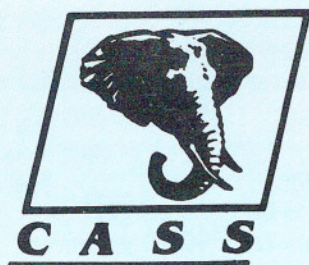

CENTRE FOR ADVANCED STRATEGIC STUDIES



**PROCEEDINGS OF SEMINAR
ON
LAWS OF WAR
9TH JANUARY, 1998**

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SEMINAR

LAWS OF WAR - 09 JANUARY 1998

BACKGROUND

The Law of War has developed as a result of soldier's experience. It fully accepts the concept of military necessity. The first treaty at Geneva in 1864 laid down the treatment of wounded soldiers and the second in 1868 prohibited the use of explosive rifle bullets. Subsequently there was the Hague convention for the protection of cultural property in 1954, the additional protocols to this convention signed in 1977. The first relates to International Armed Conflict and the second to Non International Armed Conflicts.

In the case of armed conflict of an international nature, the following minimum provisions apply. Persons taking no part in hostilities, including members of the armed forces who have laid down their arms and those out of action will be treated humanely. The principles of law of war include themes such as limitation on the use of some weapons. Then, there should be no unnecessary suffering and damage. Also, there should be a distinction between combatants and civilian personnel, military objectives and civilian objectives. The actions taken by combatants should be proportional to the ultimate aim or military necessity.

Role of International Committee of The Red Cross

With a membership of 250 million, 169 Red Cross Societies and 3 Nobel Peace Prizes, the Red Cross Movement is one of the greatest sages of modern times. Its emblem is also the most recognised symbol on earth.

2. Born on the Battlefield of Soferino in 1859, the International Committee of the Red Cross is visible in every corner of the globe where distress, suffering and protection beckon a response.

3. The Red Cross Movement consists of 3 components
 - a. The International Federation - support all National Societies
 - b. The individual Red Cross Societies in every country
 - c. The ICRC - The independent founding body which is based in Geneva and promotes the Geneva Conventions.

4. The Principal Roles of the ICRC are Detection, Protection, Tracing, Medical, Relief, Water and Sanitation, Dissemination, Mine awareness.

OPENING REMARKS :

AIR MARSHAL (RETD) S. KULKARNI

On behalf of the Centre For Advanced Strategic Studies and the Institute of Advanced Legal Studies, it gives me a great pleasure to welcome you all to this morning's seminar on "Laws of War".

We have two distinguished speakers with us this morning. Firstly, Air Vice Marshal Gupta and secondly Rear Admiral Malhotra.

Briefly introducing the speakers to you - Air Marshal Gupta joined the Indian Air Force as a Fighter Pilot in 1960 and he retired as the Assistant Director (Stores) at the National Defence College in 1995. He has a long and distinguished career. He has taken part in the Battle of Longowal. Later, he was also on the Staff of the Research Planning Staff as also he was a senior researcher in the Institute of Defence Studies and Analyses. After retirement, he is a consultant to the International Committee of Red Cross, and in that very capacity he is here today.

Rear Admiral Malhotra also joined services in 1960. He has had a distinguished career as a Communicator. He retired as the Assistant Chief of the Naval Staff (Operations) and to his credit is an excellent book which was released by the President of India in 1992. That book is actually a must reading for most of naval officers.

Both of them have a distinguished career. Admiral Malhotra, is also now a Consultant with the International Committee of Red Cross. This morning's seminar will be chaired by the Director of the Institute of Advanced Legal Studies, Professor Satyaranjan Sathe.

CHAIRMAN'S OPENING REMARKS :

PROF. SATYARANJAN SATHE

War has always been an event which has frightened people. It has caused untold sufferings to people. The Second World War, I remember since I was a small school boy. World War saw for the first time a holocaust and it saw atrocities on humanity on an unprecedented level. In one single day, two cities of a country vanished. So we have seen what war is.

Right since the first world war, people have started looking to this that if at all war was inevitable, let us limit its hazardous effects. At least its effects should not affect those who are not combatants. So there was first thought of distinguishing combatants from non-combatants and internally also among combatants, once people were taken as prisoners, how they should be treated. What kind of justice should be given to them.

All these thoughts have come and from that have emanated a number of Conventions. Two conventions in fact emanated. After the Second World War, the United Nations itself said that war is outlawed, that nobody can take recourse to war. But it made an exception that you can always use force in self-defence and then what is self-defence and what is aggression? It is ultimately to be interpreted by every country and usually the powerful country interpreted it in its own way. So an aggressor is never an aggressor because he has power.

Ultimately, international relations are governed by power. The debate continues. And then a new phenomenon comes. That was universal declaration of human rights in 1948 which talked of human rights and today we are talking about human rights and army is used in various situations. We use them against riots, against communal riots, we use them against earthquakes, we use them against floods. In all these emergencies military power is used. But sometimes we send them abroad for peace keeping in other countries and in all these cases and sometimes now we are using them to combat terrorism.

And in all these situations certain problems keep cropping up - problems of human rights violations. This line dividing the use of legitimate power and encroachment on people's dignity, people's liberty is very thin and is often blurred when situations are so tense. Therefore all these laws are required to be reiterated from time to time and redefined also from time to time as situations go on changing and that is exactly why we have collected here this morning.

Let us look back to what rights we had and to what extent they are adequate enough for our purpose and then let us also think about what could be done to make human rights less vulnerable. This is the theme and I think we have two very learned and very well experienced persons for this morning's session. So I will not stand between you and them any longer.

I once again welcome you, and request Admiral Malhotra to address.

Thank you.

SESSION I

LAWS OF WAR

Chairman : Prof Satyaranjan Sathe

Main Speakers : Rear Admiral (Retd) Vijay Malhotra

: Air Vice Marshal (Retd) N.L. Gupta

PAPER PRESENTED BY VIJAY MALHOTRA

Professor Sathe, Air Marshal Kulkarni, Commandant NDA, Ladies & Gentlemen.

I have been asked to talk to you on the origin of the ICRC, and the evolution of humanitarian law. But looking at such a distinguished audience, I will take it to a higher plane and flow into the implications on foreign policies and on security issues of international humanitarian law, which is a very innocuous sounding term. A very handsome term, a very noble term, but has the cold blooded reality of hard politics behind it.

So let us start off from the beginning by pointing out to you and you will agree here that no symbol, no plaque, no logo on this planet is better known than the sign of Red Cross. Like the Swiss banking system it is shrouded in secrecy. Very few people know about the mother of this organisation, the International Committee of the Red Cross, Mother of all Red Cross Societies throughout the world, founder of international humanitarian law, co-promoter of the Geneva and the Hague Conventions which protect combatants and non-combatants, winner of three Nobel prizes, including the first one, which Pandit Nehru described when he signed Geneva Convention on behalf of India in 1950 as the, 'Supreme Humanitarian Achievements of the 19th and 20th Centuries'.

As a Consultant of the ICRC, the one single fact that comes to my mind, is that there is a different ethos in terms of perception of war in the West i.e. Europe, in the East, i.e. China, Japan, Manchuria, and

Korea and in the South East, i.e. Philippines, Burma. All these countries have been ravaged by war in its entirety.

India has been very fortunate, in that in the past four hundred years this country has not been bloodied by war in terms of entire cities being bombed or invaders committing atrocities. I think, the last time India was invaded by a ruthless guy was Nadirshah who put Delhi to the sword. After that, the armed forces of India have been engaged in war, but it is a one to one I mean the armed forces of India have engaged the armed forces of Pakistan on the border. But neither country has undergone saturated bombings, invasion and all the horrors that are associated with war. And that is why international humanitarian law has not got that firm foothold, that burning desire to curb the atrocities of war, as it is evident in Europe.

Equally, notwithstanding these two different cultures, the armed forces of India and Pakistan received very high marks in Western Capitals for the observance of IHL even though it was not taught formally because of our culture. Basically IHL is common-sense. So in all the conflicts between India and Pakistan there have been no exceptional violations, if any at all, regarding bombing of schools, ambulances, hospitals, raping of women, looting, shooting. All these atrocities which are visited upon the harmless non-combatants have not occurred. Even in laying of mines, which is such a hot topic today, India scores high points, as also Pakistan. All the mines laid, after each encounter were removed. And therefore in the global language, India is not a mine afflicted country

So much so for a country where IHL is not taught and where IHL is not as relevant as it should be. On the other hand, we have Yugoslavia in Europe, where in spite of all the efforts and assistance from IHL, we have seen for ourselves the bloody effects of these things and atrocities of mass executions, mass burials, people disappearing etc. So what is it that we all strive for. We strive for an insurance and for the armed forces particularly, I would like to say that today if we go to war we are not particularly frightened of being captured. Because reasonably there is a thing called international humanitarian law to which all countries are signatories to, and reasonably there is every chance of being treated well, giving you food, get letters from

home, get the food packages from your wife. And why is it taken for granted. It is because of the ICRC and the global conventions that the ICRC has espoused and brought to bear.

It all started on the 24th of June 1859 in the Battle of Sol Korino, the Franco Prussian War with four hundred thousand troops fighting it out in one day. Can you imagine eighty thousand horses, the charge, of the horse artillery ? How nicely you can see Princess Diana's coffin drawn by cortage of the horse artillery. What was the horse artillery ? The horse artillery was a team of twelve horses which galloped into enemy ranks regardless of muskets, spears, and trampled upon the enemy forces, opponents soldiers. On the 24th of June 1859, in those days, that is barely 130 years ago, it was possible for armies to fight each other without the civilians coming in. As Prof. Sathe said, that event, that horrible event took place a little later because of technological developments. But in those days armies fought. There is the Mahabharat as well. it was a sight. One could and you can watch two armies fight.

Along came a Swiss gentleman on a business tour - Noris Donald - and he was on a business trip when he stumbled upon the battle and was shocked to see that there were more veterinary doctors available for treating the horses than medical doctors to attend to the wounded. There were forty thousand wounded and killed, in the space of one afternoon. Noris Donald was so moved by this that he took all efforts to move the wounded to the nearby churches and nearby villages and render them whatever help he could with the help of the local population.

Thereafter, when he came back to Geneva, he wrote a book called, 'A Memory of Sol Korino', and he sent a copy of this book to the monarchs and political leaders of Europe. Now when this book was seen and read, there was a deep sense of revulsion and a single brilliant idea that Noris Donald espoused in this book was that in times of peace we must have societies to aid and render assistance to the wounded of both sides involved.

This was his single vision and this was the birth of Red Cross. Today, Gentlemen, there are 250 million members of the Red Cross

societies throughout the world. I should say Red Cross and Red Crescent Societies, I will come to that a little later. Throughout the world, it is, the largest movement that is seen.

So what happened next. After his book was read, five Swiss gentlemen got together and invited sixteen States for a conference and in this conference they got together in 1864 and formalised a set of rules which was the pre-cursor of the Geneva Conventions and the International Humanitarian Law as we know it today.

This was the first meeting of five Swiss gentlemen. The ICRC today remains totally neutral, private and independent agency. You can call it the largest NGO in the world, which has a budget of 750 million dollars and every country is subscribing to its treasury. So that single man, Oni Donald, with that one idea, gave rise to this amazing movement which protects you in uniform and protects us out of uniform from the horrors of war.

And as time has gone by, IHL has gained ever more importance and ever more leverage in the councils of world and foreign policies. So when it first started, IHL was nothing except a set of rules to assist the sick and wounded and protection-combatants in times of war. Very simple, very straight forward, predicated by the circumstances of those times, that bloody battle, no doctors plenty of waste and International Humanitarian Law came into being. Well, it happened to be a law in those days. And today International Humanitarian Law is a cornerstone of the foreign policies of many countries, especially the West with a totally different set of rules.

When the five gentlemen got together and established the first Geneva convention, it was so widely applauded as so noble and so it got such good marks from everybody that they had to decide on a plaque, a symbol. So they decided that the best thing they could do was to reverse the Swiss plaque. The Swiss plaque is the opposite of this white cross with red background. So the Red Cross took the symbol of a red cross on a white background.

However, Turkey objected when they were fighting the Russians in 1879 and they said we do not like this because it is a mask of

Christianity and therefore the Red Crescent Society came into being. I did not know this when I left the service that the Red Cross is not a recognised symbol in Islamic countries. The Islamic red crosses have the Red Crescent. And this symbol of Red Cross and the Red Crescent is the symbol of the Federation of Red Cross and Red Crescent Society which meet every four years in an internationally diplomatic conference in Geneva and thrashes out the laws of war.

I will now, Ladies and Gentlemen, come straight to the point and focus on the significance of the ICRC and International Humanitarian Law on our daily life today, and on the international and security issues that affect each country. So I go back to 1864 when the First Geneva Convention was founded and the first international humanitarian law definition was expressed and thereafter describe to you the snow balling effects IHL has had on world affairs.

If you all remember, the 19th Century, late 19th century was an era of global colonisation, where the European powers were colonising the world. Have you all heard of the famous statement that the beginning of the British Empire commenced in Oxford and Cambridge. It is so. Because the Universities of Oxford and Cambridge gave rise and imparted instructions in science and technology with which the British armies and the other European armies conquered the world. And whilst these European powers were colonising the world, they were also engaged in bitter fights amongst themselves. There were wars wrecking Europe and as Science and Technology increased, as weapons increased in their velocities and brutalities, the international humanitarian law came to assume a dynamic role to control the casualties and the other effects of warfare on civilians. Because it was now spreading. Air warfare came into being. Submarines came into being, faster ships with torpedoes, cities were bombed.

So all this started giving a sense of shock and revulsion and there was an awakening amongst leaders of the world that this must be curbed. The ICRC shares protocols of conventions of momentous importance to the soldiers and sailors facing the frontline.

You know we do not have much memories of this Daw Russia. But Russia was a very powerful and a very enlightened country in the

19th Century and the Daw of Russia was the first gentleman to do something in this direction. His scientists had invented explosive project sites under forty grams of weight when the daw being so fired. Without going to war, and without being put into action, he banged. The first and the only altruistic act in the history of warfare. Where a king without pressure from anybody else to render an advantage his scientists had given him after seeing what this bullet did to a human being.

Now, I do not know who the human beings were. But this is what happened. After that, the international humanitarian law started spreading its tentacles and started encompassing every aspect of warfare as and when it developed from the Science Manuals. So we had a declaration concerning banning bullets, convention relating to submarine control, contact mines, control on mines, for that innocent passing ships were affected, gas dictated warfare.

This was not agreed to by the British and by the Americans and they did not sign the conventions. After world war I, the horrors of it you all you know, must have caused, they did not approve of this India also is not signing it but 125 countries have signed it. Pressure built up and British and American Governments signed.

Then the next protocol was on assignment like nasty explosives like those that were not seen and therefore wounded soldiers were denied the privilege of X-Ray; boobie traps after the Vietnam war. There were conventions banning boobie traps because that affected so many non-combatants as well. and this of course is the most famous one. Protocols on restricting incendiary weapons.

You all remember that young girl who was the victim of a napalm attack and which came in the magazine of Time. A thirteen year old girl ruined by napalm attack, naked. That lady now is with the ICRC, as an ambassador for banning inhuman weapons and devices.

This was a very famous protocol passed on that young girl which got worldwide coverage through the media. Gentlemen, protocols on blinding laser weapons - Vienna. Again a weapon system which has

been devised by the West and banned before it could be used. And of course I do not talk to you about the autobath process in the anti personal mines issue, which is very much in the media today.

Behind all this, Gentlemen, today is a little known fact that if you produce a weapon, it would be subject to the examination of the UN Security Commission, to see whether there are any barbaric effects or any effects which violate international humanitarian laws.

Now what is the ICRC doing in all this. The ICRC has been requested by the international community to help them in disseminating IHL and that is why, Ladies & Gentlemen, Air Marshal Gupta and I am here today. The ICRC has instituted a worldwide organisation where the red cross indicate, where the delegates are being sent. They train retired officers because they feel that that is the best approach and it is for us to lecture to the armed forces and help the armed forces, to inculcate a consciousness of IHL till such time as the expertise is gained for the armed forces to commence succeeding programmes themselves.

You can see the famous case of Peru where the Japanese ambassador and his guests were held hostage by the tookamary . That was the ICRC which, I hope, all of you are knowing that America is conspicuous by its absence on the IHL. So I won't go into any elaborate sanctions against the American people. They know.

Now finally, Gentlemen, I had a discussion with the Indian foreign secretary a couple of weeks ago and he outlined his perception of IHL, which I share with you. And he said that high on the agenda of the Western Governments is IHL. Now today IHL and human rights have become very very close, well mixed up. But actually there is a sharp dividing line between the two.

IHL is a service activity. It has got clearly marked do's and dont's. You cannot torture a prisoner, you cannot shoot a prisoner of war, you cannot starve a population. There are clear cut rules to which countries have signed in the four Geneva conventions.

Human rights law is a bit different. The human rights is a function of each Governments in so far as to what each Government

is willing to grant its citizens. So the human rights in actual terms has nothing to do with the IHL.

IHL is armed forces activity, a soldier's activity. And as you know human rights vary from country to country. I mean China once had a set of human rights. India calls it a set of human rights, but it is in the Constitution.

And it is a political activity as to what the Government wants to grant its citizens, in terms of right of speech, right of expression, right of liberty. You know all the human rights which we hear about. But because of the movement of IHL all that has become confused. Because there is a school of thought which says IHL is nothing but human rights in war. But that is not correct because in times of emergency, a Government is authorised to suspend certain rights and therefore there is a dividing line. But it is not on my mandate to talk about it today. But they are legal. I thought I would just like to mention that and also to our friends in the armed forces that if they think that lectures on IHL has got anything to do with human rights, nothing could be further from the truth. IHL is a service activity to which every country has signed and the rules of the game are laid down.

Now the second point that as we have said before the onset of conventional wars as we have known them, is more or less receding. IHL is becoming increasingly obsolete. But what has happened to make the problem more difficult is that as the conventional wars have receded, we now have proxy wars, insurgencies, militant activities and such armed conflict in the world.. You can name it as you like, these have come to the centre stage of armed conflict in the world.

And here we have a situation that IHL because of their national treaty by various Governments. It is binding on the armed forces. But it is not binding on the opponents. IHL is not binding on the LTTE. IHL is not binding on the militants in Kashmir. So this is the dichotomy that has developed and is naturally causing so much concern because there is a degree of resentment and a degree of resistance to the observance of IHL by uniform forces of the States when dealing with irregular forces like militants, terrorists and others. So this has come

very much into vogue now. And is naturally engaging the attention of Geneva and other places where IHL is promoting.

And finally, Gentlemen, I give you one good news in the whole deal is the fact that India and Pakistan have signed a pact that they will not attack each others nuclear stations. Damage caused to a civilian population has to be taken into account before you attack and based on this tenet of IHL, these two countries have got together like many others and have signed a non-attack pact on each others' places.

The final thing I like to say on international humanitarian law is that in the Americans or British diplomacy or in fact the western diplomacy covering international security issues IHL is very much a high factor. Human rights law is very high factor. Why it is so? They are not concerned whether your child goes to school or somebody is begging on the road or it is not given to the horrors of slums. No, the American theory as outlined by the Secretary of Defence in promoting IHL is in their logic, in their strategy. They have clear cut perception operatives and that is promote human rights laws. IHL, human rights, fundamental rights, promote IHL. Because in promoting IHL and human rights, you are promoting democracy. The more accountable a Government, the higher the human rights in that society. The less accountable a Government, or autocratic a government like Saudi Arabia or China or Korea, the less the human rights in that society. And in their perception and their studies, they have concluded that democratic countries are far less likely to go to war than autocratic countries, which of course does not prevent them from dealing with the devil.

And you know they call it constructive engagement when they talk to South East and their great allies. Anyway I do not want to go into the political nuances because the ICRC is a non-political organisation and therefore anything political is outside it. But I leave it to you to work out for yourself.

With that gentlemen, I finish my part of IHL and how it started, the origin of the ICRC, how it evolved, what role it is playing in international relations and in point of fact right now India's quest for a UN seat has having been lost on one of the consideration being non-

observance of IHL even though India has impeccable record as far as human rights are concerned. Now the Islamic countries Pakistan, they came immediately and Pakistan is trying to project that how can India aspire to become a member of the Security Council when they do not observe human rights in Kashmir. So how can it be on the governing Board of the global body like the UN where human rights is the first tenet of observance.

In other words you cannot violate it and yet be a member of the Board and that is the argument they use very effectively amongst the Islamic force and among the countries to block India's admission. In fact there are other considerations as well. But my aim was to focus to you how the IHL, as observed plays such a key role in the international security perceptions.

In the second part of this talk, Air Vice Marshal Gupta will talk to you on a different scale and describe to you what the IHL actually is. But what area Gupta will not be able to cover in the time available to him is that IHL covers a very wide canvas which I have tried to touch upon and in so far as the Navy is concerned, IHL is dictated and brought about a technical document for army and navy. It may not involve civilians. It is only for air force and army combined which comes into contact with shifting targets but in the navy, because of the neutral status and neutrality in the ocean that the international highways are common.

IHL has brought about the technical document which renders some designs of torpedoes and about the mines which can be used to whom you can attack, what are the various objectives, what are the rights of different States and what are the rights of offshore nations. So it is a different bargain brought out to us and therefore I take it because when Gupta talks to you about international humanitarian laws there are facets to it which go much further than the mere definition and the nuts and bolts of the subject.

Thank you.

**PAPER PRESENTED BY
AIR VICE MARSHAL (RETD.) N. L. GUPTA**

Introduction : Terminology Familiarisation

Let us cover some of the terms we will see repeated over and over again.

Armed Forces

We know what these are. Under Hague and Geneva Law we have no difficulty in recognising the definition. The armed forces of a state consist of :-

- All organised units and personnel which are under a Command responsible for the behaviour of its subordinates.
- They must be subject to an internal disciplinary system which enforces compliance with the law of war.
- How does an armed force comply with these rules. Well quite simply. It has a clear Command Structure. It has Manuals on military law, it has good Leadership and Training. By the way, a small point, children under the age of 15 by law should not be recruited into any armed force.

Combatants

These are members of an armed force except medical personnel and religious personnel. As a member of the armed forces they are permitted by the law of war to take direct part in an armed conflict. He is then protected by the law, e.g. POW status whereas others may not.

They must distinguish themselves from the civilian population by Uniforms, insignia etc.

In some exceptional circumstances uniforms might not be worn. eg Sri Lanka, Afghanistan. They are however still combatants as long as they carry their arms openly during military engagements. i.e., during an attack they are clearly visible as armed men, and are not

trying to disguise themselves as civilians. They should also be bound by the Law of War.

Spies

The Law clearly tells us who these people are. They are persons who acting clandestinely or under false pretences, gather information in your territory with the purpose of giving it to their side. Their protection under the law as you might expect is limited. If captured, they have no rights as POW. They do have the basic right of a fair trial.

Lets not get confused with our own forces who might be tasked with reconnaissance or similar observation activities deep in enemy territory. Special forces for example. They will be wearing uniform and in no way should they be regarded as spies. If captured, they of course have POW status.

Mercenaries

These people fight simply for money or perhaps excitement. They are not a member of the armed forces. They are not regarded by the Law as being combatants i.e. not allowed to take part in armed conflict. Equally if captured they do not have POW status. Like spies, they should be tried and dealt with.

Military Non Combatants

These are essentially your medical, religious personnel. They have a very special status under the Law. As you know they do not actually fight although medics at least are armed for self defence. They are protected from attack under the Geneva Conventions, as are hospitals and medical transport.

This protection must not be abused, otherwise the immunity disappears eg Using their protected status to shield or disguise military operations. Your medics and religious personnel if captured are not POW. They will continue to carry out their function administering to

your people in POW camps. They should be protected and allowed to get on with their job.

Some other Non Combatants

- Accredited War Correspondents
- Supply Contractors
- Members of Labour Units

If they are authorised and have a proper ID card then they are regarded as non Combatants and receive POW status if captured.

Civilians. Self evident

Medical Services

The Law of war gives the same status to military and civilian medical service, as well as to wounded, sick and shipwrecked. Military medical units and personnel may deal with civilian as well as their own wounded and vice versa.

The medical services use the distinctive sign of the Red Cross or [Red Crescent]. They carry an arm band and are issued ID card. On buildings the sign must be recognisable so it is made as big and as visible as the tactical situation permits. At night, it should be illuminated.

Religious Personnel

Religious personnel attached to the armed forces have protected status. They should not be attacked. They should also wear arm bands with a red cross and carry special ID card. If captured they may be retained to meet the spiritual need of your POW . They should have direct access to POW in detachments outside the camp. they are not POW.

Military Objectives

These are:

The armed forces of the opponent except their medical and religious personnel. The establishments, buildings, and position where the opponent or his material is located.

Other locations or objects which nature or location make an effective contribution to the overall mission. Their destruction, capture or neutralisation would offer a distinct military advantage. e.g. a Telecon Centre, Power Lines, Bridge.

A military objective remains a military objective even if civilian persons are in it. They share the danger of being there.

Cultural Property

We are talking about property which is of great value to you and your enemy. There are a number of categories:

High Cultural Value. These are obvious historic monuments, works of art or places of worship which make up our heritage as human beings. The Taj Mahal, The Eiffel Tower, Pyramids.

They enjoy full protection under the Law Of War. They should never be attacked or destroyed.

General Protection

Again an object or objects of great importance to a nation and its people perhaps not quite so recognisable to a soldier as the Taj Mahal. Monuments, Archaeological sites, large museums or libraries.

The parties to a war should respect such property, avoid damage to it and not put it in jeopardy by improper use eg military purposes.

Only if the site is misused or in the case of unavoidable military necessity should its protection cease.

To assist recognition such property should be marked as follows :

Special Protection

This as the name implies is a higher level of protection. The parties may move important cultural objects to shelters, there may be some centres containing cultural objects which cannot be moved. These permanent or temporary centres must not be used for military purposes and they must be situated well away from any likely military objective eg an industrial area, an airport or a broadcasting station. Such sites should be notified in times of peace, to a world body tasked with registering all property special protection UNESCO.

This is a more perfect form of protection than that granted under general protection. As such the law restricts the possibility of placing objects or locations under special protection to a limited number of sites.

These sites are to be indicated by a sign as laid down.

As to your obligations towards such sites the following should be adopted:

Appraise the men of the meaning of the two signs. Avoid damaging them if at all possible. If the property is misused for military purposes it can lose its immunity under the law. A part from this sort of obvious misuse its immunity can only be withdrawn in exceptional circumstances of unavoidable military necessity. This decision should only be made by an officer commanding a force the equivalent of a division in size or larger because of the importance of these special sites.

Works Containing Dangerous Forces

By these we mean such things as Dams, Nuclear power plants, Chemical works. To attack such places may result in the release of dangerous forces which could be catastrophic not only to the civilian population but to own personnel.

The destruction or attack of such sites should be avoided unless absolutely necessary.

The sites can of course be defended, but the defensive armament of such sites must be limited to that exact purpose.

Such sites, if not obvious, already can be marked with the sign as laid down.

Protective Zones

The Law permits various zones to be set up for the protection of people and property from hostilities. They include hospital, safety, neutralised and demilitarised zones and non defended localities. Basically the idea is that the two sides will agree on the establishment of one or more of these places and once agreed are duty bound to respect them.

Hospital Zones/Safety Zones and Localities

The Geneva conventions state that such zones can be set up or at least planned for in peacetime. They provide safety areas for sick and wounded, the old and children.

Upon the outbreak of hostilities these zones are notified to the enemy and they notify you of theirs. These mutual agreements include details of location and how they can be recognised. It is in both parties interests to respect these zones.

Sri Lanka Hospital Zone Jaffna.

Demilitarized Zones

These are well defended protected zones regulated by clear agreements between the two parties, verbally or in writing. They are open to all non combatants.

The agreement can be made at any time. Sometimes towards the end of hostilities e.g., Korea, UN Buffer Zone Cyprus.

Both parties agree that all combatants, mobile weapons and equipment must be evacuated.

That no further use is made of the remaining fixed military installations.

That the population and authorities do not commit any hostile acts That any activity linked to the military, ceases.

Non Defended Localities

Another option. You or the enemy declare an area or town, village as undefended. Normally an improvised protection measure. Perhaps to save lives or infrastructure. It is open to occupation by you. Both customary and Hague law state that undefended localities open to occupation should not be bombarded.

They are defence less areas you can walk in and take them over. Can be established through a simple declaration and notification. No need for a formal agreement although always better.

There are other flexible options in terms of protected zones. e.g., neutralised zone. An emergency hospital or safety zones. We have heard of protection zones in Bosnia. And weapons exclusion zones. Total exclusion zone Falklands.

The concept is the same. Declaration, agreement and respect. Aimed zones. River lines, roads or even flags for smaller zones.

It goes without saying that the armed forces must have given precise guidelines and orders on how to deal with and respect such zones.

Prisoners of War (POW)

The term applies only to captured combatants in International Armed Conflict. The rules are all contained in the 3rd Geneva Convention.

Combatants who are captured in other types of conflict whilst not POWS are entitled to the basic guarantees contained in Article 3 common to all the conventions (and article 4 & 6 of additional Protocol 2.)

Customary Law dictates that POW are the prisoners of the state, not the unit or individual who captured them.

Law of War : Historical Background

What is the law of war ? It was born on the battlefield. It has been shaped and gradually moulded by our experiences as human beings. It is not Eastern law or Western law. It is very much soldiers' law moulded by our forefathers' sweat and blood on the field of battle. As such, I will not be discussing legal jargon or point of law. Rather, I will be discussing down to earth practical rules, or codes of conduct which any soldier can, and indeed must understand. The law of war is so rich in tradition and the customs of mankind that no lawyer could possibly confuse or complicate it. Soldiering is straightforward. The law of war is also simple and straightforward.

So in reality the law of war is as old as war itself and war is as old as life on earth. Even in the distant past, military leaders quite often ordered their troops to spare the lives of captured enemies, to treat them well and to spare the civilian population. Often on the termination of hostilities the warring parties agreed to exchange the prisoners they held. Over time and similar practices gradually developed into a body of customary rules governing the conduct of war.

Our own Indian history is rich in this customary Law of War. The Mahabharat and Ramayan are of considerable importance for humanitarian law because of the references to the precepts of war, the means of warfare, and the treatment of combatants and non combatants. They bear a remarkable resemblance to the modern concepts enunciated in the Geneva conventions.

Because the law of war has developed as a result of soldiers' experience, it in one way hinders actions on the battlefield. It fully

accepts the concept of Military Necessity. In no area does it conflict with the Principles of War, concentration of force, surprise etc. What it does do however, is remind a soldier and his commander that there are certain minimum standards of behaviour in war, which if sensibly applied, can and will alleviate the suffering of the victims affected by the fighting. There is nobility in fighting and possibly dying for your country.

There is equal nobility and honour in showing humanity and compassion to your defeated foe, or the innocent civilians caught up in battle. The law of war explains how this can and should be achieved. To be more precise, it has been to protect in times of armed conflict persons who do not take part or who have ceased to take part in hostilities like civilians, medical and para medical personnel or religious personnel, combatants who have stopped fighting, because they are either wounded or sick and have been captured or surrendered and defenceless.

The development of the Law of War

I now want to briefly explain how this law of war has developed up to the present time. I have explained its customary and traditional nature. This worked well in the past, but gradually armed conflicts became more and more complex.

Internal conflicts between neighbors developed into international conflicts between countries. Technical developments in weapons continued to advance and their destructive power, their velocity and range have continued to grow at a remarkable pace, star wars technology, laser weapons etc.

Only a hundred years ago, fighting took place almost exclusively between soldiers and did not affect civilians, except a very few who had the misfortune to be near a battlefield or were submitted to a siege. But since then, and especially since the Second World War, civilian casualties have increasingly outnumbered military and reached the frightening proportion of one to ten or even more in some conflicts.

The world body had to react to its new circumstances. The treaty making process for the rules of warfare began in the 1860s when on

two separate occasions an international conference was held to conclude treaties, each dealing with a very specific aspect of the law of war.

The first held in Geneva in 1884, laid down rules for the treatment of Wounded Soldiers on the battlefield, and the second in St Petersburg in 1868 prohibited the use of Explosive Rifle Bullets. These two international conferences were the starting point of the codification of the law of war in modern times.

The process has been a dynamic one and continues even today. There are three main strands to the Law Of War. Geneva, Hague and mixed law. The former simply named after the cities in which the treaties were drawn up. Let us take a brief look at each.

Geneva Type Law

These comprise the four Geneva Conventions drawn up in 1949. India ratified these conventions in 1950. They deal with the protection of the victims of war. The first deals with the protection of wounded and sick on land, the second with the protection of wounded and sick shipwrecked at sea, the third with the treatment of prisoners of war, and the fourth with the protection of civilians in times of war.

The Hague Type Law

Very much a soldiers' law, it deals with the conduct of hostilities especially the means and methods of combat. In particular it covers conduct of combat and the concept of occupation and neutrality. The third one deals with various treaties relating to specific weapons. e.g. explosive projectiles, expanding bullets, poison and poison weapons, gases and bacteriological weapons, booby traps, mines and other devices. All good practical laws.

Mixed Type Law

This whole business of the Law of War was dynamic. It is definitely not based on a set of old dusty books which nobody is supposed to read. The mixed type law is really the newest law. It attempts again perhaps under the principle of Simplicity to bring

together the Geneva Hague laws and update them. There is for example:

The Hague Convention for the protection of cultural property of 1954. This relates to international armed conflict.

The additional protocols to the Geneva Conventions signed in 1977. This relates to non-international conflicts.

The process continued. In 1980, under the auspices of the UN a new convention was adopted. This prohibited or rested the use of certain conventional weapons which were deemed to be excessively injurious or to have indiscriminate effects:

- Weapons that produce fragments in the human body that cannot be detected by X-Ray, plastic for example.
- It condemned the indiscriminate use of mines and booby traps against civilian population. It forbids, for example the placing of booby traps in apparently harmless objects, included in the list are childrens toys. The protocol requires the recording of the location of land mines with the purpose of protecting the civilian population.

It made a great step forward by restricting use of incendiary weapons. It prohibited their use against civilians, forest and other types of plant cover as long as they are not used to conceal combatants or military objectives.

We have nearly finished with the Law as it stands today. I would just like to emphasise two points of detail.

Only a few provisions of the Law relate directly to non international armed conflict. Perhaps the most important is Article 3 common to all of the Geneva conventions. It states:

In the case of armed, conflict not of an international character, occurring in ones territory, the following minimum provisions are Bound to apply:

That persons taking no active part in hostilities, including members of the armed forces who laid down their arms and those out of action because of sickness, wounds, detention or any other cause shall in all circumstances be treated humanely, without any Adverse Distinction founded on Race, Colour, or Faith, Sex, Birth or Wealth, or any similar criteria. To this end, the following acts are and shall remain prohibited at any time, and in any place, whatsoever:

- Violence to Life and Person. In particular Murder, Mutilation, Cruel Treatment and Torture.
- The taking of Hostages.
- Outrages upon Personal Dignity. In particular Humiliating and Degrading Treatment.
- Sentences and Execution without Proper Trial. In Addition
- The wounded and sick shall be collected and cared for.
- Humanitarian organisations such as the ICRC may offer their services in the conflict.

So a very important mini convention, within the conventions which sets out the minimum rules which must be applied by all parties to non international armed conflict.

Finally let us end on the make up of the law where it all began, that is with customary law. In cases not covered by treaty law, civilians and combatants remain under the protection and authority of international law derived from a nation's established custom, the principles of humanity and the dictates of public conscience.

The Basic Principles

The basic principles of the Law of War are sensible. You can see in them the realities of war, and perhaps most important of all they do not include anything that a reasonably minded soldier could not apply or at least try his best to apply in battle. You will see the following themes or principles running throughout the Law Of War.

- The First Principle Is Limitation.

- Your right to choose means and methods of warfare or injuring your enemy is not unlimited. Restrictions on certain types of Bullets, Incendiary Weapons, Poisoned Weapons, Gases.
- Unnecessary Suffering and Damage. Do not create unnecessary suffering and damage if it is not required in the process of overpowering your enemy. Distinction between Military and Civilian.
- At all times you should make a distinction between Combatants and Civilian Personnel ; and Military Objectives and Civilian Objectives.
- Constant care must be taken to spare the civilian population and civilian property.

Proportionality

Your actions as an individual soldier, or commander Must Be Proportionate to your ultimate aim or mission.

Excessive force resulting in disproportionate civilian casualties, and collateral damage is quite clearly against the principles of the Law of War. Here we get down to some basic military requirements particularly from commanders.

To avoid breaking this principle requires thought and effort. It might be easy to destroy a whole town or village with its hospitals, religious centres and civilian population. It is more difficult to carefully plan a 2 or 3 phase operation to isolate and destroy your enemy and limit additional damage.

Good planning and clear Rules of Engagement are required to stay within the Law. This is, after all, only a product of good training and professionalism.

It is also very sensible not to waste your own lives and ammunition in disproportionate actions.

Military Necessity

Military necessity is an important principle. It accepts the realities of War, and allows whatever reasonable force is necessary to make the enemy submit.

It is not a let out clause nor an excuse for sloppy planning or leadership. But it does protect the good commander and it does allow him to achieve his mission against his enemy. The other principles continue to apply, but there is nothing in the law which ties a commanders hands, if he can reasonably claim that it was of military necessity to carry out such and such an action.

You are attacking a position held by determined enemy. They continue to fight to the last man. You are forced to kill them all. You were entirely justified in your actions. What you did was of military necessity. It was clearly within your orders and your battle plan.

A hospital is clearly being used as a strong defensive position in a town. You are being fired on by enemy from this building. It immediately loses its protection under the rules of war. It is of imperative military necessity that you neutralise it. Entirely justified.

The Law of War Versus the Realities of Battle

Let us just sum up by seeing if anything I have said detracts from your task in battle or military necessity in general. I cannot bring to your attention anything in the Laws of War that asks you as a military commander to implement rules that are impossibly difficult. Remember the laws came from the experiences of soldiers anyway.

All that the Law asks you to do is to Balance as sensibly as possible the Military and Humanitarian factors prevailing at the time you make a decision.

If it is necessary from a military point of view to carry out a particular action just make sure that the action is in a manner and on a scale that is proportionate to the direct military advantage expected from the operation.

The sceptical might say that war is by its very nature beyond the control of law. There is war because Law has broken down and so there are no rules any more. Its now a match without referees so lets go for! But while humanity and military expediency might seem opposing forces they are not always so.

The threat of retaliation from an opponent if the rules of war are broken constitutes a good reason for restraint. Furthermore, if the bitterness caused by inhuman or brutal behaviour lingers on it will slow up any peace process. clemency, is often in the interest of the victor as much as to the benefit of the vanquished.

For all their apparent incompatibility, I hope you can see that there is an important partnership sometimes fragile between humanity and war. The partnership is kept together by Good, Well Trained, Professional and Motivated soldiers, who know, and, wherever possible apply the rules of war.



CHAIRMANS CONCLUDING ADDRESS

Professor Satyaranjan Sathe

Ladies & Gentlemen.

We are coming to the concluding part of this very interesting and thought provoking seminar, which we have had this morning.

As a lawyer I can say that I don't agree with many things that have been said and I would like to say so very explicitly. Human rights is a philosophy and it has not to do anything with the ICRC or international committee of Red Cross. ICRC or anything that can be held responsible or given credit for internationalisation of human rights values.....Human rights is basically a compendium of values. It is a way of life and the whole effort is to disseminate those values as widely as possible and this is not happening today.

The fight for human rights is not a recent thing. It has, you can trace its origin to magna charta wherever there has been power.

People have fought against the tyrannical use of that power. People have always fought against terrorism and oppression and when you fight against terrorism and oppression and as you are invoking human values. So it is not something new for us. It has been a very ancient document.

The question is, various questions have been raised and I can quite see the apprehension, our reactions to various things - two or three things which are happening around us. Since we are human beings will react to that. We are not angels. So we react to that. But I think one thing must be made very clear that the human rights is not the monopoly of the West. In that I would say that the maximum violations of human rights have been done in the West. It is in the West that the holocaust took place. It is an international consensus of some people that these human rights or the human beings should be able to live in peace. And their poverty, ignorance and tyranny, all are enemies of human rights. It is in this sense that you have to look at these human rights. So it is not a Western concept.

In fact, after violations of human rights took place, a tribunal was appointed at Nuremberg and that tribunal, for the first time, defined a new offence called crime against humanity. And then some people were punished. About KPS Gill, I will come to it very briefly afterwards. But then this was the defence of the Nazis that we did everything we could according to the seniors or the superiors orders and the tribunal said that this is no defence. You cannot kill human beings and say that you were executing orders of the superiors. You have no right to do that.

Now this is the basis of human rights philosophy that no state can empower you to do that. No State should empower you to do that. Some people were talking about parity and some people were talking about Amnesty International or human rights organisations or civil liberties unions. They condemned the police, the army, but they don't condemn the terrorists. Terrorists are first to be condemned because terrorism is against humanity, terrorism is firstly against human rights. When we criticise the police and the army, we are criticising them for being counter terrorists. Because ordinarily terrorism cannot be combated by counter terrorism. If you are acting on behalf of the State,

you have to act according to law. You cannot take law into your hands and just imagine what will happen if you legitimise it. It can act against you. It can act against any one of us. It is a different matter that the police do not come to me and ask me to come to police thana and interrogate me and keep me in police custody just because I have some position in society. What happens to a poor man. He is kept in custody, sometimes he dies in custody. So giving power to the police, giving power to the army or anybody, to take law into his hand is against human rights and therefore we criticise it. That does not mean that we are not criticising the terrorists. For example if a murder took place and police catch somebody and cook up some evidence against him. As a lawyer it is my duty to put forward his defence in the court of law. That does not mean that I am saying that murder is good, that the murderer is to be supported. This does not amount to supporting crime. This does not amount to supporting criminals. It only amounts to supporting an innocent person from victimisation and that is why these rights are absolutely necessary. These are not for somebody else.

KPS Gill was successful. We have to say that in curbing terrorism. Terrorism nowhere in the world, even I have not seen anywhere in this world as terrorism was combated on or overpowered merely by force. Terrorism is essentially a political problem and it has got to be solved through political means. It requires a good political leadership. Not merely army, and not merely police. Police and army will support, but decisions have to be taken. And if you see Punjab, in Punjab terrorists themselves have made some mistakes so that they got alienated from people. To some extent KPS Gill could take advantage of it. Now I don't blame KPS Gill because what he did perhaps in that situation what he thought his own way as to what to do.

But because KPS Gill had to do in Punjab. You can see that what KPS Gill did there someone else can do in Bombay, and someone can always say that what I am doing is good. Should there be not somebody else who will decide that it is good. Can you be a judge of your own action, or somebody else has to be a judge of your own action. This is a dilemma that we are facing. But sometimes we get exasperated with terrorism and I say Yes, these people must be punished. When my relations are killed, my own family members or innocent people are killed, you know, I am bound to feel angry.

Someone who is only suspected to be a terrorist is often subjected to oppression and we are against it. We are not against legitimate prosecution of the offenders. We are against prosecution of those people who are not proved to be guilty and they could be innocent.

I will point out a case that happened recently in Bombay. The High Court has now asked the police to investigate. There were two people who were killed by the police. One was a gangster and the other was a very small person who used to sell something on the pavement. At the most he might be doing 'paketmari'. Police caught hold of them and then finished them and said they were killed in encounter. His wife was saying he has nothing to do with terrorism, nothing to do with gangsters. And the real person who the police said they have killed is not the person whom they have killed. This is a recent happening in Bombay. So we are apprehensive.

What happened in Punjab affected the entire country. Yes, if you are a police without vision, then this thing would happen. But if you are a police with vision.....which can keep people together. Give them some parties. I do not think I can go on explaining. But these are a few issues which I thought I should dwell upon briefly and I now realise that our this inter action has been very fruitful. I feel that such interactions should take place more frequently very often so that there are different people from different walks of life who could come together and sit.

Human rights require and you and I differ and yet we do not lose respect for each other. This is of the essence. I hate what he says, but I respect his freedom to say what he wants to say. Here we disagree, because all of us are thinking about public interests. Somebody who feels that what KPS Gill did was right that is also motivated by public interest. It is his perception, his way of thinking. I think that it was not proper. It is his way of looking at it. But more and more if we sit together we may be able to resolve and we may be able to spread the philosophy of human rights, make it a reality.

It is not something that it has come from anybody. It is a part of us. Our country which has had such great people does not need to be told of human rights from somebody else. I think in this century, 20th

Century has produced two important events in the world history. One is Gandhi and another is nuclear bomb. Gandhi belonged to this country and I think the 21st century will have to decide whether we opt for Gandhi or we opt for nuclear bomb. If we opt for Gandhi, it will be survival of everyone else and if we opt for nuclear bomb, it will be destruction of everyone.

Before I conclude, let me thank you all from the Centre for Advance Strategic Studies as well as the Institute of Advanced Legal Studies. I also thank our two eminent speakers, Admiral Malhotra as well as Air Vice Marshal Gupta for their very learned and very stimulating talks which focused on the various aspects of these problems, and to all of you for being with us.

SUMMARY OF DISCUSSIONS

The seminar was then thrown open for general discussion, which brought out the following points :-

- People accredited to ICRC are being sent into the jungles to meet LTTE personnel and to persuade them to take recourse to legal measures, and as they are fighting a war, to adhere to the Laws of War. The ICRC is holding dialogue with Sri Lanka and LTTE.
- Terrorists exercise the freedom to select any target which can produce media impact. They do not respect any law, whereas the security forces are bound by law.
- The militants get support in terms of arms, ammunition, funds etc. from outside. The ICRC and the United Nations get together, examine the outfit and if necessary declare it as terrorist, if so warranted. Such a declaration attracts sanctions and pressures on countries sponsoring the militant activity. This is the only way in which the legal system, natural rule of law can counter foreign aided militancy or terrorism.
- The ICRC has a mandate to visit prisoners in J&K, and also visit the Amnesty under the Geneva Convention, if invited. This can help nipping in the bud mischievous propoganda. The ICRC prepares a report based on its findings and gives it to the General Secretary.
- The US is bulldozing sanctions and harsh measures on Iraq under the garb of curbing terrorism and pursuing its strategic interests and those of a number of countries. In the context of International Humanitarian Law (IHL) the Iraqi population is suffering. The US sanctions do not stand scrutiny under IHL and therefore worldwide criticism of the US.
- The ICRC keeps well clear of any political sort of complexion.

- War is not a legal currency to be used for settling disputes.
- The International Court of Justice was petitioned to stop nuclear weapon tests and production of nuclear weapons. Under tremendous pressure the Nuclear Weapon States, the International Court gave a cowardly, ambiguous and a bad judgment on the issue.
- Ignorance of IHL results in its violation and also in failure to avail of it for yourself.
- The ICRC is run by 21 Swiss individuals without any Government funding or support. The ICRC, therefore is neutral, impartial and has acquired a reputation which it wants to maintain.
- Human rights and IHL are generally clubbed together, but they are different. IHL is applicable also in peace time. For example if a mob is on a rampage and you shoot them, it is a case for IHL, but if you catch one person from the mob and lock him up, it is a case of Human Rights. In the first case, you are firing at a village, a mob, non-combatants, civilians.
- The singular achievement of the ICRC in Afghanistan was to restore women to hospitals, with medical attention and the Taliban was pressured to direct accordingly.
- The Punjab IG of Police, Mr KPS Gill is accused of fighting terrorism with terror by the Human Rights activists on grounds of the method not being legal. The case has gone to the International Human Rights Commission. Mr. Gill's contention is that he used the appropriate means and end results justify these. Law and order had broken down. State machinery had collapsed. The Human Rights activists were nowhere in sight when the militants were breaking human rights laws, terrorising, kidnapping, looting and raping, murdering, "settling" land disputes and old scores. With the collapse of state machinery, Mr. KPS Gill was charged

with the responsibility to hold the can. He achieved the impossible and curbed the insurgency. He was given no guidelines. None could give these. If at all these were given these could be only along the lines which Mr. Gill used. And these would be only verbal. The State should lay down the guidelines for such emergencies. It is very unfair to accuse and charge Mr. KPS Gill for acts which uprooted insurgency from Punjab and guarded India's national security.

CENTRE FOR ADVANCED STRATEGIC STUDIES

**SEMINAR "LAWS OF WAR"
(09 JANUARY, 1998)**

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