

Historical origins of the humanitarian discourse

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Humanitarian considerations as a motive behind restrictions on *arms* or *means of warfare* are not a new phenomenon. It can be traced back through human history - there was a prohibition against poisoning wells in ancient Greece for example. The focus here, however, will be on the past 150 years or so. I will give a short overview of how concerns for the humanitarian impact of different weapons have been reflected in instruments pertaining to regulation of weapons (means of warfare) during this time.

In 1868, several states gathered in St. Petersburg to discuss the prohibition of a particular type of exploding ammunition of less than 400 grams of weight. The Russians themselves had recently developed these bullets, and they realised the horrible humanitarian implications that the proliferation and use of this new technology would have, both for themselves and their enemies. The governments present in St. Petersburg agreed on a treaty (to be known as the St Petersburg Declaration), which stated that:

“...the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy”, and that “this object would be *exceeded* by the employment of arms which *uselessly aggravate the sufferings of disabled men, or render their death inevitable.*”

It was thus humanitarian concerns that led these states to agree to restrict the manner in which they would conduct warfare through banning the use of these weapons. This treaty is often mentioned as the first instrument that specifically regulated means of warfare in modern times, and it was clearly based on humanitarian concerns.

Thirty years later, in 1899, dum-dum bullets, that also caused unnecessarily horrible wounds, were on the political agenda during diplomatic discussions in The Hague. Based on the same reasoning, (they were causing unnecessary human suffering to combatants) such bullets were banned from use in warfare as well.

At that same conference in The Hague, a weapon of mass destruction was in fact also on the agenda. A specific prohibition against the use of poisonous gas as a means of warfare became a part of the second Hague Convention from 1899. For a number of reasons, however, this prohibition proved to be not very effective, and the First World War saw extensive use of poisonous gases as a means of warfare, with horrifying effects.

After the first world war, states were therefore very much aware of the extreme humanitarian suffering caused by the use of gas as a means of warfare.

Governments came together to discuss better and stronger measures to prevent the use of gas in future wars because not only had thousands died in gas attacks, but the continuing human cost was evidenced in terms of the thousands of men with often disabling and life long nerve damage and blindness.

The political discussions on use of gas thus evolved around these humanitarian consequences and this meaningless destruction of human life and health. The discussions resulted in the adoption the 1925 Gas protocol. In its preamble, the parties to the protocol stated that the use of poisonous gas in war: “has been justly condemned by the general opinion of the civilized world”.

Although poisonous gas was not used as a means of warfare *in combat* (it was used of course, against civilians in the concentration camps in Germany and Poland) during the Second World War, it has been used in some contexts after 1945. The norm prohibiting chemical weapons in the gas Protocol of 1925 was not sufficiently strong. Many states parties had declared that they saw the gas protocol only as a prohibition against *first use*, and thus if attacked by gas, they would reserve the right to retaliate with the same weapon.

Precisely because of the humanitarian argument, the “no first use” concept was considered unacceptable. Therefore, in the decades after the Second World War, new diplomatic discussions commenced, pertaining to both biological and chemical weapons.

Both the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1997 contain unconditional prohibitions on these weapons. One cannot use them, even in defence against attacks by these weapons, because the humanitarian cost will be too high.

Having originally aimed at protecting combatants, the discourse on humanitarian consequences that developed after World War II focused more on protection of civilians; particularly biological and bacteriological weapons could not reasonably be contained to affect only soldiers.

Also the prohibition against chemical weapons was discussed and developed with the rule on distinction in mind in addition to the rule on superfluous injury. The vast damage and harm to humans these chemical weapons could cause, were at the heart of the diplomatic discussions on these weapons.

Human suffering, particularly among non-combatants, also triggered the political processes on anti-personnel landmines and on cluster munitions. Landmines were a global problem, with many countries affected in various ways. Typically children or women were being killed or maimed because of landmines that often had been emplaced years before. Cluster munitions remnants were (and still are) concentrated within *fewer* countries, but with high density in the contaminated areas and with devastating effects for victims. It should be noted that one significant legal development with a clear humanitarian underpinning are the recent legal provisions on victim assistance in these two treaties.

Humanitarian considerations and discussions were also at the core of the many discussions and negotiations in the CCW, or The Convention on Certain Conventional Weapons. For example the prohibition under the CCW on blinding laser weapons was an expression of this – the permanent blinding of soldiers were seen to constitute superfluous injury. Also the terrible wounds and injuries resulting from incendiary weapons, such as napalm, as well as the human suffering and permanent pain resulting from non-detectable fragments, have been subject to discussions leading to restrictions and prohibitions in the CCW framework.

The humanitarian discourse pertaining to nuclear weapons started as soon as nuclear weapons had been used, in 1945. And this use, on two occasions, in addition to use in the form of testing, forms the backdrop for the humanitarian consequences discourse today. Nuclear weapons do not kill or maim people on a daily basis, even though there are many victims also from previous testing of nuclear weapons, so the debate on nuclear weapons has been very different from the debates on for example landmines or cluster munitions.

But, the debates leading up to the only legal instrument that deals specifically with nuclear weapons, the NPT, were also based on humanitarian concerns. The very first preambular paragraph of the NPT, says “Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war...,”

In spite of this start of the NPT treaty, humanitarian discussions have not been a core element of the NPT discussions over the years. But the 2010 Review Conference of the NPT agreed on an outcome document that – for the first time in NPT history – recognized the “catastrophic humanitarian consequences of any use of nuclear weapons”. One might argue that this reference was not particularly significant in itself, as it stated the obvious. The significance lay in what it triggered. Since the adoption of the 2010 NPT outcome document, we have seen the gradual emergence of what is now being referred to as the Humanitarian Initiative.

We have seen the Council of Delegates of the Red Cross/Red Crescent adopt two resolutions on the issue. And we have seen the convening of three multilateral conferences, in Norway, in Mexico, and now here in Austria, where the humanitarian impact of nuclear weapons have been put back into the heart of the debate on nuclear weapons.

The legal frameworks for the weapons of mass destruction, in particular, are based on humanitarian imperatives, both because of these weapons' inability to distinguish between civilians and combatants but also because of their terrible *effects* as weapons.

The conventions on biological weapons and chemical weapons can be seen as both non-proliferation and even disarmament treaties, because they prohibit transfers and they prohibit stockpiling and prescribes destruction of potential stocks. In addition, these two conventions constitute clear prohibitions on use.

The NPT, as we know, in spite of the fact that nuclear weapons pose an even graver humanitarian risk, does not prohibit use. This may be seen as something of an international law paradox.