

LEGAL CONSTRAINTS ON THE PERVERSE USE OF TECHNOLOGY: THE CASE OF ANTI- PERSONNEL LAND MINES

*Gurdip Singh**

A tragedy too often forgotten is the havoc wrought by mines, millions of which lie on or in the ground, spreading terror for years or even decades after the hostilities have ended. Every year, in numerous war torn countries, thousands of men, women and children are victims of mines. Some of the mines are simple devices, while others make use of advanced technology. However, the fact remains that the mines are fighters that never miss, strike blindly, do not carry weapons openly, and go on killing long after hostilities are ended. Mines are most ruthless of terrorists and are the greatest violaters of international humanitarian law.

Mines produce damage by either blast or penetration of metallic fragments. With the explosion, dirt, mud and other debris are driven into the human tissues. The variable extent of damage and contamination by dirt and debris makes surgery for mine injury difficult because injuries of such severity and degrees of contamination are rarely seen in civilian practice and only a few surgeons have experience and skill in dealing with such wounds. The mines can be placed at the ground level and suitably covered to escape detection. These can be placed even on the posts or in trees. The mines can be triggered by foot pressure or release of foot pressure, trip wires, electronically or remotely. The mines either produce a large explosion or deliver projectiles which are metallic, either pre-formed fragments, nails, or spheres. In addition to causing appalling human injuries, the indiscriminate laying of mines makes land incultivable and results in damage to the natural environment. For certain population groups, the inability to cultivate their land is a threat to their very survival.

The present article endeavors to examine the following issues: whether the practice of deployment of anti-personnel land mines is inconsistent with the mandate of human rights jurisprudence; whether international humanitarian law regulates and controls the use of anti-personnel land mines; whether international humanitarian law needs to be strengthened so

* Professor, Law Centre-II, Faculty of Law, University of Delhi, Delhi.

as to impose an absolute ban on the recourse to anti-personnel land mines; whether the deployment of anti-personnel land mines constitutes a crime against humanity.

I. ANTI-PERSONNEL MINES AND HUMAN RIGHTS

Article 6 of the International Covenant on Civil and Political Rights, 1996 protects the fundamental and basic human right, namely, the right to life and provides as follows:

Every human being has the right to life. This shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 4 of the Covenant does not permit derogation from the guarantee of the right to life even in a time of national emergency. To examine the issue of applicability of Article 6 of the Covenant to the case of the use of anti-personnel land mines, it may be argued; the Covenant made no mention of armed hostilities or weapons and it has never been envisaged that the legality of the anti-personnel mines was regulated by the Covenant; the Covenant was directed to the protection of human rights in peacetime and the questions relating to the unlawful loss of life in hostilities were governed by the law applicable in armed conflict.

In the *Advisory Opinion of the International Court of Justice on the Legality of the Threat of Use of Nuclear Weapons*¹, the International Court of Justice refused to accede to similar arguments when raised with regard to the threat or the use of nuclear weapons. The Court held that the protection of the International Covenant on Civil and Political Rights did not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions might be derogated from in a time of national emergency. It was clarified that the respect for right to life was not, however, such a provision and in principle, the right not to be arbitrarily deprived of one's life applied also in hostilities. The Court further observed that the test of what was an arbitrary deprivation of life during armed conflict would be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict. The use of anti-personnel land mines amounts to deprivation of the right to life during the armed hostilities as well as decades after the hostilities come to an end. Thus, the anti-personnel land mines laid during peacetime or continued to be laid even after the conclusion of the armed hostilities violate the guarantee of right to life contained in Article 6 of the International Covenant on Civil and

1. *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 35 INTERNATIONAL LEGAL MATERIAL., 1996 at 809.

Political Rights. However, the issue of the validity of the use of anti-personnel land mines during armed hostilities must be determined with reference to the law applicable in armed conflict. The question whether the use of anti-personnel land mines during armed hostilities amounts to arbitrary deprivation of life contrary to Article 6 of the Covenant would only be decided by referring to the law applicable in armed conflict and cannot be deduced from the terms of the Covenant itself.

II. ANTI-PERSONNEL MINES AND INTERNATIONAL HUMANITARIAN LAW

The question arises whether use of anti-personnel mines is illegal in the light of the principles and the rules of international humanitarian law applicable in armed conflict. An examination of the Hague law and Geneva law contained especially in the Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land and the Regulations Annexed thereto, Geneva Conventions of 1949 for the Protection of the War Victims, and Additional Protocols of 1977 reveals that there are two cardinal principles underlying international humanitarian law.

The first cardinal principle in the fabric of international humanitarian law is aimed at the protection of the civilian population and civilian objects and establishes a distinction between combatants and non-combatants. It requires that the States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. The second cardinal principle prohibits to cause unnecessary suffering to combatants. It proscribes the use of weapons causing them such harm or uselessly aggravating their suffering. According to the second principle, States do not have unlimited freedom of choice of means in the weapons they use.

International humanitarian law prohibits certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. These principles also find support in the Martens Clause which was evolved by the Russian delegate De Martens during the First Peace Conference in 1899. The Clause explains that unforeseen cases should not, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders. On the contrary, the Clause provides; in such unforeseen cases both civilians and combatants would remain under the protection of the principles of the law of nations as derived from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. It implies no more and no less than that, no matter what States may fail to agree upon, the conduct of war

will always be governed by existing principles of international law. Martens attempted to balance military necessity against the requirements of humanity. By reconciling the necessities of war with the laws of humanity, the Martens Clause advocates general prohibition to use weapons which cannot discriminate civilians from combatants and cause unnecessary suffering. The Martens Clause consistently finds a place in the Hague law, Geneva law, and the United Nations Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects adopted in 1980. In the 1980 Certain Weapons Convention, States once again repeat the Martens Clause in confirming their determination:

that in cases not covered by the Convention and its annexed protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

The cardinal principles of international humanitarian law lie at the roots of 1980 U.N. Convention on Certain Conventional Weapons and its three protocols, each of which regulates the use of a particular type of conventional weapons thought to pose particular risks of indiscriminate effects or unnecessary suffering. Protocol I on Non-Detectable Fragments prohibits the use of weapon whose primary effect is to injure by fragments in the human body that escape detection by X-rays. Protocol II contains detailed set of restrictions on the use of mines, booby-traps and similar devices. Protocol III restricts the use of incendiary weapons in various ways.

A. Protocol on Restrictions on the Use of Anti-Personnel Land Mines

Protocol II of the 1980 Certain Weapons Convention contains prohibitions or restrictions on the use of mines, booby traps and other devices. The Protocol is applicable in international armed conflicts and not in internal ones. However wars of national liberation are included among the international armed conflicts. A mine is defined in the Protocol as an explosive munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle and "remotely delivered mine" means any mine delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.² Booby-trap means any device or material which is

designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act³. Thus, booby-traps are possibly but not necessarily explosive. The term "other devices" means manually emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote or automatically after a lapse of time⁴.

The experience of recent armed conflicts has abundantly shown the great risks incurred by the civilian population which persist long after the cessation of active hostilities as a consequence of the use of land mines and booby traps.⁵ The main purpose of Protocol II on "Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices" is to curb those risks. The Protocol also provides protection to the combatants as well as United Nations Forces. The general restrictions on the use of mines, booby traps and other devices, laid down in the Protocol, are threefold: firstly, prohibition to use these weapons either in defence or by way of reprisals against the civilian population; secondly, prohibition of indiscriminate use and; thirdly, injunction to take all feasible precaution to protect civilians from the effect of the weapons.⁶

To Protect the United Nations Force or mission performing functions of peacekeeping, observation or similar function, the Protocol obliges each Party to the conflict, if so requested and to the extent of its abilities, to remove or render harmless all mines or booby traps in that area and to take all other necessary measures for the protection of the force or mission and to make all relevant information in its possession available to the head of the force or mission.⁷

Although 1980 Mines Protocol constitutes significant step in the regulation of the use of anti-personnel mines in armed conflict, it suffers from serious substantive shortcomings. Firstly, The Mines Protocol covers only international armed conflicts, namely, the armed conflicts between States and does not cover internal armed conflicts. Secondly, the Mines Protocol does not contain verification or compliance provisions to imple-

2. Article 2 paragraph 1 of the PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES OF THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS, 1980, 1342 UNTS, 1980 at 137, reprinted in 19 INTERNATIONAL LEGAL MATERIAL, 1980 at 1523.

3. *Id.*, Article 2, paragraph 2.

4. *Id.*, Article 2, paragraph 3.

5. Frits Kalshoven, CONSTRAINTS ON THE WAGING OF WAR (ICRC, 1991) at 153.

6. *Supra* n.2, Article 3.

7. *Id.*, Article 8.

ment Protocol's obligations. During the armed conflicts of the 1980's, the number of civilian casualties caused by the indiscriminate use of anti-personnel land mines reached appalling proportions and by the beginning of 1990's, the need for stricter controls on the use of anti-personnel land mines was echoed in various quarters. There was a widespread belief that Mines' Protocol needed to be strengthened to deal with the catastrophe caused by the extensive and indiscriminate use of anti-personnel land mines. This led to the revision of the Mines Protocol.

In May 1996, the first Review Conference for the United Nations Convention on Conventional Weapons (CCW) completed its review of the Convention with the adoption of a revised Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices. The revised Protocol of 1996 attempts to expand the scope of the original Mines Protocol, places stringent legal constraints on remotely delivered and other land mines, requires the States to use commonly available technology to make the mines detectable, and makes the States responsible for the clearance of mines after the cessation of hostilities.

B. Expansion of the Scope of Mines Protocol

In the Review Conference of the Protocol, it was suggested by the United States and other Western delegations that in view of the great majority of civilian land mine casualties occurred in internal conflicts and therefore, the expansion of the Mines Protocol so as to cover internal conflicts was advocated. The non-aligned States especially India and China opposed applicability of the Protocol to internal armed conflicts and alleged intrusion into national sovereignty. However, both India and China finally accepted the extension of the Protocol to internal conflicts if the revised Protocol provided that the extension of the Protocol to internal conflicts would not be used as an excuse for unlawful intervention into domestic conflicts. The revised Protocol expands the scope of the original Mines Protocol and applies to internal armed conflicts and reiterates that nothing in the Protocol may be invoked to affect the sovereignty of a State or its responsibility to defend itself or to maintain law and order or to justify intervention by any other State in its internal affairs.⁸

C. Remotely Delivered Mines

Remotely delivered mines are the mines delivered by artillery or aircraft from a distance. The original 1980 Protocol imposes special restrictions on their use by requiring that the remotely delivered mines may be used only if their location is accurately recorded or they are equipped

8. 1996 *Revised Mines Protocol*, 35 INTERNATIONAL LEGAL MATERIAL, 1996 at 1206 Article 1.

with an effective neutralizing mechanism to destroy or render them harmless when they are no longer required for the military purpose for which they are deployed.⁹

The revised Mines Protocol of 1996 considerably strengthens the above features of the original Protocol by requiring that all remotely delivered anti-personnel mines be equipped with a self-destruct (SD) device and a back up self-deactivation (SDA) feature¹⁰. The SD device is designed to destroy the mine within a specified time after emplacement and does not leave behind a live mine after the expiry of the time period specified for the destruction of the emplaced mine. The SDA feature works as a back up self-deactivation device and ensures that a mine that fails to self-destruct will become inactive as a result of its deactivation after the expiry of the time specified for its deactivation. The combined effect of the SD and SDA features is that there is vital certainty of the mine becoming harmless after specified period of time. The 1996 revised Mines Protocol provides for a requirement for self-destruction (SD) within 30 days of emplacement with a reliability of 90% and self-deactivation (SDA) within 120 days with a combined reliability of 99.9%¹¹. However, the States with millions of nonconforming anti-personnel mines have been granted by the revised protocol a transition period of upto 9 years from the date of entry into force of the revised protocol to convert or replace them. The revised Mines Protocol prohibits all transfers of non-conforming mines.

D. Non-Remotely Delivered Mines

Several States including Russia, China, India, Pakistan and Finland have been using long lived anti-personnel land mines for the defense of their border areas. These States expressed unwillingness at the Review Conference to install SD or SDA features which result in continual destruction and replacement of millions of mines deployed by them to defend their border areas. The revised Mines Protocol accommodates the strategic interests of these States and provides that non-remotely delivered anti-personnel land mines must either be equipped with SD or SDA or be confined to fields protected by specific measures to ensure that civilians are not endangered. The protective measures include: placing markings along the perimeters of the field that are clearly visible to persons about to enter; monitoring of the field by military personnel; and installing fencing or some other means sufficient to ensure the exclusion of civilians from

9. *Supra* n.2, Article 5.

10. *Supra* n.8, Technical Annex, para 3(a).

11. *Ibid.*

the area¹². The revised Mines Protocol requires that a field where mines are deployed may not be abandoned unless it is cleared of mines or turned over to the forces of another State that has accepted responsibility for its maintenance and subsequent clearance¹³. At the event of forcible loss of control of the area as a result of enemy military action, the revised Protocol obliges the Party taking control of the area to maintain it in accordance with the requirements of the revised Protocol.¹⁴

E. Detectability

Some land mines cannot be detected by the commonly available magnetic mine detectors and pose severe risk to the civilians, mine-clearance persons, U.N. Peacekeeping Forces and Relief Missions that enter the mined area. Such mines are plastic mines which do not pass magnetic signature sufficient for detection. The Review Conference witnessed initiation of a proposal by the United States for imposition of barriers to the deployment of plastic mines which escape detection by the mine detection equipment. The proposal of United States was opposed by India and China who have deployed such plastic mines.

In a bid to balance the competing claims of United States *vis a vis* India and China, the revised Mines Protocol provides for a requirement that anti-personnel land mines must contain an amount of metal (eight grams of iron) which would be sufficient to enable detection by the magnetic detectors. The eight gram detectability requirement has, however, been subjected to a transition period of upto 9 years to convert or replace non-conforming mines, during which time their transfers would be prohibited¹⁵.

F. State Responsibility for Deployment and Clearance of Mines

To discourage the practice of deliberately abandoning the anti-personnel land mines as a means of terrorizing the civilian population or denying them access to fields, roads, wells, or other facilities, the revised Protocol places the responsibility for clearance and maintenance of mines on the party that laid them¹⁶. The revised protocol requires that after the cessation of active hostilities, the mines must either be cleared or maintained in the controlled areas¹⁷.

12. *Id.*, Article 5.

13. *Ibid.*

14. *Ibid.*

15. *Id.*, Technical Annex, para 2.

16. *Id.*, Article 3.

17. *Ibid.*

In addition, the revised Protocol provides for: restrictions on the transfer of mines to the non-Party States and of the mines prohibited by the revised Protocol¹⁸; protection of U.N. Peacekeeping Forces and other international missions from mines laid in areas of their operation¹⁹; and promotion of mutual assistance and technology transfer for mine clearance and compliance with the Protocol requirements²⁰.

The adoption of the revised Protocol constitutes significant step to achieve the goal of total ban on the anti-personnel land mines. The provisions of the revised Protocol concerning constraints on the deployment and transfer of anti-personnel land mines, detectability of mines, and State responsibility for the clearance of land mines contribute enormously to save many lives and limbs of civilians, peacekeepers, relief workers and mine clearance personnel. The procedures of the revised Protocol provide a basis for further improvements, particularly with respect to compliance, SD and SDA requirements, and the detectability requirement²¹. The revised Protocol, however, suffers of shortcomings as it falls miles short of comprehensive ban on the use, stockpiling, production and transfer of anti-personnel land mines.

III. TOWARDS A GLOBAL BAN ON ANTI-PERSONNEL LAND MINES

On September 18, 1997, the Ottawa Landmine Convention was adopted which imposes a global ban on the use, stockpiling, production and transfer of anti-personnel land mines and their destruction²². The Convention was concluded outside the auspices of the United Nations and without the involvement of major powers. Canada initiated Ottawa process and 90 States participated which led to the negotiation of a global ban on anti-personnel land mines in the form of a treaty. Among the non-signatories are many of the world's principal producers whose militaries consider land mines an essential defensive weapon. The non-signatories include United States, Russia, China, India, Pakistan, Greece, Turkey, Iraq, Egypt, Syria, Israel, Libya, Sri Lanka, North Korea, South Korea, and the Republic of Yugoslavia²³. The treaty is the third international instrument on anti-personnel land mines. However, unlike the earlier instru-

18. *Id.*, Article 8.

19. *Id.*, Article 12.

20. *Id.*, Article 11.

21. Michael J. Matheson, *The Revision of the Mines Protocol*, 91 AMERICAN JOURNAL OF INTERNATIONAL LAW, 1997, 158 at 167.

22. CONVENTION ON THE PROHIBITION OF THE USE, STOCKPILING, PRODUCTION AND TRANSFER OF ANTI-PERSONNEL LAND MINES AND ON THEIR DESTRUCTION, ARMS CONTROL TODAY, September 1997 at 11.

23. *Ibid.*

ments, the Landmine Protocol of 1980 and the revised Landmine Protocol of 1996 which place limits on the use of anti-personnel land mines, the Ottawa Convention obligates States Parties to forswear anti-personnel land mines and to destroy their stockpiles as well as all anti-personnel land mines in mined areas within fixed timetable.

The Ottawa Convention bans the use, development, production, acquisition, stockpiling, and transfer of anti-personnel land mines subject to two exceptions: firstly, States Parties are allowed to retain or transfer the minimum number of anti-personnel land mines absolutely necessary for the development of and training in mine detection, mine clearance and mine destruction techniques; secondly, States Parties may transfer anti-personnel mines for the purpose of destruction²⁴. As regards the destruction of stockpiled mines, the Convention provides that with the exception of mines necessary for demining purposes, each State Party must destroy or ensure the destruction of stockpiled mines within four years of the Convention's entry into force for that State²⁵. As regards destruction of anti-personnel mines in mined areas, the Convention requires each State Party to destroy anti-personnel mines in the mined areas within ten years of the entry into force of the Convention for that State²⁶.

The Convention contains provisions concerning transparency and requires the Parties to provide the UN Secretary General, within 180 days after the Convention's entry into force for that State, a detailed report of its anti-personnel land mines stockpiles, mined areas and steps taken to protect nearby populations, demining and destruction programmes, destruction inventories, and technical characteristics of mines produced or possessed to facilitate mines clearance²⁷.

The Convention also contains compliance provisions²⁸ and permits a State Party to submit, through the Secretary General, a request for clarification relating to compliance by another State Party. If the requesting State does not receive a response, the issue may be brought before the Meeting of State Parties. In the Meeting of State Parties, a fact-finding mission may be established which may be granted access to the areas, facilities and relevant persons related to its mission.

The Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and Their Destruction is designed to

24. *Id.*, Article 3.

25. *Id.*, Article 4.

26. *Id.*, Article 5.

27. *Id.*, Article 7.

28. *Id.*, Article 8.

face the challenge of removing anti-personnel mines placed throughout the World, and to ensure their destruction. The Convention reinforces the international humanitarian law that the parties to an armed conflict do not possess an unlimited right to choose their methods or means of warfare and that a distinction must be made between civilians and combatants. The effectiveness of the Convention lies in its ban on anti-personnel mines as well as the provisions concerning transparency and compliance.

IV. CONCLUSIONS

The edges of the international humanitarian law need to be sharpened to put an end to the suffering and casualties caused by anti-personnel land mines that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, destroy environment, and have other severe consequences for years after emplacement. The mandate of the principles of humanity is that the international community of sovereign States must accept the global ban on anti-personnel land mines along with transparency measures and positive commitment to comply with the ban. The ban on anti-personnel mines would also serve as an important confidence-building measure.

The stockpiling, production, use and transfer of the non-conforming anti-personnel land mines must be proclaimed as a crime against humanity entailing criminal responsibility of the perpetrators. The acts resulting in the causation of indiscriminate, superfluous, unnecessary and enormous injury to the civilians and the combatants by the unlawful deployment of the anti-personnel land mines amount to serious violation of the human rights norms, humanitarian law, and environmental law and accordingly turn into international crimes.

The international norm of criminal responsibility of the perpetrators of the crime of emplacing non-conforming mines can be enforced only if the perpetrators are exposed to prosecution as well as civil liability to make reparation. The civil liability of the perpetrator should be founded on the basis of the Perpetrator Pays Principle which requires the perpetrator to compensate the victims for the harm caused by the deployment of the anti-personnel land mines. A perpetrator is person who is responsible for the production, stockpiling, use or transfer of non-conforming anti-personnel land mines. The Perpetrator Pays Principle shall operate on the lines of the Polluter Pays Principle which constitutes a customary norm of the international environmental jurisprudence as well as Indian environmental jurisprudence. The quantum of compensation to be paid by the perpetrator

to the victims should be correlated with the potential or capacity of the perpetrator to pay.

The emergence of the public conscience underlies the process of elimination of anti-personnel land mines that uniquely endanger innocent civilians long after the fighting ends. The sanctions of the international instrument providing for the legal ban on anti-personnel land mines coupled with public conscience constitute appropriate measures to curb the menacingly injurious consequences of the anti-personnel land mines.