resolution of the 1922 Washington Conference on the Limitation of Armaments and was composed of experts from France, Italy, Japan, the Netherlands, the United States and the United Kingdom. The Hague Draft Rules, which had only the status of a recommendation, stated in Article 24 (1): "Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent." (Dietrich Schindler and Jiri Toman (eds.), *The laws of armed conflicts. A collection of conventions, resolutions and other documents*, Dordrecht, 1988, p. 210.)

The wording of the second sentence of Article 52 (2) is based on the following paragraph of the Resolution adopted in 1969 by the Institute of International Law, whose terms were likewise adopted with some slight changes by the ICRC in Draft Protocol I:

"There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them," *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary*, ICRC, Geneva, 1973, p. 60

The resolution was adopted by 60 votes to 1, with 2 abstentions.

When commenting on Article 52, authors should not be misled by its title, "General protection of civilian objects", or by the fact that it is the first article of Chapter III (itself entitled "Civilian objects"), Section I, Part IV: "Civilian population". After having stated the principle that "civilian objects shall not be the object of attacks or of reprisals" (which is new only with respect to the prohibition of reprisals), paragraph 1 of the article stipulates: "Civilian objects are all objects which are not military objectives as defined in paragraph 2." The definition of military objectives in the second sentence of the paragraph is not confined to determining what is to be understood by "military objectives". Indeed, the originality and importance of the rule lies in the fact that within the general category of military objectives, which it exhaustively defines, it establishes a distinction between two sub-categories: that of objects which are military objectives and therefore legitimate targets and that of objects which are not. In itself, this distinction is not a permanent one: the same object may lawfully be attacked in some circumstances and may not be so in others, all the while remaining a military objective in law, that is to say a potentially lawful target.¹⁶

The article was adopted by 79 votes to 0, with 7 abstentions. The interpretative declarations made by certain States at the time of the Protocol's ratification bear only on a minor point. More important is the fact that in 1976 the United States, which to this day has not ratified Protocol I, officially adhered in advance to the terms of the second sentence of Article 52 (2) by inserting an amendment in the United States Army handbook on the law of war (*FM 27-10*) that reproduces the wording of this sentence as it was adopted by consensus, in commission, during the second session of the Diplomatic Conference.¹⁷

b) From a theoretical and a practical point of view, the rule established by the second sentence of Article 52 (2) represents the most remarkable application both of the principle of superfluous injury or unnecessary suffering and of the principle of necessity.

The underlying mechanism of this rule may be considered a model application of the third article of the Russian draft of 1874 quoted above. The first element of the definition — the constant element — corresponds

¹⁶ With the order of its two paragraphs reversed, the terms of Article 52 (1) and (2) were adopted word for word in Article 2 (4) and (5) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) annexed to the Convention of 10 October 1980, as well as in Article 1 (3) and (4) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).

¹⁷ See *Headquarters, Department of the Army: FM 27-10 - The Law of Land Warfare*, Change No. 1, 15 July 1976, para. 40, c.

to the expression “consistent with the laws and customs of warfare” used in the Russian document, while the second — the variable element — finds a parallel in “justified by the necessities of war”. Although it takes a different form, the method used by the ICRC to define military objectives in its Draft Rules of 1956 (revised in 1958) incorporates a similar mechanism. Article 7 (2) of this document reads as follows: “Only objectives belonging to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives”. Paragraph 3 specifies: “However, even if they belong to one of these categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage”.¹⁸

The second sentence of Article 52 (2) is also related to the principle of military necessity by the fact that the rule is applicable through specific decisions made “in the circumstances ruling at the time”. It should be noted that the time factor, which in this expression plays a decisive role in limiting the definition of military objectives that may lawfully be attacked, plays the same role in the first element comprised in the definition, where it is conveyed by the condition “make an effective contribution to military action” — i.e. the military action of the adversary, who is in possession of the objective in question.

It is less easy to specify the connection between the second sentence of Article 52 (2) and the principle of superfluous injury or unnecessary suffering. The fact that the rule applies to objectives and not, as in the Declaration of 1868 and HR, Article 23 *e*), to means of warfare, cannot be argued to constitute a reason for not assigning the same basis to the later rule. Indeed, the notion of “methods of warfare” itself, introduced in PI, Article 35 (2), encompasses considerably more than is conveyed by the expression “arms, projectiles and material” used in the text of 1899 and 1907. In the final analysis, the link between the rule established by Article 52 (2) and the principle stated in St. Petersburg lies in their shared purpose, concerned as it is with reducing injury or suffering by setting as narrowly as possible “the technical limits at which the necessities of war ought to yield to the requirements of humanity”, to quote the words used in the first paragraph of the Preamble to the Declaration of 1868.¹⁹

¹⁸ ICRC, *Draft rules for the limitation of the dangers incurred by the civilian population in time of war*, second edition, Geneva, 1958, pp. 66, 70.

¹⁹ Contrary to violations of the prohibition on indiscriminate attacks defined in Articles 51 (5), *b*, and 57 (2) *a*, iii, violations of the rule stated in the second sentence

c) The term “military objectives” in the first sentence of Article 52 (2) denotes both material and human military objectives. According to its wording, however, the second sentence pertains only to military objectives that are “objects”. The question therefore naturally arises whether the *ratio legis* for this important rule might not apply with equal force (allowing for the differences involved) to combatants as well. The *ratio legis* is twofold, comprising both an explicit and an implicit aspect. The ICRC had already previously given the explicit reason in connection with the corresponding article in the Draft Rules of 1956; it did so again when it proposed, in draft Protocol I, the rule on which the text of the second sentence of Article 52 (2) is based. In the ICRC’s understanding, the new rule is intended to reinforce the protection of the civilian population by adding, to the principle of the immunity of the civilian population, individual civilians and civilian objects (Articles 51 [2] and 52 [1]) and to the two complementary principles of distinction (ban on indiscriminate attacks, Article 51 [4] and [5a]) and of proportionality (Article 51 [5b]), a further protection which would indirectly result from the limitation of military objectives that may lawfully be attacked. The implicit *ratio legis* for the second sentence of Article 52 (2) is the very one which underlies the principle of superfluous injury or unnecessary suffering. It must therefore be asked whether these two reasons should not apply to attacks against members of armed forces as well.

Strictly speaking, the extension of the rule stated in Article 52 (2) to combatants would not have the purpose of protecting them, but of excluding them, under certain circumstances, from the definition of military objectives that may lawfully be attacked. However great a difference is entailed with respect to the original field of application of the principle of superfluous injury or unnecessary suffering, it may be held that this is not enough to dismiss the idea of extending the rule stated in the second sentence of Article 52 (2) to include armed forces. The hypothetical cases in which the extended rule would, *mutatis mutandis*, be applicable to combatants are in fact much fewer than those involving material military objectives. Indeed, on account of the great mobility of armed forces the two conditions expressed in the definition — the first one in the formula

of Article 52 (2) are not included among the grave breaches of Protocol I listed in its Article 85. However, Article 52 (2) is not meant to be an exhaustive enumeration of war crimes, even in the case of violations of a rule established by the Protocol. Thus, the fact that violations of the rule stated in the second sentence of Article 52 (2) are not explicitly repressed provides possible infringers with no protection against the risk of being prosecuted for war crimes, and more specifically for breaches of the laws and customs of war. However, the problem related to the principle *nullum crimen, nulla poena sine lege* does arise here. See below the corresponding text under note 28.

“make an effective contribution to military action”, the second one by the words “in the circumstances ruling at the time” — would require a fairly broad interpretation.

On the basis of a reasoning that could not have been much different from the one we have just explained, the ICRC placed members of the armed forces at the top of the list of categories of military objectives included in its Draft Rules of 1956. The above-quoted Article 7 (3), which defined, by elimination, the military objectives that may lawfully be attacked, was therefore meant to apply to combatants as well as to objects. The Committee did not adopt this proposed rule in draft Protocol I, probably because it feared — admittedly with some reason — that such an innovation could not but meet with an opposition that might jeopardize the adoption of the rule stated in Article 52 (2).

The lack of a treaty rule extending the principle expressed in the second sentence of Article 52 (2) to members of armed forces does not mean that it is necessary to consider as immutable, and even less as an imperative rule of the law of war, the centuries-old opinion that, by virtue of their status, combatants may lawfully be attacked without restriction in any place, at any time and under any circumstances whatsoever, admitting only those exceptions provided for in the rules pertaining to specific situations: PI, Article 37, (prohibition of perfidy), PI, Article 40, (quarter), PI, Article 41, (safeguard of an enemy *hors de combat*) and PI, Article 42 (1), (occupants of aircraft). To declare that it is unlawful, for example, to shower bombs and shells on troops that are completely defeated, encircled or retreating, and in any case practically defenceless, thereby not even affording them the opportunity to surrender, the principle of superfluous injury or unnecessary suffering expressed in HR, Article 23 *e*), and PI, Article 35 (2), or else PI, Article 40, may exceptionally be invoked. In point of fact, the latter rule should not be understood as being strictly limited to the stipulation that “it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis”. Attacks conducted with such a purpose in mind are prohibited by this article whether they have been ordered or are spontaneous and whether the intention of leaving no survivors has been announced to the enemy or not. In that this rule should be seen as an application both of the principle of humanity and of that of superfluous injury or unnecessary suffering,²⁰ our example shows that the possibility

²⁰ For a similar interpretation establishing a connection between Article 35 and the prohibition of refusing quarter expressed in Article 40, see ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987, p. 476, para. 1598.

of extending to combatants the rule stated in the second sentence of Article 52 (2) must be left open.

IV. STATUS AND ROLE OF THE PRINCIPLE OF SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING

The last paragraph of the Declaration of St. Petersburg, in determining the Preamble's status and role, thereby defined the place of this instrument in the system of standards set by the law of war:

"The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity".

The Declaration thus makes clear that "the principles" expressed in the Preamble are not applicable in and of themselves: their application depends on the adoption, by convention, of specific rules pertaining to new types of weapons — or to a certain type of weapon that has existed for years in the arsenals of certain States but has not yet been generally recognized to be unlawful — whose use is deemed to be contrary to the stated "principles". This term, in the plural, may be summed up in what we have called the principle of superfluous injury or unnecessary suffering. The authors of the Declaration assigned it the status and role of a directing principle requiring that the lawfulness of means and (since Article 35 [2]) of methods of warfare shall be judged according to the criterion represented by the principle itself. Such a concept of the principle expressed in 1868 goes beyond that of a "source of inspiration" suggested by Professor Cassese,²¹ whose opinion the ICRC in its Commentary would appear to share.²²

²¹ A. Cassese, "Weapons causing unnecessary suffering. Are they prohibited?" in *Rivista di Diritto Internazionale*, Vol. 48, 1975, pp. 12-42: "a very significant source of inspiration" (p. 37).

²² *Op. cit.*, p. 404. For an interpretation in agreement with ours, see Erich Kussbach, "Internationale Bemühungen um die Beschränkung des Einsatzes bestimmter konventioneller Waffen", in *Oesterreichische Zeitschrift für öffentliches Recht und Völkerrecht*, Vol. 28, 1977, pp. 1-50. The author sees in the principle stated in HR, Article 23 e), a "general regulating principle" ("ein allgemeines Regulativ") and a "juridical principle of the law of war" ("ein Rechtsgrundsatz des Kriegsrechts"), and not merely a moral principle (p. 24).

In spite of the terms used in the quoted paragraph from the Declaration of 1868, it would be impossible to rule out the possibility that the use of a certain means or method of warfare may be prohibited by a customary rule. In such a case, the rule's emergence will be preceded by a period of uncertainty during which the unilateral or multilateral claims that this means or method of warfare is illegal will meet with the denial of the State or States which are in possession of it and intend to preserve it, or whose military doctrine continues to provide for the possibility of resorting to it although, according to its opponents, such a method of warfare is contrary to PI, Article 35 (2). Despite the risk of partiality involved, the opinion of third-party States concerning the disputed means or method of warfare is crucial to the possible formation of a rule prohibiting its use. Such an opinion may be expressed, for example, in the form of a paragraph in the military manual on the law of war issued by a State which judges that the use of a certain means with which the armed forces of one or several third-party States are equipped, or that the possible resort to a certain strategy or tactic used or considered for use by a certain third-party State, are prohibited by PI, Article 35 (2).

The recent military manual on the law of armed conflicts issued by the Federal Republic of Germany proceeds in such a manner. After recalling the ban on using dum-dum bullets (Declaration Concerning Expanding Bullets, which prohibits "the use of bullets which expand or flatten easily in the human body", and was adopted by the First Hague Peace Conference of 1899) as well as the customary prohibition of using small-calibre weapons, paragraph 407 of this manual prohibits the use of a new category of projectiles. These are not referred to by their name but by their specific effects, considered as answering to the definition of superfluous injury or unnecessary suffering. The prohibited projectiles are those "of a nature to burst or deform while penetrating the human body, to tumble early in the human body, or to cause shock waves leading to extensive tissue damage or even a lethal shock". At the end of the paragraph, the authors of the manual mention what they consider to be the formal basis for this prohibition: PI, Article 35 (2).²³

The effects thus succinctly described are those of the small-calibre high-velocity weapons used by the United States army during the Vietnam War. The lawfulness of these weapons was often questioned by experts,

²³ Bundesministerium der Verteidigung, *Humanitäres Völkerrecht in bewaffneten Konflikten. Handbuch*, August 1992. The English translation issued by the ministry is entitled *Humanitarian law in armed conflicts. Manual*.

non-governmental organizations and jurists²⁴ as well as by the United Nations. At the ICRC's invitation, a group of international experts called upon to examine the question of weapons of a nature to cause superfluous injury or unnecessary suffering or have indiscriminate effects studied the medical effects of projectiles of the type referred to in the paragraph quoted from the manual. In the report on these meetings published by the ICRC, the paragraph in which the description of these weapons is summed up concludes with the following statement: "Because of the tendency of high-velocity projectiles to tumble and become deformed in the body, and to set up especially intense hydrodynamic shock-waves, the wounds which they cause may resemble those of dum dum bullets".²⁵ Stressing the purely documentary character in the report, the ICRC observed that "it does not formulate any concrete proposals for the prohibition or limitation of the use of the weapons under consideration, although the ICRC and the experts alike hope that this may one day be possible".²⁶ In the opinion of the German Ministry of Defence, the prohibition of using the weapons described in paragraph 407 of the manual comes within the scope of positive law.

Juridically speaking, this is a unilaterally adopted position. As a result, however, and even if other States do not follow suit, the governments of countries whose armed forces are or later will be equipped with the kind of weapon described in the quoted paragraph will be required to prove that the use of such projectiles is lawful. Although it would not constitute sufficient proof to argue that no treaty rule prohibits the use of the weapons under consideration, this argument nonetheless has a certain

²⁴ See for example Giorgio Malinverni, "Armes conventionnelles modernes et droit international", in *Annuaire suisse de droit international*, Vol. XXX, 1974, pp. 23-54. The article concludes as follows: "(...) high-velocity projectiles obviously belong to the category of weapons causing superfluous injury or unnecessary suffering" (p. 47).

²⁵ ICRC, *Weapons that may cause unnecessary suffering or have indiscriminate effects. Report on the work of experts*, Geneva, 1973, p. 38.

²⁶ *Ibid.*, p. 8. Although the type of weapon under consideration was discussed at the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, the debates did not result in a protocol pertaining to the regulation of this means of warfare. The Conference had to limit itself to adopting a resolution which, recalling that dum dum bullets were prohibited by the Declaration of 1899, requested States to continue research into the special traumatic and ballistic effects of small-calibre weapons and called on governments to show great caution in the perfecting of these weapons. — Concerning another new means of warfare, laser weapons, and the questions they raise from a humanitarian point of view, see Louise Doswald-Beck (ed.), *Blinding weapons. Reports of the meetings of experts convened by the International Committee of the Red Cross on battlefield laser weapons, 1989-1991*, ICRC, Geneva, 1993.

importance in positive law in helping to assess to what degree the respective opinions of those who hold that the use of the disputed means of warfare is lawful or not are accepted by the international community. In this respect, it must be acknowledged that the opinion expressed in the quoted paragraph of the manual belongs to *lex ferenda*.²⁷

The most recent application of the customary principle prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering is Article 3(a), of the statute of the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, adopted by Security Council Resolution 827 of 25 May 1993. Heading the list of violations of the laws or customs of war that come within the Tribunal's competence, Article 3 (a) mentions "[the] employment of poisonous weapons or other weapons calculated to cause unnecessary suffering".

This paragraph gives rise to the following criticism:

Concerning the form. — Between the use of "poisonous weapons" prohibited by HR, Article 23 (a), and the use of weapons of a nature to cause superfluous injury or unnecessary suffering, prohibited by Article 23 e), no relation exists in fact or in law that can justify listing them together as constituting a single violation. While it is to be regretted that the authors of the English version committed the negligence of adopting the restrictive translation of 1907 (made so by its use of the expressions "calculated to cause" and "unnecessary suffering"), it is to be regretted even more that the authors of the French version translated this doubly flawed text back into their own language instead of keeping to the authentic French version of Article 23 e).

²⁷ This is probably the correct way to interpret the cautious opinion of a writer who commented on the above-quoted paragraph in D. Fleck (ed.), *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, C.H. Beck, Munich, 1994.

On this particular point we are in agreement with the opinion of Professor Kalshoven, who does "not share the optimism" of those who "believed that 'unnecessary suffering' and 'indiscriminate effects' provided standards that could simply 'be applied to existing and possible future weapons'. For any such straightforward application, their component parts on the one hand and the characteristics of modern weaponry on the other provide far too many complications and difficulties of interpretation." ("The conventional weapons convention: underlying legal principles", *IRRC*, No. 279, November-December 1990, pp. 510-520 (p. 517).

Concerning the content. — Neither one of these two violations is mentioned in the provisions of the Geneva Conventions or in those of Protocol I, nor are they included in the definition of war crimes provided in Article 6 (b) of the Statute of the International Military Tribunal of Nuremberg. However, neither the article of the Conventions pertaining to grave breaches nor Article 85 of Protocol I claim to define war crimes in an exhaustive manner, and Article 6 (b) of the Statute of the Nuremberg Tribunal itself specifies that it is not all-inclusive. No objection can be raised against making the use of poisonous weapons a violation, that is to say an indictable offence, and indeed the prohibition of such weapons is a well-established rule of customary law. The same may not be said, however, for the prohibition of using “weapons calculated to cause unnecessary suffering”. Although the use of such weapons is termed a violation in the Report of the United Nations Secretary-General containing the draft Statute as subsequently adopted by the Security Council, to term it as such was to ignore the concern expressed in that Report that “the application of the principle *nullum crimen sine lege*” requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise”.²⁸ The terms in which the violation under consideration is formulated are much too general to meet this explicit requirement by the Secretary-General, which derives from the basic conditions laid down by international criminal law and by the domestic criminal law of States governed by the rule of law. In fact, only a very limited number of specific treaty rules meet this requirement, and they are applications of the prohibition stated in HR, Article 23 *e*). The only ones that can actually be cited are the prohibition of using dumdum bullets and the prohibition “in all circumstances [of using] any booby-trap which is designed to cause superfluous injury or unnecessary suffering” set out in Article 6 (2) of Protocol II annexed to the 1980 Convention.

One further point should not be omitted when dealing with the topic under examination. It is important to assert that the principle of superfluous injury or unnecessary suffering is equally applicable to international *and* non-international armed conflicts, with no need to distinguish between conflicts coming within the provisions of Article 3 common to

²⁸ S/25704, p. 9.

the four Geneva Conventions and conflicts having reached the level defined in Article 1 of Protocol II thereto. Such applicability is imperative, we believe, for fundamental reasons of humanity.²⁹

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²⁹ For a similar opinion see the Declaration on the rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts, adopted in 1990 by the Council of the International Institute of Humanitarian Law (*IRRC*, No. 278, Sept.-Oct. 1990, pp. 404-408 [p. 405]). On the applicability of the three Protocols of 1980 to non-international armed conflicts, see also Yves Sandoz, "The question of prohibiting or restricting certain conventional weapons", *IRRC*, No. 279, Nov. - Dec. 1990, pp. 473-476, and Maurice Aubert, "The International Committee of the Red Cross and the problem of excessively injurious or indiscriminate weapons", *ibid.*, pp. 477-497 (pp. 493-494).