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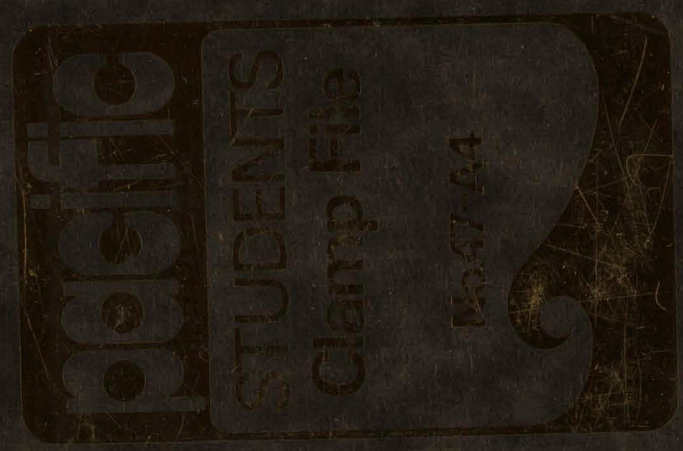

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Protecting Non-Combatants on the Battlefield: the 1977 Protocol I on International Armed Conflicts

Research Paper for International Law

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I. INTRODUCTION

Warfare is an activity that has occupied human-kind throughout the history of the species.[1] It is an activity that man has pursued with seemingly unflagging enthusiasm, into it he has poured immense physical and creative effort and the end result is a sum of human misery that is incomprehensible. To speak of regulating war, of limiting its effects and protecting non-combatants, seems farcical considering the record of man's inhumanity to man. Yet there is a "law of war", there are accepted norms of conduct that, while they may on occasions be spectacularly flouted,[2] can and do serve as moderating influences.[3]

In the last hundred years international conferences have codified aspects of the law of war, the promulgated rules being widely accepted as laying down the recognised standards for the treatment of non-combatants in times of war. Among the most authoritative of these codes have been the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1929 and 1949. The law of the Hague is mainly significant for the rules it contains on the protection of non-combatants on the battlefield,[4] whereas the law of Geneva is primarily concerned with the plight of non-combatants off the battlefield.[5] Recently it has come to be thought that because of the change in the nature of war and the way in which it is conducted these instruments do not sufficiently reflect modern conditions and so need to be updated.[6]

Accordingly in 1973 the International Committee of the Red Cross produced two draft additional protocols to the Geneva Conventions of 1949, the first applying to international armed conflicts, the second

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1. If there was a more gentle dawn to the human story we have no record of it. Indeed it has been postulated that man's pre-human experiences imbued him with a genetic "killer instinct" that ensured his survival as a species by motivating him towards aggression and warfare. However as to that see Desmond Morris The Naked Ape (London, 1967) 146-186.
2. As with the Nazi excesses of the Second World War.
3. For example the Geneva Convention (prisoners of war) of July 27, 1929 undoubtedly influenced the conditions of prisoners of war in the Second World War.
4. Convention Respecting the Laws and Customs of War on Land (HagueIV) October 18, 1907, Section II (Hostilities), Articles 22-28. J.B. Scott (ed.) The Hague Conventions And Declarations of 1899 And 1907 2nd ed. (New York, 1915) 116-119. L. Friedman (ed.) The Law Of War A Documentary History Vol. I (New York, 1972) 308.
5. There are in fact four Geneva Conventions of 1949. The first dealing with the amelioration of the condition of the wounded and sick in armed forces in the field, the second doing the same for the wounded, sick and shipwrecked of the armed forces at sea, the third dealing

applying to non-international (internal) armed conflicts. These draft protocols were sent to all signatories of the Geneva Conventions of 1949 and to member states of the United Nations, with invitations to each state to send diplomatic representatives to a conference to be held in Geneva in 1974 to discuss, amend and sign the additional protocols. One hundred and twenty states sent delegates to Geneva, as did eleven liberation groups and fifty two other interested organisations.[7]

Conference[8] sessions were held in Geneva for four years culminating in the agreement on the texts of two amended protocols which were opened for signature at Berne on December 12, 1977.

Protocol I[9] (which applies in international armed conflicts) contains battlefield Articles[10] which attempt to regulate the activities of belligerents on the actual battlefield so as to minimize the damage that warfare usually inflicts upon the civilian population. They do this by requiring the belligerents to distinguish at all times between combatants and non-combatants and to direct their military efforts only against the former. The incidental destructive tendency of war is also regulated by requiring combatants to assess the likely damage to the civilian population if a particular military operation is conducted and to weigh that damage against the military advantage anticipated from the successful prosecution of the operation.

It is these Articles that this paper is primarily concerned with. They are the result of collaboration between soldiers, diplomats and lawyers who were faced with the task of balancing humanitarian interests against "military necessity" so as to produce a set of rules that could realistically be expected to promote the interests of non-combatants in a combat zone. This paper will critically evaluate the

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with prisoners of war and the fourth with the protection of civilians. For the text of the Conventions see N.Z. T.S. 1963:3(E). and the Schedules of the Geneva Conventions Act 1958.

6. R.R. Baxter "Modernizing The Law Of War" (1978) 78 Mil.L.R. 167.
7. These organisations included diverse groups that ranged from the Arab Lawyers Union to the World Young Woman's Christian Association. However the liberation groups and humanitarian organisations had only observer status, they could debate but not vote. Nevertheless they exerted some influence on the Conference, the liberation groups in particular being very persuasive.
8. Its full name is the unwieldly- "Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts" - (Hereinafter called "the Conference").
9. For the text of the Protocol I see Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, with Protocol I,

Articles in an attempt to ascertain whether a proper balance has been struck.

To do this it will first be necessary to examine the theoretical problems faced by those who attempt to codify the rules of war so as to be able to place the Articles in their proper perspective. The paper will then examine each Article to ascertain its meaning and its impact on the existing law. Since the Articles are intended to guide the actions of men in battle it will also be necessary to view them from a pragmatic tactical point of view to see what their likely influence will be. Finally it will be useful to relate the Articles to the New Zealand Army to see what impact they will have on its training programmes.

II. POLITICS, SOVEREIGNTY AND MILITARY NECESSITY.

The formulation of norms of international law is largely a political process. International society is characterised by the struggle caused by the conflicting interests of the nation states and thus any codification of international law (such as in Protocol I) will involve the reconciliation of these interests in a process of coercion and compromise. As Tunkin puts it:

> "It should be pointed out that the process of forming a customary norm of international law, just as a treaty norm, is the process of the struggle and co-operation of states. The formulation of a customary rule occurs as a result of the intercourse of states, in which each state strives to consolidate as norms of conduct those rules which would correspond to its intersts."[11]

The use of the label "political" to describe the process of codification of international law can not, however, be taken too far. Any codification process will be based on the current law, and the question of how the law may be developed, what it should be, will have strong elements of practicality. That is, what will work. However, the process of deciding what "should" be the law will also largely be one of the reconciliation of the competing interests of the states involved in a manner that can be described as "political." [12]

In discussing this point with regard to the Conference Baxter concludes:

Protocol II and Resolutions adopted at the Fourth Session H.M.S.O. (London, 1977) 17.

10. Articles 48-60.
11. G.I. Tunkin Theory of International Law (translated by W.E. Butler,

"It is inevitable that considerations other than those of humanity should intrude themselves into the law-making process. In the course of debate about such matters, a state will naturally pursue its own national advantage ... Moreover, the very coming together in a conference ... offers an opportunity to seek diplomatic and political advantages through manipulation of the process. Conferences acquire a certain life of their own and become games played for their own sake. Considerations of humanity become caught up in what I have elsewhere described as humanitarian politics."[13]

Because states are pursuing their national advantage the final Act of a Conference usually represents much compromise and a fulfilment of perhaps only the minimum requirements of the states. The Report of the United States Delegation to the Conference describes the political contest that formed the basis of the proceedings.

" ... we were able to make clear from the outset that we were not prepared to pay a high price in terms of military effectiveness or political barnacles in order to obtain treaty provisions that we desired ... and we worked assiduously with allied delegations and with the Soviet Union to ensure that the other major military powers had similar approaches."[14]

According to the Report this approach, along with the "general acceptance of the fact that an agreement unacceptable to the major powers was not worth having"[15] made it possible to achieve reasonable compromises that met at least the minimum requirements of the delegations present.

Thus although the law-making process involved intermingled aspects of law and practicality the final text was much influenced by political considerations, considerations that arose because of the nature of the international community and in particular because of the doctrine of sovereignty. As a result of this when the subject being codified is as sensitive as the law of war the final text is likely to reflect the fact that it is a compromise between sharply divergent views.

A. Sovereignty.

It is submitted that the success of the law-making process in producing

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Harvard 1974) 114

12. See J. Brierly "The Future of Codification" (31) B.Y.I.L. 1.
13. R.R.Baxter, supra note 6, 166.
14. Extract from the Report of the U.S. Delegation reproduced by J.A. Boyd

clear statements of law containing precise rules and hence clear obligations will largely depend upon how far the subject being codified lies within the jealous ambit of sovereignty. For sovereignty is a term that refers to the proud autonomy of states, an autonomy rooted in a nationalism which will not readily cede national control over matters vitally affecting the state.[16]

This does not mean that the doctrine of sovereignty is unyielding, there are many situations where it is advantageous for states to regulate internationally matters that affect all states. It is necessary, for example, to have efficient international civil aviation services and states will admit a derogation of their sovereignty (or, as might be argued, exercise their sovereignty) to bind themselves to explicit obligations in this area.[17] However, as the subjects to be codified come closer to the sovereign heart of a nation there grows a reluctance to be closely bound. Of course the reciprocal benefits stimulus may still cause states to wish to conclude international agreements on such subjects, but since agreement usually entails reaching a consensus, and that process involves (as we have seen) compromise to meet minimum acceptable standards, this can result (especially where interests are sharply divergent) in an instrument containing imprecise statements of principle, sometimes negatived by a proviso, that leaves states much room for discretion.[18]

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in "Contemporary Practice of the United States Relating to International Law" (1978) 72 A.J.I.L. 390

15. Ibid.

16. H. Lauterpacht saw the unwillingness of states to allow their sovereignty to be fettered as one of the main factors contributing to the artificiality of international law:
"The deficient reality of international law is the result not so much of its deliberate breaches by States as of their refusal to submit, in the first instance, to the normal incidents of the rule of law as generally understood. That attitude is commonly described as the unwillingness to abandon part of the sovereignty of States in the international sphere. That description, though trite, and nearly tautologous, is accurate." H. Lauterpacht Collected Papers Vol. II The Law Of Peace (ed. E. Lauterpacht, Cambridge, 1975) 33

17. For example the Convention on International Civil Aviation of December 7, 1944.

18. Arguably the Definition of Aggression adopted by the General Assembly of the United Nations in resolution 3314(XXIX) at the 2319th plenary meeting on 14 December, 1974 illustrates some of these points. And see G. Schwarzenberger International Law As Applied By International Courts And Tribunals Vol. II The Law Of Armed Conflict (London, 1968) 10-13 for a discussion of the typology of the rules of war and the relationship of their substantive content to their conflict with the dictates of sovereignty.

The problems posed by sovereignty to codifiers become almost insurmountable when the matter proposed for regulation is war. For at the core of the doctrine of sovereignty lies the right of a state to maintain and defend its national and territorial integrity. In time of war these are absolutely threatened and consequently sovereignty in wartime exists in its most rampant and unbridled form. To draft an international document containing rules to regulate the manner in which a state martially protects itself is therefore a tremendously difficult task. To give such rules substantive content and meaning is even more difficult.[19]

B. Military Necessity and Humanitarian Principle.

However there are obvious advantages in having international agreement on what are acceptable practices of war. It is in the interests of all states to limit the ravages of war, to reduce the suffering and destruction to a minimum. This is the aim of the law of war, to take proper cognizance of humanitarian principles. The force acting against this aim is military necessity. That is, the sovereign right of a state to take such military actions as are necessary to defend its sovereignty. As was referred to in the Introduction the test of an instrument regulating warfare is how well the balance between these competing forces has been struck.

In keeping with the above discussion of the effects of sovereignty one might expect that in an instrument regulating warfare humanitarian obligations will be expressed with lessening precision as they come to conflict more deeply with military necessity. Schwarzenberger in fact identifies four types of rule of war according to the extent to which they conflict with military necessity.[20]

The first type of rule prohibits wanton acts of destruction that are of no military value and so do not conflict with the necessities of war. Thus the rules of warfare can be most effective and be stated most precisely.

The second type of rule limits warfare "in cases in which considerations of civilisation demand priority over military interests."[21] For example the prohibition of the use of poison and poisoned weapons.[22]

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19. For example at the Conference interests diverged between the modern high-technology armed forces and those more underdeveloped nations who rely on massed manpower. Each side wished to have rules that would favour their situation. To find a text acceptable to both sides was surely a gordian task, whether that text has substantive content will be generally examined later in the paper. As to this point see the Report of the U.S. Delegation, supra note 14, 390; and see also R. Baxter, supra note 6, 167.
20. G. Schwarzenberger, supra note 18, 10-13.

The third type of rule is a true compromise between the requirements of humanitarianism and the necessities of war. For example the St Petersburg Declaration of 1868[23] prohibiting the use of explosive or inflammable projectiles below 400 grammes in weight.

The fourth type of rule is merely a bow to humanity. It is purely admonitory, military necessity is in practice unchecked. For example whereas Article 25 of the Hague Regulations on Land Warfare of 1907 absolutely prohibits the attack or bombardment of undefended places, Articles 26 and 27 show that if a place is defended the necessities of war are overriding as far as limiting surprise bombardment and indiscriminant destruction are concerned.[24]

It is arguable that this typology supports the submissions advanced above on the effects of sovereignty on the codification of international law. It also shows that military necessity must be finely judged if the rules of war are not to exhibit "a mischievous propensity to unreality."[25]

C. Defining Military Necessity.

It has been said that the essence of war is violence, and that moderation in war is imbecility, but practice has shown that the conduct of belligerants can be moderated in an effective manner. In other words humanitarian considerations have been able to raise a threshold which must be crossed before acts can be said to be militarily necessary (type three of Schwarzenberger's analysis). What considerations can achieve this moderation of belligerent activity?

The answer, cynical though it may be, is self-interest. For warfare is the ultimate means by which one state can enforce its will upon another state in a struggle that can end in the destruction of the vanquished's sovereignty. To protect that sovereignty a nation will muster all the resources it can command and employ whatever methods it decides offer it an advantage. The question in fact becomes one

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21. Ibid; 11.
22. For a further discussion of why such a prohibition exists and is effective see G. Schwarzenberger The Legality of Nuclear Weapons (London, 1958) 26 et seq.
23. L.Friedman (ed), supra note 4, 192 for the text of the Declaration.
24. J.B. Scott (ed.), supra note 4, 117-118; L Friedman (ed.), supra note 4, 318-319.
25. H. Lauterpacht, supra note 16, 37.

of advantage, but of strategic and not necessarily tactical advantage. For instance, though both sides in the Second World War possessed gas and bacteriological weapons, weapons which tactically would have been devastatingly effective, neither side ever employed them. The reason was that neither side cared to face the consequences of provoking the other side into using their weapons by first employing their own.[26]

Closely connected with the reciprocity concept is the notion of reprisal. If one belligerent goes beyond the bounds of what is customarily considered to be the normal practices of warfare the opposing party can enforce the law by taking retaliatory actions so unacceptable to the belligerent in breach that he will cease the activities which occasioned the reprisal. In many instances the mere threat of reprisal will be sufficient to halt unacceptable practices.[27]

The purpose of humanitarian law in time of war is to protect those who do not directly participate in the hostilities, or who are hors de combat, and to "humanise" combat weapons so that they do not cause "unnecessary" suffering. The fundamental rule of humanitarian law to ensure this has been formulated by Pictet as:

> "... belligerents shall not inflict on their adversaries harm out of proportion to the object of warfare, which is to destroy or weaken the military strength of the enemy."[28]

Shorn of sentiment the rule is a telling one, for it is only logical that the most efficient way to employ military strength is to expend it against military targets. If this is understood by the combatant then the laws of humanity will be much advanced. Of course it is not as simple as that, a major problem for instance (and one which was grappled with in drafting Protocol I) is in defining "military target".

Another moderating influence is the strategic consideration of the post-war situation. If a war is aimed at completely destroying the enemy then few of the above considerations will apply, but if the object is to gain control of territory or to extend political influence then moderation

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26. In 1935 the Italians used mustard gas in their campaign against the Ethiopian tribesmen. This was in contravention of the Gas Protocol of Geneva of 1925, but it must be noted that the Ethiopians did not have the capacity to retaliate in kind, a factor that shows the efficacy of the negative reciprocity principle - that is to say it is unlikely that the gas would have been used if the Ethiopians had been capable of reprising.
27. More will be said on the question of reprisals in that part of the paper that deals with the individual battlefield Articles.
28. J. Pictet Humanitarian Law And The Protection Of War Victims (Geneva, 1975) 31

in the means and methods of war used may well be in the belligerent's favour when looking ahead to the end of the war.[29] An ex-enemy embittered by harsh treatment will make a far less tractable neighbour than one who has little cause for complaint in this area. And in such bitterness be the seeds of future war, not to mention guerilla activity against occupying forces. Besides it will not be to the advantage of a victor to occupy a blasted land that cannot support its remaining inhabitants let alone contribute resources to benefit the occupiers. Indeed, conditions may even demand that the victor succor the vanquished.[30]

However, the effects of the above influences developed through practice as customary norms of international law rather than as results of a codification exercise. Further their effect varies according to the dictates of the particular conflict and the balance that is eventually struck is one appropriate to the circumstances. In this respect the "rude practice of war"[31] as Johnson puts it develops the customary laws of warfare in a manner perhaps more realistic than the products of codifiers.

> "So long as what is done in war is done consistently, by both sides, with an absence of protest and without excessive reliance on the doctrine of reprisals ... this 'rude practice' is as good a method as any of developing the customary laws of warfare. It sometimes works better than the method of drawing up conventions in peacetime, because such conventions are apt to be prepared against a background of pressures which have little to do with the realities of war."[32]

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29. This point is emphasised by the reflection that in real terms a war does not end simply on the cessation of hostilities. The effects of those hostilities are ongoing and the goals for which the war was fought must be pursued vigourously when the hostilities end if the victor is not to "win the war but lose the peace". See R. Baxter, supra note 6, 167.
30. In assessing the result of the Allied bombing programme in the Second World War, Churchill wrote a memorandum that reveals his understanding of these principles. The unexpurgated version of this memorandum is reproduced in D. Johnson Rights In Air Space (Manchester, 1965) 51.
31. Ibid., 27
32. Ibid. The criticism might also be added that such conventions may be drawn up to account for specific situations experienced in a previous conflict, and thus they look backwards although they will be expected to apply in future conflicts where the situations may be entirely different.

The pressures of war are perhaps the most compelling a nation can face, and they will vary depending on the nature of the conflict. A guerilla-type war will demand different patterns of conduct from the belligerents than a conventional war, and even within a war patterns will change as the conflict lengthens into a contest of attrition or as attitudes become coarsened with time and combat. The moderating influences are rooted in self-interest and operate almost automatically in the sense that as soon as hostilities are commenced compelling logic will demand that they be considered. The extent to which they can act as humanizing influences will depend on the conflict, and as the patterns of conflict change so too will their relative effect.

Given that this is so can a code such as Protocol I add to the efficacy of the customary norms? Can a written code, sired for humanity and nurtured politically, be flexible enough not to be discarded as contradicting necessary actions of war, yet be sufficiently concrete to modify the means and methods of conduct along humanitarian lines?[33]

These queries can, it is submitted, be answered in the affirmative. A written code in this area can clarify the existing law so as to define the parameters of customarily accepted conduct. If due attention is paid to the realities of combat a code can lay down guidelines which will aid a combatant in determining the scope of his actions. In this way a regularity of conduct could be achieved which would alleviate the coarsening effect of protracted war and emphasise the reciprocity principle.

However, the value of such a code can only be fully realised if it is used by the nations of the world as an authoritative training reference to be incorporated in their military training programmes. The combatant must be educated in the code so as to create an expectation of conduct in his mind, and to know that his actions must conform to that expectation.[34]

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33. Draper (G.I.A.D.Draper "The Emerging Law Of Weapons Restraint" (1977) 19 Survival 9.), has suggested that the drafters of Protocol I may have added to the unreality of the laws of war. His contentions will be discussed later, but for the present the point needs to be made that if the "extra-legal" forces behind the Conference made inevitable an unreal text then this is a serious criticism of the law-making process (or, as Lauterpacht (supra note 16, ibid) would have it, evidence of the "artificiality", in substantial respects of the Law of Nations conceived as a system of the effective rule of law).

34. To achieve this the rules must be formulated so precisely that combatants of all nations agree on the nature of their obligations. For if the provisions are drafted too broadly subsequent interpretations as reflected in the nations' training programmes could create

It is evident from the above discussion that the drafters of Protocol I had no easy task, and it is in the light of these problems and theories that the paper now turns to examine the battlefield Articles.

III THE BATTLEFIELD ARTICLES OF PROTOCOL I

A. Article 48 - The Basic Principle

Article 48 enunciates the basic principle from which all the succeeding Articles follow.

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[35]

That the necessity of making this distinction lies at the root of the humanitarian laws of war has long been recognised. The preamble to the Declaration of St Petersburg of 1868 states:

> "... the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."[36]

Here the interests of the combatant and the humanitarian coincide, for to the combatant the question is how best to expend his military force against the military capacity of his enemy while to the humanitarian it is how to keep the civilian population outside the ambit of military operations.[37]

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dissimilar expectations of conduct in the minds of the combatants, to the detriment of humanity and to the law of war. See G. Draper, supra note 33, 15.

35. Article 48, supra note 9, 46. Notice that this is in accord with the fundamental rule of humanitarian law as formulated by Pictet, supra note 28.
36. L. Friedman (ed.), supra note 4, 192
37. "The problem of the protection of the civilian population can be approached from two different standpoints. From the humanitarian standpoint, it must be considered how the Parties in the conflict, who do not have an unlimited right to adopt means of injuring the enemy can leave the civilian population outside the sphere of the effects of military operations. From the military standpoint, it is more a question of how the Parties can concentrate their operations on the distruction of the enemy military resources."
"Protection Of The Civilian Population Against Dangers Of Hostilities" Document CE/36, 11 submitted by the International Committee of the Red Cross, Geneva, January 1971 to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

The theoretical possibility of accomplishing this has already been discussed and no more need be said here. The remainder of this section of the paper is concerned with the way in which the battlefield Articles implement the principle.

B.Article 51 - Protection of the Civilian Population.

Article 51 is the first substantive regulatory Article with which this paper is concerned;[38] it confers on the civilian population and individual civilians general protection against dangers arising from military operations. To give effect to this protection Article 51 enunciates several rules which "... shall be observed in all circumstances."[39]

In order to appreciate the significance of these rules it is necessary to first examine the law relating to the protection of civilians as it stood before Protocol I.

a. Protection Of Civilians Before Protocol I.

In ancient (and not so ancient) times the property and persons of the enemy's civilian population were literally the victors' spoils. The anticipation of such spoil was one of the chief motivating factors of the soldiery of the time, the richer the prospect of pillage the more martially inclined the soldier. As nation states became more organised wars tended to be fought between relatively small professional armies. Rape, loot and pillage were still "perks" of the job, but the practices were becoming frowned upon and attempts were being made to limit the effects of war of the civilian population.[40]

In 1874 a group of soldiers, diplomats and lawyers from fifteen nations met in Brussels to draft an international declaration concerning the laws and customs of war. Although a text was produced it was never ratified by the nations concerned because of political dissent, but the principles enunciated showed the expectations of the time and spurred the calling of further conferences.[41]

Article 12 of the Declaration of Brussels as adopted by that Conference restated the basic tenet of the St Petersburg Declaration of 1868.

> "The laws of war do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy."

In the St Petersburg Declaration this preambular statement applied only

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38. The definition Articles (49 & 50) will be dealt with as they arise.
39. Article 51, papa. 1. See Annex I.

to the military forces of the enemy, but the Branch Conference extended it to forbid:

> "All destruction or seizure of the property of the enemy which is not imperatively required by the necessity of war."[42]

Further, only defended places could legitimately be attacked, undefended concentrations of civilians could be neither attacked or bombarded.[43] If a place was defended the commander of the attacking forces was supposed "except in the case of surprize" to do all in his power to warn the authorities of the impending attack.[44] Even in the course of the attack buildings devoted to civilian purposes such as hospitals and churches were to be spared so long as they were not being used for military purposes.[45]

The next codifying effort was made in the summer of 1899 when representatives of twenty-six states met in the Hague to codify, for the first time in history, international rules for the conduct of warfare.[46] These were contained in the Conference's second Convention[47] and were basically an affirmation of the principles of the Brussels Conference and iterated them in practically the same words.[48]

Again in 1907 the delegates of forty-four[49] nations came to the Hague to draft a more comprehensive document on the laws of war. The Annex to the Fourth Convention (Hague IV) included detailed regulations on land warfare.

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40. G. Schwarzenberger, supra note 18, 16.
41. L. Friedman (ed.), supra note 4, 152.
42. Article 15, ibid., 197.
43. Ibid.
44. Article 16, ibid.
45. Article 17, ibid.
46. The Conference was called as the result of an initiative by the Tsar of Russia who was worried that the arms race was leaving his country far behind because it could not afford to rearm. He thought that if states would agree to freeze the situation and maintain the status quo no-one would be relatively better or worse off and a great deal of expense would be saved. This piece of logic was greeted with some scepticism by the more worldly nations of Europe who found themselves at the Conference "to save Russia's face" but who had no intentions of limiting armaments. Neither did they, but public opinion was so strong that they felt they had to achieve something. Thus they concluded three Conventions: on Arbitration; Laws and Customs of War on Land; and Extension of the Geneva Rules to Maritime Warfare; three Declarations: on Projectiles from Balloons, Asphyxciating Gases, and Expanding Bullets; six "Wishes" for future accomplishment; and a Resolution. That they achieved even this is surprising considering the temper of the participants. For an entertaining account of the Conference (and an insight into the political process) see B. Tuchman The Proud Tower (New York, 1966) 229-267.

Once again the principles of the Brussels Conference and the Hague Conventions of 1899 were reiterated almost verbatum.[50]

The attack or bombardment of undefended towns, villages, habitations or buildings were absolutely prohibited,[51] but if they were defended the commander of the attacking force should still do what he could to warn the authorities before bombarding "except in cases of assault."[52] Even then civilian objects should be spared,[53] and the pillage of a captured town or place was specifically prohibited as unlawful.[54]

Thus the civilian population was protected from overt attack, provided they did not reside in a defended place.[55] The provisions of the Conventions have long been regarded as customary international law binding on all states, and not just those that ratified them.[56]

(i) Aerial Warfare

The First World War ushered in the era of air power, an eventuality undreamed of when the Hague Conventions of 1907 were drafted. It soon became obvious that new rules would be necessary to cover this new method of warfare, although in the beginning some attempt was made to stretch the Hague Regulations to encompass it. Two cases involving the bombing of cities in the First World War were referred to the Greco-German Mixed Arbitral Tribunal. In Coenca Brothers v. Germany[57] a German air-raid on Salonica was held to be "contrary to international law" because of the failure to give the warning required by Article 26. This decision was confirmed in Kiriadolou v. Germany[58] in which the attacked city was

47. J.B. Scott (ed.), supra note 4, 116.
48. Ibid., 117.
49. The South American nations had been invited, the United States having overridden the "distaste" of the European powers. B. Tuchman supra note 46, 282.
50. The 1894 & 1907 battlefield Articles (22-28) for example are practically identical in wording. J.B. Scott (ed.), supra note 4, 116-118.
51. Article 25, ibid., 117.
52. Article 26, ibid., (According to Schwarzenberger this proviso made the content of the rule non-existent. supra note 18).
53. Article 27, ibid., 118.
54. Article 28, ibid.
55. The Hague Convention on Naval Warfare 1907 used a different test, that of military objectives, that had to be satisfied before bombardment from the sea could commence.
56. See H. Lauterpacht (ed.) Oppenheim's International Law Vol II (7th ed. London, 1963) 415-421 and also Respect For Human Rights In Armed Conflicts Vol I Document A/9215,167. A survey prepared by the U.N. Secretariat in 1973.
57. (1928) 7 Recueil Des Decisions Des Tribunaux Arbitraux Mixtes 683; (1927-28) Int. L.R. 570.

Bucharest. In the Coenca Brothers trial it was admitted that Article 26 envisaged only land bombardment but it was held that the principle easily extended to aerial warfare and that bombardment without warning could not be permitted.

It was evident though that the peculiar nature of aerial warfare could not satisfactorily be regulated by rules drafted for land warfare. For one thing the Hague Regulations of 1907 were concerned with a war fought on defined fronts where the only vulnerable civilians would be those in occupied territory and those in places within field gun range. In this situation the defended status of a place was a relevant criterion for basing protection, if the aim was occupation there was no military point in bombarding an undefended town. Obviously this criterion was irrelevant to aerial warfare where occupation was never the aim.

The Conference on the Limitation of Armament was held at Washington in 1922 during which a resolution was passed establishing a Commission of Jurists to look at the regulation of aerial warfare.[59] This Commission drafted a code of sixty-two articles, but it was never accepted by the Governments and so its status as a declaration of international law is uncertain.[60]

The Hague Air Warfare Rules (as they came to be known), while not pretending to be exhaustive,[61] were intended to propose a legal regulation of the peculiar problems of aerial warfare, including aerial bombardment. Article 22 states:

> "Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited."[62]

The test of legality of bombardment is no longer whether or not the place is defended but is instead whether or not the target is a military objective.[63] Thus Article 24 states:

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58. (1930) 10 Recueil Des Decisions Des Tribunaux Arbitraux Mixtes 100; (1929-30) Int. L.R. 516.
59. D. Johnson supra note 30, 39
60. Opinion on the matter is divided. See the Secretariat survey supra note 56, and H. Lauterpacht (ed.) supra note 56.
61. Article 62, L Friedman (ed.) supra note 4, 449.
62. Ibid., (440)
63. The test in fact adopted by the Hague Convention on Naval Warfare of 1907. See J.B. Scott (ed.) supra note 4, 157.

"1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would contribute a distinct military advantage to the belligerent.

2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes.

3) The bombardment of cities ... or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives in paragraph 2 are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities ... or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

5) A belligerent State is liable to pay compensation for injuries to person or to property caused by the violation ... of the provisions of this article."[64]

This Article obviously represents a considerable advance over the previous law in both its particularity and definity. It was probably as a result of these two characteristics that the rules were politically unacceptable to the governments of the day.

Article 25 elaborated Article 27 of the Hague Regulations of 1907 by extending to aircraft the prohibition against the bombardment of buildings dedicated to public worship, art, the care of the sick and other cultural monuments (provided they were not at the time being used for military purposes).[65]

Article 26 of the Rules enabled a state to establish a zone of protection for important historic monuments inside which no bombardment would take place provided the other Powers were notified, the zones were clearly

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64. supra note 61.
65. Ibid.,

marked, were not used for military purposes and were open to inspection by a neutral committee.[66]

The efficacy of the Rules was soon to be put to the test as 1939 heralded another world-wide descent into barbarism. On September 1, 1939 President Roosevelt appealed to the governments of Europe to declare that they would "in no event and under no circumstances undertake bombardment from the air of civilian populations or unfortified cities, upon the understanding that the same rules of warfare shall be scrupulously observed by all their opponents."[67]

On September 2 the British and French Governments agreed that they would not bomb from the air "any except strictly military objectives in the narrowest sense of the word."[68] A fortnight later Germany announced that she also would adhere to the principle, provided that this adherence was reciprocated.[69]

Despite these reciprocal protestations the concept of "total war" soon eviscerated their substance. Cities were bombed and levelled, often for the purpose of terrorising their civilian inhabitants. Target-area ("carpet") bombing was adopted by the Allies as a method of shattering not only the enemy's ability to produce war materials but also his morale. The distinction between military objectives and civilian objects was largely lost as the practice of war vastly expanded the definition of the former. The Hague Rules of Air Warfare were not often mentioned in official circles at this time.

> "The area attack of this period was deliberately aimed at the destruction of the principal cities of Germany. The object was ... to destroy in the centre of the cities, the housing, public utilities and communications to such an extent that their inhabitants would not be able to go on working. Though, on occasion, individual factories or groups of factories were designated as the centre of the target and it was also hoped that many would be destroyed or seriously damaged by the overspill of the area attack, it was the destruction of the living quarters of the towns which was the main object of the attack. The worker was to be deprived of the means of

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66. Ibid.,
67. D. Johnson, supra note 30, 47.
68. Ibid.
69. H. Lauterpacht (ed.), supra note 56, 527.

working by the devastation of his environment. Though the destruction of the will to work had in this period been made secondary to the destruction of the means to work, yet there was in the minds of some in Britain the thought that such demoralisation would be caused as to result in a general refusal to work under such conditions."[70]

However, the practice of carpet-bombing proved to be costly in terms of lost aircraft and aircrew and the results were not what were expected.[71] Morale was not shattered (in fact there were indications that it strengthened into stubborn resolution),[72] and the effects on war production did not justify the losses incurred. Further there was the post-war situation to be considered. Sir Winston Churchill in a minute written in the latter stages (28 March, 1945) of the war summed up the strategic position with his usual firm grasp of reality:

> "It seems to me that the moment has come when the question of bombing of German cities simply for the sake of increasing the terror, though under other pretexts, should be reviewed. Otherwise we shall come into control of an utterly ruined land. We shall not, for instance, be able to get housing materials out of Germany for our own needs because some temporary provision would have to be made for the Germans themselves. The destruction of Dresden remains a serious query against the conduct of Allied bombing. I am of the opinion that military objectives must henceforward be more strictly studied in our own interests rather than that of the enemy ... I feel the need for more precise concentration upon military objectives, such as oil and communications behind the immediate battlezone, rather than on more acts of terror and wanton destruction, however impressive.[73]"

What was left of the principle that a distinction should be made between military objectives and civilian objects at the end of the Second World War? The charge of indiscriminate bombing of the civilian population

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70. C. Webster and N. Frankland The Strategic Air Offensive Against Germany 1939-1945 Vol II Endeavour H.M.S.O. (London, 1961) 235 The result of this policy was explained by Sir Arthur Harris (Officer Commanding Bomber Command) who, on November 3, 1943, gave the Prime Minister a list of nineteen German towns which had been "virtually destroyed". By this phrase he meant to express a degree of devastation which made the town "a liability to the total German war effort vastly in excess of any assets remaining". As a further indication of what had been achieved against these towns (among them Hamburg, Cologne, Essen, and Dortmund) Harris compared their condition with that of Coventry. There 100 out of 1,922 acres had been devastated. In Hamburg it was 6,200 out of 8,382 acres, in Essen 1,030 out of 2,630 acres. Ibid., 47-48.

was included in the indictment of the German major war criminals before the International Military Tribunal at Nuremburg, but no convictions were brought in.[74] H. Lauterpacht argues that this was because the practice was widespread on both sides, and not because it was no longer illegal.

> "While such a basis of exculpation is controversial, it leaves open the possibility for the view - which is believed to be the accurate view - that indiscriminate strategic target-bombing is unlawful when judged by the established standards of the traditional distinction between combatants and non-combatants."[75]

Other jurists are not so sure. Professor Schwarzenberger writes that the practice of World War Two has reduced the distinction between combatants and non-combatants almost to vanishing point.[76] He sees in the trends of the two world wars (an in the Viet-Nam experience) a tendency towards total war, war in which no real distinction is made between combatants and non-combatants.

> "In view of the conduct of air warfare during the Second World War and in Viet-Nam, the inconclusiveness in this respect of relevant post-1945 treaties and the generally known preparations made by all major Powers for air and missile warfare ... it appears impossible to state with any confidence that near-total air and missile warfare runs counter to the contemporary laws and customs of war."[77]

Lauterpacht concedes that the practice of nations has reduced the distinction between combatants and non-combatants "into a hollow phrase"[78] but maintains that the seed kernal of the law remains as "unchallenged principle":

> "That unchallenged principle is embodied in the rule that non-combatants, whether in occupied territory or elsewhere, must not be made the object of attack unrelated to military operations and directed exclusively against them."[79]

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71. In terms of production the loss of armaments directly due to area bombing in 1943 and 1944 was only about 5%. Ibid., 252.
72. Ibid., 237-243.
73. C. Webster and N. Frankland The Strategic Air Offensive Against Germany 1939-1945 Vol III Victory H.M.S.O. (London, 1961) 112; D. Johnson supra note 30, 39.
74. H. Lauterpacht (ed.), supra note 56, 529.
75. Ibid., 530
76. G. Schwarzenberger supra note 18, 159.

In other words all that remains forbidden is the express terrorisation of the civilian population, a rule that in practical terms seems to differ little from Schwarzenberger's conclusion that "near-total" war is not illegal. Especially as Lauterpacht considers that the practice of the Second World War made controversial the assumption that the civilian population as such is entitled to protection. That is to say he considers it controversial whether an attack is prohibited because the presence of large numbers of civilians in the vicinity of the target would make great damage to the civilian population inevitable.

In the Second World War civilian protection became nominal as the concept of legitimate military objectives became so enlarged as "to lose in fact any legally relevant content".[80] In this respect, admits Lauterpacht, the prohibition against terrorization can be of limited practical use[81] for in most cases centres of civilian population will contain military objectives the destruction of which will mean the destruction of the civilian objects and consequent terrorisation. Such terrorization could motivate the attack while plausibly being passed off as only incidental to the destruction of military targets.

However, if Schwarzenberger is correct in saying that the adoption of near-total warfare has obliterated the distinction between combatants and non-combatants then the foundation of the humanitarian rules of law has disappeared. Lauterpacht realises this and (quite naturally) prefers to conclude that the final prohibition remains:

> "Nevertheless it is in that prohibition, which is a clear rule of law, of intentional terrorisation - or destruction - of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all, without that irreducible principle of restraint there is no limit to the licence and depravity of force. If stark terror and panic dissolving all bonds of organised life are an object at which the belligerent can legitimately aim, there is no reason why he should stop short of murdering the inhabitants of occupied territory - for such action is certain to create terror both in the occupied territory and in territory which he threatens to occupy ... It is clear that admission of a right to resort to the creation of terror among the civilian population as being a legitimate object per se

77. Ibid.
78. H. Lauterpacht (1952) 29 B.Y.I.L. 360,364.
79. Ibid., 365.

> would inevitably mean the actual and formal end of the law of warfare. For that reason, so long as the assumption is allowed to subsist that there is a law of war, the prohibition of the weapon of terror not incidental to lawful operations must be regarded as an absolute rule of law."[82]

Johnson agrees with this conclusion basing his analysis on the practice of states and writes that modern international law permits 'strategic' and, of course, 'tactical' bombing in time of war, but forbids 'terror-bombing'.[83]

It is submitted that so far as aerial warfare was concerned the Second World War came very close to denying, in Lauterpacht's words, "that (aerial) war can be legally regulated at all". For example, towards the end of that war the Allies decided that a blow of "catastrophic force" should be aimed at German civilian morale, not to win the war, but to hasten victory. The decision as to what form the blow should take was made without the least regard to international law. One suggestion was that a number of relatively small towns with populations of about twenty thousand should be obliterated. It was discarded solely, it would appear, because:

> "Such attacks, it was shown, would require visual aiming and would, therefore, depend for their success upon good weather, and the activity of the American bomber force in daylight. It was unlikely that more than thirty such towns could be destroyed in a month, and even if a hundred were eventually devastated only three per cent of the German population in relatively unimportant areas would be affected."[84]

It is submitted that since, as Johnson points out, international law is evidenced partly by the practice of states the above example raises doubts as to whether terror was not an accepted aim of aerial warfare.

However one may still conclude that terror in itself was not an accepted method of war. It was never advocated for the ground and sea forces, and it was always denied that it was the primary object of the bomber raids (Churchill's memorandum notwithstanding). The point has been dealt

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80. Ibid.,
81. Ibid., 368
82. Ibid., 369
83. D. Johnson supra note 30, 57.
84. C. Webster and N. Frankland supra note 73, 54. The plan eventually opted for was for a massive raid on Dresden, which took place in February of 1945 utterly ruining the city. The raid did not achieve

with at some length here because it was this situation that the drafters of Protocol I were looking back upon when they prepared part of Article 51, and in order to appreciate their efforts it is necessary to have some idea of what in fact they are trying to regulate.

(ii) War On Land.

As to land warfare the situation at the end of the Second World War was similar in that the bombardment of civilian concentrations was accepted practice but only if concentrations contained military objectives. In this area the Hague Regulations of 1907 specifically applied, and though they prohibit the bombarding of undefended civilian concentrations, they do not protect civilians absolutely. If a town contains military objectives it may be bombarded despite probable civilian losses. Some regulation is made to protect cultural and other objects (hospitals and the like), but the protection is minimal.[85]

However the prohibition against terrorisation and wanton destruction is well established and was applied by Military Tribunals at the end of the Second World War.[86] But the point remaining is that assault, siege and bombardment are in themselves legitimate means of warfare, the probability of incidental civilian loss is irrelevant and may even be counted as a factor that will persuade the besieged of the advisability of surrender.

b. Article 51 In Context

Paragraph 1 of Article 51 confers on civilians[87] a "general protection against dangers arising from military operations".[88] This initial statement immediately widens the whole scope of the existing law of the Hague, for the "general protection" means that not only are civilians to be immune from direct attack aimed specifically at them, they are to be protected as much as possible from the incidental effects of warfare. The significance of this when related back to the Second World War practice (particularly with regard to aerial warfare) is immediately apparent.

Paragraph 2 states in absolute terms that the civilian population as such is not to be the object of attack nor subjected to violence the primary purpose of which is to spread terror among them. Thus the vital principle of law that Schwarzenberger feared had almost been lost in the

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its purpose, it did not break the morale of the German people.

85. Article 27 J.B. Scott (ed.), supra note 4, 118.

86. See In re Holstein and Others (1949) 8 War Crimes Reports 9; 9 Int. L.R. 261. Re Szabados (1949) 9 War Crimes Reports 59; 9 Int. L.R. 261.

practice of the Second World War, and which Lauterpacht refused on principle to discard is here peremptorily affirmed.

Paragraph 3 directs that civilians shall be protected "unless and for such times as they take a direct part in hostilities". The adjective "direct" was included so as to protect civilians who indirectly participate in hostilities by, for example, growing food for troops or working in a munitions factory. An example of civilians taking a direct part in hostilities would be that of the taxi drivers of the Marne who, in 1914, ferried troops and equipment to the front to protect Paris. A more general example would be the levee en masse.

Paragraph 4 details the second limb of the general protection, protection against indirect attack, by prohibiting attacks[89] which are general in their effect and which cannot distinguish between civilian and military targets. These are termed "indiscriminate attacks" and include attacks that, while employing discriminating weaponry, are not directed at a specific military objective. Likewise paragraph 4(b) prohibits the use of methods or means of combat that cannot be directed against a specific military objective, that are inherently indiscriminate. Paragraph 4(c) plugs a gap by forbidding the employment of methods or means of combat that, while they can be aimed at a specific objective, have such a devastating effect that damage cannot be limited to the target within the degree acceptable to the Protocol.

Paragraph 5 gives a non-exhaustive list of types of indiscriminate attack. The first of these is saturation or carpet bombing in which

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These cases mainly speak to the situation of wanton destruction committed in occupied territory as (alleged) reprisals. However the principles enunciated apply by analogy to terrorisation used as a method of combat.

87. Article 50 (see Annex I) defines civilians negatively, that is to say they are all those not defined by Article 4A(1),(2),(3) and (6) of the Third Convention of Geneva, 1949 and by Article 43 of Protocol I. Stating it positively this means that a civilian is a person not belonging to any armed force and who does not take part in hostilities.

88. According to Article 49(2),(3) and (4), Protocol I (and hence Article 51) applies to all attacks in whatever territory conducted. "Military operations" refers to attacks by land, and attacks by air or sea against objectives on land. They do not otherwise affect the law applicable to aerial or naval warfare. Furthermore the battlefield Articles are additional, and not exclusive of, other relevant humanitarian rules of law.

89. "Attack" is not used by Protocol I in its usual sense, that is to say it does not connote assault. By virtue of Article 49(1) an "attack" is any act of violence against the enemy, regardless of the phase of war.

whole towns are treated as one military objective and levelled so as to destroy several separate and distinct military targets located within the town. If this provision can be effective it will return the concept of military objective (so far as aerial warfare is concerned) to its pre-Second World War state as evidenced by Articles 24 and 25 of the Hague Rules of Air Warfare.[90]

The provision also substantially modifies the Hague Regulations of 1907 as they apply to land warfare by effectively abolishing the defended place test for justifying bombardments. Clearly attacks by ground forces must now be directed only against identified military targets within a town, it is no longer permissible to bombard generally in the expectation that the damage to civilians will assist the defenders in deciding to capitulate.

Paragraph 5(b) labels as indiscriminate attacks which, although directed against a military objective, may be expected to cause individual civilian loss "which would be excessive in relation to the concrete and direct military advantage anticipated." This is a proportionality test, a test that must be answered by the commander of the attacking force(in the first instance - but often by politicians if the attack is to be a major one in response to strategic policy).[91] It is thus a subjective test based on the appreciation of the attack-authoriser. It is a test that is a crucial component of the protective structure erected by the battlefield Articles, its efficacy will be evaluated shortly.

Incidental loss of civilian life as measured against potential military advantage was a calculus included in Article 24(3) and (4) of the Hague Rules of Air Warfare. Those Rules were more restrictive than the present provision in that Article 24(3) prohibited the bombardment of towns not in "the immediate neighbourhood of the operations of land forces",[92] where in the present case there is no such provision. However it might also be argued that the Hague Rules provision that towns could be bombarded if there exists "a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population"[93] is less restrictive than the Protocol I provision that

90. L. Friedman (ed.) supra note 4, 440-441.
91. See for example how the decision to attack Dresden was made: C. Webster and N. Frankland supra note, 73, 54-109
92. L. Friedman (ed.) supra note 4, 440.
93. Article 24 (4) ibid.

demands that the "concrete and direct military advantage anticipated" must be greater than the expected disadvantage to the civilian population. Arguably a less nebulous test, but a moot point since the Hague Rules of Air Warfare were never adhered to anyway.

The proportionality rule also represents an advance over the Hague Regulations of 1907 since Article 26 (the relevant Hague Article) requires no such calculus. Once it is established that a place is defended incidental civilian loss is (subject to the limited provisions of Article 27) very much a matter for the conscience.

(i) Evaluation Of The Indiscriminate Attack Provisions.

What practical effect can the indiscriminate attack provisions have on the conduct of military operations?

As far as aerial warfare is concerned the prohibition against carpet bombing, paragraph 5(a), may well be effective because of the experience of the last world war in which it was shown that no worthwhile military advantage was gained by the practice, and indeed it may have been detrimental to the interests of the attacker. Further, the great technological advances made in weapons systems means that precision bombing of great accuracy is possible, thus limiting incidental civilian losses. Against this however is the corresponding increase in anti-aircraft capabilities. In an interview with an American Navy pilot the writer learned, for example, that the anti-aircraft defences around Hanoi were so effective that precision bombing was almost impossible. It is not likely that, in comparing expected civilian losses with anticipated military gain (as required by paragraph 5(b)), an attack commander will consider the disconcerting effectiveness of enemy anti-aircraft fire as a factor requiring him to abstain from attacking because of the resulting inaccuracy of the bombing.

The definitions contained in paragraph 4 have given rise to some controversy. Draper, for example, is concerned that they may be attempting to obliquely prohibit the use of specific categories of conventional weaponry, something that they could not do specifically.[94] (At the Conference the question of prohibitng specific weaponry was gone into at some length, but no agreement could be reached).[95]

> "The ICRC, precluded from specific limitations of indiscriminate types of weapons for various reasons it cannot remove, has sought in a series of detailed rules ... to protect the civilian population ... from military attack. If these ... rules are to operate in

94. G. Draper, supra note 33, 11.

armed conflict, then the weapon restraints or prohibitions not established directly will have been brought into the law obliquely. This is a high expectation which, if it fails, will undermine the Rule of International Law in serious measure. Nevertheless it may be said that the attempt had to be made."[96]

It is submitted that Draper's criticism has some merit. "Blind" weapons such as booby-traps or land-mines do seem to fall foul of paragraph 4(b) or (c). However the delegations were not unaware of this and in interpreting paragraph 4 they were of the opinion that it is not intended to signify that there are means and methods of combat the use of which would involve an indiscriminate attack in all circumstances. Instead they took the paragraph to mean that weapons can, according to the circumstances of their employment, be used legitimately or illegitimately.[97]

In this way Draper's objection is largely avoided since states will not feel that they are prohibited from using conventional weaponry, all they will feel bound to do is consider the circumstances of their use.

Further "unreality" was avoided by the understanding that Protocol I in no way limits, affects or applies tonuclear weapons.[98] Not only was this made plain during the Conference but was also included in declarations made by states on signing the Protocols.[99]

This paper is not concerned with the legitimacy or otherwise of nuclear warfare. It is submitted that in the event of nuclear war it is not likely that any rule of "law" will moderate the behaviour of the belligerents. In such a situation it is likely (unless one accepts the idea of a "limited" holocaust) that the foundation of the law of war (the distinction between combatants and non-combatants) will be totally destroyed. In this respect the exclusion of nuclear weapons

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95. "The indifference or open hostility of those states which possess the most advanced military technology, including the Soviet Bloc and the majority of NATO, made it seem that any provisions that might be drafted would not be accepted by those very states whose weapons were to be brought under control. A treaty binding the "have-nots" but not the "haves" would be futile. And so the whole campaign ran down." R. Baxter supra note 6, 181.
96. G. Draper supra note 33, 12.
97. Document CDDH/215/Rev.1, 44. Statement of the United Kingdom Delegates.
98. "The United States and other countries made it clear that the new provisions applied only to conventional arms and not to nuclear

from the ambit of Protocol I adds to the reality of that document and does not detract from its likely efficacy.[100]

The proportionality test of paragraph 5(b) was also criticised by some delegates. Mr Nguyen Van Huong of the Democratic Republic of Viet-Nam considered that the subjective nature of the test made it possible for any attacker to justify his actions on the ground that his appreciation of the situation favoured an attack.[101]

It is submitted that this is a valid observation, but not a valid criticism for it is difficult to see how any realistic objective criteria that would apply in all situations could have been laid down. What the provision does, and it is submitted that this is all it could realistically hope to do, is to raise the civilian factor in the mind of the attack commander so as to make him justify to himself his proposed course of action. If his decision to attack is manifestly improper then it is unlikely that the subjective nature of paragraph 5(b) would protect him in any subsequent judicial proceedings.

Paragraph 5(b) is further limited in its effect by the interpretation of the phrase "concrete and direct military advantage anticipated" to mean "the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."[102] This means that the military advantage referred to is the strategic and not necessarily the tactical one. That is to say the battle as a whole must be regarded and not just isolated part of it, a reservation that will allow actions that microcosmically appear to be unlawful but which are justified by the broad strategic situation.

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weapons, and the I.C.R.C. itself now proceeded on these assumptions from the outset. The new Protocol I thus places no restraints whatsoever on use of nuclear weapons." R. Baxter supra note 6, 179.

99. The United Kingdom signed Protocol I with the understanding: "... that the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons..." The United States of America signed with the same understanding. Ministry of Foreign Affairs Document 108/11/27,3.

100. For information on this topic see: Shimoda v. Japan (1963) 8 Japanese Annual Of International Law 212. G. Schwarzenberger The Legality Of Nuclear Weapons (London, 1958)

101. (1975) Document CDDH/III/SR.13 to 40, 26.

102. Understanding of the United Kingdom on signing Protocol I supra note 99,2. The United States of America made the same reservation which reflected the feeling of the Conference.

Article 51 was adopted by 77 votes in favour, 16 abstentions and one against. The nation objecting to the Article was France which considered that it:

> "... would seriously hamper the conduct of defensive military operations against an invader and prejudice the exercise of the inherent right of legitimate defence recognised in Article 51 of the Charter of the United Nations. As an example ... it would be very difficult in many cases to estimate the limits of a 'specific military objective' ... especially in industrialized zones of large cities and in forestry zones which could serve as a cover to the stationing and movement of enemy forces, while being used as a shelter by the civilian population."[103]

The French delegate considered that provisions concerning indiscriminate attacks could not prohibit a state from defending its territory, even if such defence might result in losses to its own civilian population. Because of this the Article placed humanitarian principles above reality and therefore it was objected to.[104]

Article 51 is more complex than its counterpart in the Hague Regulations, perhaps reflecting the fact that warfare is now a much more complex business, and if it has placed humanitarian principles above reality then its drafters have failed in their balancing process. As the French delegate pointed out in an urban situation an army's military objectives will seldom be clearly separate or distinct, but will this hamper military operations, either defensive or offensive?

For example, suppose an infantry commander is given the task of capturing a medium-sized town and destroying the enemy defending it. He knows that the town is held in some force by a mixed armour/motorised infantry battle group which has had time to prepare a good defensive position, but which is likely to attempt only a delaying defence. Intelligence reports indicate that each of the three main approaches to the town is commanded by an enemy strongpoint situated within the environs of the town. These are held by the bulk of the enemy infantry. The location of the enemy armour is uncertain, but it is likely that it will be occupying well-sited hull-down positions from which it can support the strongpoints. In the usual way alternative positions, and the routes between them will have been well prepared. The infantry

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103. (1977) Document CDDH/SR 34-46, 162.
104. Ibid,

commander now makes his appreciation of the situation and one of the factors that he knows he must consider is the fact that the entire civilian population is still in town. From his consideration of enemy strengths the infantry commander makes the following broad deductions:
(1) The enemy infantry is concentrated in three main positions, therefore these must be bombarded as heavily as possible prior to and during the attack.
(2) The enemy's armour is unlocated, but in view of its likely actions the bombardment of probable fire positions (and the routes between them) will also be necessary.
(3) The enemy will probably try to withdraw before the attack is carried home, therefore checkpoint and rendezvous areas and withdrawal routes suitable for motorised infantry should be bombarded as the attack progresses. Further, a limitation to the aim of capturing the town is that the enemy defending it is to be destroyed, therefore his withdrawal routes should be blocked if possible. Here the streets are narrow, the buildings high and brick-built, therefore bombardment aimed at blocking exit roads with rubble should be considered.

There would naturally be a great deal more to the appreciation but the above is enough for this study. The commander is beginning to realise that the courses open to him are indicating that a substantial part of the town is likely to be flattened if the attack takes place with consequent severe loss of civilian life and property. Under the Hague Regulations of 1907 he would not need to hesitate as since the town is defended he would be entitled to bombard it at will, subject only to Article 27 regarding sparing hospitals and charitable institutions if possible. The commander now has to turn to consider Article 51 of Protocol I to decide whether it places any legal limits on his proposed courses of action. He decides, correctly it is submitted, that it does not.

At first glance it appears that the three strongpoints constitute "clearly separated and distinct military objectives located in a ... town" for the purposes of Article 51(5)(a) and that the commander's proposed courses constitute a prohibited indiscriminate attack. However, a closer perusal of the tactical situation reveals that the strongpoints are in fact salient features of a co-ordinated defence system. They are connected by communications and supply routes and are supported by armour which in turn has its own established positions and routes.

All these are legitimate military targets and their bombardment is justified, even when it is not known for certain whether they are in fact occupied by the enemy. Military necessity dictates that this be so, and in the present situation the commander is justified in concluding that the three strongpoints are not clearly separated and distinct military objectives and in acting accordingly.

It is reasonably certain, however, that the envisaged bombardment would cause a great deal of incidental civilian loss which might make the attack indiscriminate under Article 51(5)(b). The commander therefore has to weigh this loss "in relation to the concrete and direct military advantage anticipated". It is submitted that since there is no objective standard laid down this provision has very little meaning except in extreme cases and will not prevent the commander from carrying out a plan involving incidental civilian loss if he believes that plan to be the most feasible way of achieving his aim. The achievement of a commander's tactical aim is the most concrete and direct military advantage that a course of action can offer him, and if the best way to achieve the aim involves incidental civilian loss then he will probably decide that the loss must be borne.

In this case the commander may well decide to minimize civilian damage by not attempting to block the enemy's escape routes with the rubble caused by concentrated bombardment, but that decision will be based on military grounds. He may not want to impede his own advance,[105] a flanking movement of infantry may be the best means of cutting off the enemy's escape or - most likely - the layout of the town does not lend itself to such action. Of course if the benefits to be gained from this sort of bombardment are doubtful then the civilian loss factor may well be decisive in influencing the commander against it, but it will not be the primary factor.

105. As happened for example in Italy in 1944 in the attack on Monte Casino:
"The violence of the bombardment was frightening to behold even from a safe distance and, as events were soon to prove, it was too much and the damage it did was more hindrance than help to the 6 Brigade Infantry fighting their arduous way through the ruins. To the tanks that were supposed to be with them it was altogether too much, and most of them ended up facing impregnable mountains of rubble or vast uncrossable chasms." In this case too the majority of the population was still in the town. W.E. Murphy Official History Of New Zealand In The Second World War 1939-45: 2nd New Zealand Divisional Artillery (Wellington, 1966) 569.

It is submitted that, in the light of the above discussion, the French delegate's fears were groundless. The proportionality rule and indiscriminate attack provisions of Article 51 do not prohibit incidental civilian loss, they merely require a calculation that balances that prospective loss against the military necessity of conducting an operation in the manner envisaged. In the above situation (a fairly representative one in its context) Article 51 had no real effect on the amount of damage that the inhabitants of the town would suffer in such an attack. In view of the previous discussion on sovereignty and military necessity this is not surprising, the nations would not be likely to agree to rules that would hamper "ordinary" military operations. However what Article 51 has done in the above scenario is raise the issue of civilian loss. If the commander had contemplated attempting to block escape routes by the rubble of concentrated bombardment as a forlorn hope only, the proportionality rule might well cause him to stay his hand. Even if it was a viable proposition, the fact that the civilian factor was established in his mind would cause him to look hard at possible alternatives. Much would depend on the expectations of conduct imparted to him by training courses on the nature and effect of the Articles. In this respect the provisions of Article 51 represent a realistic[106] and a valuable advance in the law of war.

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106. In a letter dated September 22, 1972 sent to Senator Edward Kennedy in response to his inquiry on war-related civilian problems in Indochina J. Fred Buzhardt, General Counsel of the Department of Defence, made remarks on the law and the response of the U.S. forces to the law which, it is submitted, are still relevant following the drafting of Protocol I.

"The existing laws of armed conflict do not prohibit the use of weapons whose destructive force cannot be limited to a specific military objective. The use of such weapons is not proscribed when their use is necessarily required against a military target of sufficient importance to outweigh inevitable, but regrettable, incidental casualties to civilians and destruction of civilian objects."

It is submitted that this statement does not conflict with the indiscriminate attack provisions of Article 51 (4) given the interpretations of that Article to the effect that it does not outlaw specific weaponry.

Buzhardt then goes on to describe how this affected the U.S. forces in Indochina.

"The correct rule of international law which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that 'the loss of life and damage to property must not be out of proportion to the military advantage to be gained'. A review, of the operating authorities and rules of engagements for all of our forces in Southeast Asia ... reveals that not only are such operations in conformity with this basic rule, but that in

ii Reprisals.

Paragraph 6 of Article 51 bluntly prohibits reprisals against the civilian population or civilians, and similar prohibitions in other Articles likewise forbid reprisals against civilian objects (Art.52(1)), cultural objects (Art.53(c)), objects indispensable to the survival of the civilian population (Art.54(4)), the natural environment (Art.55(2)), and works and installations containing dangerous forces (Art.56(4)). The net effect of these overlapping prohibitions is to totally ban the use of reprisals (in the course of hostilities) against the civilian interests protected by Protocol I.

This represents a considerable change in the law as will now be discussed. As stated earlier the doctrine of reprisals was seen as a law-enforcing doctrine. It "permitted"[107] a state to take action, apparently in breach of the law of war, against an enemy state which had seriously violated the laws of war so as to compel the enemy state to cease the violations.

However the reprising state had first to warn the transgressor state and call on it to comply with the law, the reprisive action had to be proportionate to the transgressor state's violations, end as soon as they ceased, and the decision to take reprisals had to be made at the highest political level.[108]

After the First World War the area of belligerent reprisals was split with Article 2 of the Geneva Convention of 1929 prohibiting reprisals against prisoners of war,[109] a protection which was later extended to all those covered by the four Geneva Conventions of 1949.[110] The Hague Convention of 1954 took the question further by absolutely forbidding reprisals against cultural property.[111] However until Protocol I they remained extant with regard to the law of combat.

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addition, extensive constraints are imposed to avoid if at all possible the infliction of casualties on non-combatants and the destruction of property other than that related to the military operations in carrying out military objectives."

Thus in 1972 the United States already regarded the proportionality principle as a "basic rule" of international law and instructed their forces to act accordingly. (1973) 67A.J.I.L. 122, 124-125.

107. "... while in the view of some authors like Kelsen reprisals constitute legitimate actions in execution of rules of international law (unless they exceed certain limits and thereby become unlawful), according to a more widely accepted view they are a sort of substitute for real acts of execution and, as self-help, are merely justifiable (again on the condition that certain limits are not exceeded)." F. Kalshoven Belligerent Reprisals (Leyden, 1971) 23.

What are the merits of this new ban? Firstly Protocol I is concerned with humanitarian law and belligerent reprisals in combat "is precisely the field where recourse (to them) can be most damaging to human values".[112] The civilian interests protected by Protocol I would be innocent victims of reprisive actions:

> "... it is a conspicuous feature of belligerent reprisals that these, even when technically aimed against the State, almost certainly will have their direct impact on individuals who, as likely as not, are innocent of the wrong provoking the reprisal."[113]

Opinion at the Conference polarised sharply over the question of reprisals, although in the finish the great majority of states agreed to the Articles containing the ban. Poland, for instance, welcomed the prohibitions as a great advance in the protection of the civilian population, pointing out that of the six million Polish casualties of World War Two the majority were civilians.[114]

France took the contrary view that the ban would mean that the enemy might violate the laws of war with impunity.[115]

The last point has some substance. Paragraph 8 of Article 51 provides that any violation of the Article's prohibitions by one side does not release the other Parties to the conflict from their legal obligations. Yet if one side did breach their obligations then pressures would build up for the other side to take reprisive measures with a consequential likelihood of the ban being violated, to the detriment of the law as a whole.

> "In some cases it will even be a virtual necessity for a belligerent to set aside the rule violated by its opponent, as otherwise it would have to fight at an unacceptable disadvantage."[116]

Against this is the realisation by states that despite the existance of rules of law persistent breaches of that law will be likely to induce retaliation in kind. Protocol I does not prohibit the threat of

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108. Ibid., 22-23.
109. Ibid., 80.
110. Ibid., 265.
111. Ibid., 275.
112. Ibid., 375.
113. Ibid., 42
114. (1977) Document CDDH/SR. 34-46, 166.
115. Ibid., 162.
116. F. Kalshoven The Law Of Warfare (Geneva, 1973) 108.

reprisive actions and this, coupled with the knowledge that if provoked too far the state will carry out its threat, can continue to act as a deterrent.

It can also be argued that a ban on reprisals in the course of hostilities is unrealistic because of the possibly greater military advantages to be gained from reprisals in this area than those where they are already banned by the Geneva Conventions of 1949.

However Kalshoven in his survey of the practice of states in the Second World War can find no genuine acts of combat reprisals, and gives as a reason:

> "... the limited importance in practice of belligerent reprisals. These are in fact virtually useless, for instance, in respect of an enemy who by his whole attitude demonstrates a total disrespect for certain parts of the law of war ... They are equally useless when applied in a situation where the interests at stake are so great as to make it utterly improbable that a belligerent would change his policy merely on account of a certain pressure exerted on him by the enemy: instances of such crucial issues were the strategic air bombardment and the unrestricted submarine warfare, practised by either side in the course of the Second World War."[117]

He therefore concludes that a total prohibition of belligerent reprisals is a tenable proposition, but argues at some length that a prerequisite for the efficacy of such a step would be the institution of adequate means to take over their function of law enforcement.[118]

Section II of Part V of Protocol I contains seven Articles for the repression of breaches.[119] Article 85 makes the provisions of the Geneva Conventions of 1949 relating to the repression of breaches and grave breaches applicable to Protocol I. These Conventions lay a strict obligation on the states "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" defined in each of the Conventions. The states are also under an obligation to bring to justice "persons alleged to have committed, or to have ordered to be committed, such grave breaches."[120]

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117. F. Kalshoven supra note 107, 214.
118. Ibid., 375.
119. Articles 85-91. See Annex I.
120. Articles (in order of Convention) 49/50/129/146 supra note 5.

Kalshoven found these provisions to be impressive,[121] but it is arguable that it would be much more difficult to supervise the ban in this area (which after all deals with the actual process of war) than in the areas covered by the Conventions. Moreover reprisals are not characterised as being grave breaches of Protocol I. Article 85(3)(a) does define as a breach "making the civilian population or individual civilians the object of attack", and since violent reprisals against civilians would be making them the object of attack it is arguable that they are hereby covered. A similar argument could be made with respect to Article 85(4)(d) relating to cultural monuments, but there are no similar provisions readily applicable to the other categories of civilian interests against which reprisals are forbidden.[122] However reprisals will still be "breaches" of the Protocol.

Article 87 requires that High Contracting Parties and Parties to the conflict shall require their military commanders to enforce the Protocol, and this therefore includes the prohibition against reprisals. Self-policing in this manner would be most effective, except where (as is often the case) the decision to reprise is taken at the highest political levels.

Article 90 provides for the setting up of an International Fact-Finding Commission which shall be competent to enquire into alleged grave breaches (or other serious violations) and facilitate "through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol."[123] However in other situations the Commission shall insitute an enquiry "only with the consent of the other Party or Parties concerned".[124] Given the nature of sovereignty in time of war and the tentative powers of the Commission it is doubtful whether it will make much of a regulatory impact.

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121. F. Kalshoven supra note 107, 270-271.
122. Except perhaps for Article 85(3)(c) which characterises as a grave breach "launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57(2)(a)(iii)."
But it would be open for any state taking reprisive actions against such works or installations to argue that the expected civilian loss was justified by the "concrete and direct military advantage anticipated" (Art.57(2)(a)(iii)), i.e. the cessation of the opposing Party's unlawful actions.
123. Article 90 (2)(c)(ii).
124. Article 90 (2)(d).

It is not certain what effect the reprisive provisions will have on the conduct of a war. Parties to a conflict will not be anxious to have their shortcomings exposed, and the probability that on the cessation of hostilities the victor will be likely to prosecute grave breaches of the Protocol as war-crimes is not calculated in itself to act as a great deterrent. Especially since reprisals are usually authorised by high authority for compelling reasons associated with the opposing Party having already violated the laws of war.

However in one sense there is a greater strength of law in having a clear rule of prohibition. If the drafters had opted for a rule allowing reprisals of a limited effect or against limited objects there would be a great danger of them not being able to be so confined and a resultant spilling over into the protected categories to the detriment of the law and humanity. The fact that some reprisals would be lawful would lower the threshold of the law so as to make such a "spillage" a likely occurance. Similar dangers might arise if the drafters had left the law alone. Reprisals are paradoxical in that they serve the cause of humanity by employing inhumane practices, as a result they tend to degenerate into a downward spiral of reprisal and counter-reprisal that may bottom in anarchy.

In the opinion of the writer these arguments, and the ones advanced above, justify the ban on reprisals in the course of hostilities. Whether the ban will be strictly observed will depend, as all the rules of war depend, on the nature of the conflict and the expectations of the Parties to it.

(iii) Using Civilians To Confer Immunity On Military Objectives.

Paragraph 7 of Article 51 prohibits a Party from taking advantage of the protection offered to civilians by using them to shield military targets. Here the reciprocity principle would probably function to make this provision an effective one, for if civilians were used in this way the protective effect of the Articles would soon degenerate to the detriment of both sides.

At the Conference some nations feared that this provision might hamper the national defence where population densities precluded the movement of people from a combat zone.[125] On the face of the paragraph this could not happen. It is framed in terms of intention, and does not contain any obligation to mount a defence only in areas devoid of habitation.

C. Article 52 - General Protection Of Civilian Objects.

Article 52 is the complement of Article 51 in that whereas the latter protects the persons of the civilian population, the former protects its property. Paragraph 1 states that civilian objects shall not be the object of attack or reprisal. In this respect its effect is more limited than Article 51's because here there is no obligation specifically formulated to protect civilian objects from the incidental effects of military activity.

Civilian objects are negatively defined as "all objects which are not military objectives", the latter being defined in paragraph 2 as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage." Paragraph 3 provides that if there is doubt as to whether a normally civilian object is being so used it will be presumed not to be used for military purposes.

That this Article extends the Hague Regulations of 1907 is obvious. There it was enough if an object was defended, under Article 52 not only must it be defended,[127] it must also be making an effective contribution to military action and the curtailment of that action must offer a definite military advantage before it can be legitimately attacked.

In introducing Article 52 to the Third Committee Mrs Bindschedler-Robert of the I.C.R.C. said that the purpose of the condition requiring a

125. For example the Italian Delegation abstained from voting on Article 51 partly because of paragraph 7. In its explanation of vote the Italian delegation stated that its attitude to paragraph 7 was based on the following considerations:
"The prohibition on the use of the presence or movements of the civilian population to shield ... military objectives ... presupposed that the State in question had large areas of uninhabited territory at its disposal. ... (but) There were a large number of States whose territory was densely populated even near its frontiers. The provision could therefore in no case be interpreted as preventing or hindering a State that wished to do so from organizing an effective system of defence. That was a fundamental right which no Government could renounce." (1977) Document CDDH/SR. 34-46, 165

126. Article 52(2).

127. In the sense that if an object is making an effective contribution to military action it can be said to be "defended" for the purposes of the Hague Regulations 1907.

definite military advantage before an object could be attacked was to introduce the principle that even a military objective should not be destroyed where such destruction presented no direct or immediate military advantage.[128]

It is difficult to see how the liquidation of an object which is making an effective contribution to the enemy's military action would not offer an immediate and definite military advantage. It is also difficult to see what sort of test would be used to determine whether an object being used by the enemy's military forces is or is not making an effective contribution to his war effort. If it is left to an attack commander it is submitted that whenever a military objective is identified as making an effective contribution to the enemy's war effort it will be decided that there is an immediate definite military advantage in liquidating it. Of course this will depend on the resources available to be employed against the objective, if resources are scarce then targets will be attacked according to a priority scale based on the magnitude of the military advantage to be gained from a target's liquidation. In this way a military objective may be left alone for a time, but not for the reason of principle advanced by Mrs Bindschedler-Robert.

Opinion in the Third Committee was divided over the extent to which civilian objects should be immune. Some delegates wanted a blanket immunity for all civilian objects regardless of their use,[129] a requirement thought (correctly it is submitted) by others to be manifestly unrealistic. The delegate of the Democratic Republic of Viet-Nam argued strongly for blanket immunity[130] on the ground that it would otherwise be too easy for an attacker to justify wanton destruction of civilian objects by the assertion that they had been used for military purposes. A more moderate argument was advanced by the Swedish delegate who considered that blanket immunity was necessary in order to check the tendency to broaden the notion of military objective,[131] a broadening that had in the Second World War almost destroyed the distinction between civilian objects and military objectives.

As has been discussed in relation to the protection of the civilian population the argument of the Vietnamese delegate has its merits in that an aggressor can excuse unlawful actions by referring to broad

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128. (1975) Document CDDH/III/SR. 13-40, 16.
129. Ibid., 27.
130. Ibid., 26.
131. Ibid., 29.

subjective rules of law. However, in the area of armed conflict law the sovereignty of states cannot be too restricted in the name of humanity, it is just not practically possible. It is often better to have widely framed rules of law than no rules at all. A blanket immunity for civilian objects regardless of use would inevitably be disregarded as soon as it became militarily necessary to do so.

The same arguments apply to the points raised by the Swedish delegate, the parameters of acceptable conduct must be placed realistically if they are to regulate the activities of combatants.

There was also controversy regarding paragraph 3's presumption of harmlessness. On the one side were those who wanted blanket immunity and on the other were those, such as Mr Reed of the U.S.A., who considered that "a soldier risking his life on the battlefield could not be expected to take a decision in the circumstances of the moment, and grant a presumption in favour of doubtful objects..."[132]

In the opinion of the writer the creation of presumptions such as this are militarily unreal for the reason that a field commander who is uncertain of the hostility of an object such as a church or a school often cannot afford to act on a presumption of its neutrality. The consequences of the presumption proving unfounded could be too great to be risked.

Returning to the attack scenario; in considering the factor of ground the commander realises that the steeple of a large church would make a very good observation post from which defending artillery fire might, with disconcerting effect, be directed on his attacking forces. He does not know whether the church is being used in this manner, there are other prominent features that the enemy could use. In keeping with Article 52(3) he should therefore presume that the church is neutral and so leave it alone. However if the steeple is occupied he knows that his casualties will be severe, his chances of fulfilling his aim reduced. He feels that he cannot ignore this possibility and marks the steeple down as a pre-attack artillery target.[133] The generality of the presumption is such that in many cases it will inevitably be ignored.

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132. Ibid., 25

133. In an interview with a senior New Zealand Army Officer the writer was told that it was this officer's practice, when a Company Commander in Italy in 1944, to "knock the top off every steeple I come across" for the reason that they could not be presumed to be neutral as it would be too costly to be wrong. This practice appears to have been common:
"Finally there was the church tower in Orsogna, the thin spire which

Military action, though it may be guided by legal principles will not be subordinated to them.

D. Article 53 - Protection Of Cultural Objects And Places Of Worship.

Article 53 prohibits any acts of hostility directed against "the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples". It is also forbidden to use such objects in support of the military effort or to reprise against them.

This is an obvious advance over Article 27 of the Hague Regulations of 1907 which merely provided:

> "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes."[134]

Article 53 is expressed to be "without prejudice" to the provisions of the Hague Convention for the Protoection of Cultural Property in the Event of Armed Conflict of 14 May, 1954[135] and it appears that it expresses stricter obligations than even this Convention.

Paragraph 1 of Article 4 of the Convention states:

> "The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the

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seemed to gaze with cold, all-seeing eyes on the whole area. It survived countless thousands of shells which fell in the town and many hundreds of bombs ... On the 12th (January, 1944) after an air raid in which many bombs fell in the middle of Orsogna, the CRA called down a pinpoint concentration - a 'Murder' - by five regiments, each firing five rounds gun fire, at the church tower." W.E. Murphy supra note, 545-546.

The tenor of the above paragraphs must be qualified by the observation that in Italy it was quite common for the steeples to in fact contain enemy posts. It was in this light that they were attacked. If neither side had ever used them perhaps neither side would think them worth shelling. A good example of the need to create similar expectations of conduct in the minds of belligerents as a means of promoting the laws of war. Incidentally the Orsogna steeple remained intact after the 'murder' shoot described above.

134. J.B. Scott (ed.), supra note 4, 119.

135. (1956) 249 U.N. Treaty Series 216. The Convention was the result of a Conference convened by U.N.E.S.C.O.

property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property."[136]

This seems to be a rather more comprehensive construction of the meaning of Article 53, but paragraph 2 of Article 4 contains a proviso.

> "The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver".[137]

This is not a very wide exception, but it will be up to the commander of the moment to decide what is "imperatively necessary" and so by avoiding an absolute ban the Convention has realistically accounted for military necessity, something which has not been done by Article 53.

However, it appears that the drafters of Protocol I did not expect Article 53 to remain unviolated and tacitly admitted that it would be unrealistic to punish every transgression to the same extent. Article 85(d) makes an attack on an Article 53 object a grave breach of the Protocol only where there is no evidence of the enemy having used it for military purposes and where such an object is not located in the immediate proximity of military objectives.[138]

It is the opinion of the writer that the 1954 Convention proviso is the better way of admitting to military reality. By making an absolute prohibition combatants will commit breaches of the Protocol where they have no other choice, and this will bring the law into disrepute.

The example of the church given above is relevant here. So long as the prohibition against making military use of Article 53 objects is adhered to, and known to be adhered to, the Article could well achieve its purpose since attack would be a wanton act militarily unjustified. However, where such an object is being used for a military purpose, or where there is doubt as to its use, then it is submitted that the considerations

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136. Article 4(1) ibid., 245. Paragraph 4 prohibits reprisals against cultural objects.
137. Ibid.
138. Article 85(4)(d). See Annex I.

discussed above in relation to Article 52(3) must also apply. The Commander's decision to destroy the church steeple would not be affected by the fact that the church was a gem-like example of fourteenth century craftsmanship. His decision would be based on a military appreciation of the tactical situation and trite though it may sound, the lives of his troops would weigh more heavily in that appreciation than would considerations of art and architecture.

Against this may be cited an American Operations Order for the war in Laos and Cambodia for the attention of the Air Force[139] in which it was stated:

> "Except during SAR (Search And Rescue) operations, no US air strikes will be made within 1,000 meters of any of the areas of cultural value (nearly 100 others, in addition to Angkor Wat, sites were specifically listed in the directive)."[140]

This order represents a conscious political decision made in the circumstances of the time. Note that it is framed to comply to Article 4 of the Hague Convention of 1954, note too that the prohibition does not apply when American personnel are likely to be adversely affected (SAR proviso). This would seem to be a nice compromise between military necessity and humanitarian law, probably lawful under the 1954 rules probably not under those of 1977.

Similar criticisms may be directed at the prohibition against using Article 53 objects "in support of the military effort". If such an object's location makes it militarily significant it is unlikely to be ignored. If, for example, an historic monument occupies a prominent feature that is to be included in a defensive system then it will, of necessity, be incorporated into that system. It may even be demolished (surely an "act of hostility" under Article 53(a)) if it impedes fields of fire, or if defensive constructions require it. In any event the attacking forces would be hardly likely to spare that sector of the defence from attack because of the cultural object's presence.

In the opinion of the writer Article 53 raises a principle that should be considered by belligerents, but which will not serve to limit military activity in a situation where necessity requires it to be set aside.

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139. 7th Air Force Operations Order 71-17 (Rules of Engagement)
140. Ibid.

Since this is so the Article should not have incorporated an absolute prohibition, it should instead have instituted the narrow exception of the 1954 Convention (if it wished to emphasise a special protection) or it should have required the same sort of calculus as appears in Article 52(2). In this way the principle would still be raised in the attack commander's mind, but his decision to attack would not be absolutely contrary to a provision of international law, to the diminution of that law.

E. Article 54 - Protection Of Objects Indispensable To The Survival Of The Civilian Population.

Article 54 protects objects indispensable to the survival of the civilian population such as the means and supplies of sustenance, including irrigation works and drinking water installations. The protection applies only, subject to a proviso, when the destruction would be for the specific purpose of denying the said objects for their sustenance value to the civilian population. The protection does not apply if the adverse party is using the sustencance solely for his own armed forces, or if not as sustenance then in direct support of military action. However there is a proviso that even if the adverse party is using those objects for such purposes no action shall be taken against the objects that would leave the civilian population without adequate food or water. However, as regards national territory under a Party's own control, the prohibitions shall not apply if the defence of that territory makes it imperative that they be disregarded. Thus it is open for a state to practise a "scorched-earth" policy on its national territory.

One of the purposes of Article 54 is to prevent the creation and movement of refugees[141] by ensuring that they retain the wherewithal for survival at their home locations.

Damage incidental to civilian food sources as a result of military operations is not prohibited (though the proportionality calculus of Article 52 would still apply) so the conduct of military operations would be unfettered (subject to the proviso of Article 54(3)(b)) in the usual situation.

However, this proviso is stated in such absolute terms that many delegates were worried about its effect. They argued that foodstuffs intended solely for military consumption should not be entitled to any degree of protection. Neither should they be protected if they were being used

141. (1975) Document CDDH/III SR. 13-40, 41.

as a shield or as cover from observation.[142] The proviso, it was argued, encouraged combatants to seek protection under provisions designed to protect civilians. Further, the prohibition was so absolute that it could be taken to include destruction incidental to military operations, an unrealistic provision. Instead they urged the inclusion of a provision that damage must not be disproportionate to the military advantage sought.[143]

In reply it was argued that the proviso was strong because the principle at stake here is vital. It was no use allowing foodstuffs intended solely for military consumption to be destroyed in all cases because that would only result in the soldiers taking the civilians' foodstuffs. The practice of war is that the soldiers always eat first, and the civilians take what is left.[144]

The application of Article 44 will vary according to the type of war being fought. In a guerilla-type conflict it has been considered that a valid method of warfare is to deny the guerilla his supplies by destroying them, even if this means incidental civilian suffering. However the experience in Viet Nam has shown that such an operation is enormously expensive and not particularly effective. The only way to really win a guerilla war is to gain the support of the civilian population, and such practices are more calculated to breed guerilla recruits than anything else. Hence the American "hearts-and-minds" campaign in Viet Nam. In this respect it is submitted that the Article may be effective. The parameters have been realistically placed.[145]

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142. Ibid., 44.
143. Ibid.
144. Ibid.
145. A practice initiated by naval powers throughout history is to blockade the enemy's coasts, allowing no shipping in or out and thus cutting off foreign (overseas) trade. Since Article 54 prohibits starvation as a method of warfare can this practice lawfully continue when the seized goods are badly needed foodstuffs? Except in very extreme situations it is submitted that the practice may still continue. In the last two World Wars blockading resulted in hardships, but not starvation, and there is no obligation on Parties to ensure that the enemy's civilian population is well-fed, it is only prohibited to employ starvation as a method of warfare. Hunger incidental to a policy of blockade would arguably not be a breach of Article 54.

The situation changes when a vital food source is being used to screen military operations. If a patrol receives fire from a rice paddy that constitutes a village's main source of winter sustenance the patrol commander is hardly likely to refrain (because of this) from calling in support fire that will incidentally obliterate the rice.

Paragraph 5 permits the scorched earth method of defence, but only on one's own "national territory". The implied prohibition against scorching the enemy's earth during a retreat from occupied territory is hardly likely to be effective if one intends to continue the policy on one's own territory.

Article 54, it is submitted, allows combatants considerable freedom of action and absolutely prohibits conduct that would probably be considered improper by the combatants in any event. Evidence of the freedom of action conferred is supplied by the phrase "objects indispensable to the survival of the civilian population". In the opinion of the Australian delegate the word "indispensable" used in this context meant that the only objects protected were those the destruction of which would lead to the non-survival of the civilian population.[146] Thus the mere placing in jeopardy of the civilian population is not enough to invoke the Article 54 protection.

F. Article 55 - Protection Of The Natural Environment.

Article 54 is complemented by Article 55 which prohibits the use of methods or means of warfare which might damage the natural environment in such a way as to prejudice the health or survival of the population.

This is a provision that is totally new to codified law and it was drafted largely in response to the widespread use of chemicals in the Viet Nam war. Defoliants and herbicides in particular caused great damage and it was felt that a repitition of this should be avoided. It will probably be an acceptable restriction because, once again, it is an extremely expensive and not particularly effective type of warfare that carries with it grave political implications in the sense of worldwide disapproval during the war, and an embittered ex-enemy after the war.

G. Article 56 - Protection Of Work And Installations Containing Dangerous Forces.

Article 56 protects works or installations (mainly dams, dykes and

146. (1975) Document CDDH/III/SR 13-40, 43.

nuclear generating stations) which contain dangerous forces, even though they might otherwise be military objectives, if such attack could cause the release of the forces and consequent severe losses among the civilian population. Military objectives located in the vicinity of such installations shall be immune if attack on them would likewise cause the forces to be released.

Paragraph 2 adds the inevitable provisos. For a dam or dyke the special protection shall cease if it is used for other than its normal function and in "regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support".[147]

Thus theoretically a dam that supplies power to munitions factories, orsearchlights defending a military objective, is not liable to be attacked for these reasons alone. It is only if the support is "regular, significant and direct", and no other feasible way exists of terminating the support that an attack may legitimately be launched. The argument might also be made that the normal function of a particular dam is to provide electricity, and that historically (i.e. since before the war) some of that power has been used to make munitions. Therefore it is immune from attack because although the dam is contributing in a "regular, significant and direct" manner to military operations it is not being used "for other than its normal function" and its des-truction would cause severe civilian losses.

Of course the provision is not intended to mean this,[148] it is intended to specifically apply the proportionality rule to this situation and to also give military commanders uniformly recognised guidance on their responsibility to civilians when carrying out attacks on these sorts of military objectives.[149]

For a nuclear power station the special protection ceases only if it provides electric power in " regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support".[150]

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147. Article 56(2)(a).
148. (1977) Document CDDH/SR. 42,6; (1975) Document CDDH/215/Rev.1,24-25.
149. Ibid.
150. Article 56(2)(b). This formulation lends credibility to the interpretation that if a dam supplies electricity in such support of military operations, it may lose its immunity from attack.

Paragraph 5 urges Parties to a conflict to avoid locating military objectives in the vicinity of the protected works, but that nevertheless, if installations are provided solely to defend the protected works then they shall not be attacked, provided that their armament is limited to weapons capable only of defending the protected works.

Article 56 purports to narrow the concept of military objective by excluding from attack objects which might otherwise be prime military targets. However this is not done absolutely because such objects may still be attacked if the proviso is fulfilled. While the words of the proviso are apparently objective ("regular, significant and direct support") the assessment of them will be subjective, an assessment that will be made by the party interested in attacking them. In such a situation the effect of Article 56 will probably consist of raising an awareness that the protected objects deserve special consideration.

At the Conference it was emphasised that Article 56's special protection is but one of several layers of protection because Articles 51 and 52 still apply.[151]

> "If it can be attacked under this Article it is still subject to all relevant rules; in particular, the dam, dyke etc could not be attacked if such attack would be likely to cause civilian losses excessive in relation to the anticipated military advantage (Art.51)."[152]

It was also stressed that because the special protection of these objects was included because their destruction could be so catastrophic the standard used in paragraph 2 ("regular, significant and direct support") was higher than that used in Article 52(2), that is "effective contribution to military action."[153]

It is submitted that no attack-authorisor would be concerned about semantic differences in protective standards when faced with a decision to attack an object especially protected under Article 56.[154]

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151. (1975) Document CDDH/215/Rev.1.
152. Ibid., 24.
153. Ibid., 25.
154. See for example the account of the decision making process that led to the "dam-busters" raid on the Möhne and Eder dams. C. Webster and N. Frankland supra note 70, 269-292.
And Kalshoven is sceptical as to the efficacy of any attempt to protect nuclear power stations because of their large number and the increasing dependence on their energy. F. Kalshoven "Reaffirmation And Development Of International Humanitarian Law Applicable In Armed Conflicts: The First Session Of The Diplomatic Conference, Geneva, 20 February - 29 March 1974" [1974] N.Y.I.L. 3, 13.

For example, the standard in Article 56(2) appears on its face to mean: that the protected objects are immune from attack unless they directly participate in hostilities in such a way as to be "significant" and "direct", and with such frequency as to characterise the said support as "regular". Now, suppose in a conflict that a detachment of anti-tank missiles has been located about a dam for the reason that the feature occupied by the dam offers the best position for the detachment to be able to repel an armoured thrust against a particular objective. The detachment has not yet fired so cannot be said to have been used in "regular" support of military operations. Since its effect is only potential it cannot be said to have been used in "significant and direct support" of military operations. However under Article 52(2) the missiles, by their "nature (and) purpose" do make such an effective contribution to military action that their attack would be justified. If an attack commander reaches this conclusion (and justifies it against Article 51) he will not be deterred by the theoretically higher standard of protection afforded by Article 56 from attempting to neutralise the detachment with artillery fire before he attacks, even though this will very likely damage or destroy the dam with resulting civilian loss.

In fact Article 51 with its relevant and relatively simple proportionality test would probably be a more cogent factor in preserving an Article 56 object than the "unreal" test incorporated in Article 56 itself.

A further problem in interpretation is raised by the paragraph 5 provision that purely defensive installations erected to protect Article 56 objects are not themselves to be attacked provided they are not used offensively in hostilities and provided that their armament is limited to weapons capable only of repelling hostile action directed against the protected objects.

It is difficult to see what weapons can be said to have only a defensive function. All small-arms and any longer range weapons have an offensive potential, and therefore their presence would deprive the defensive position of the Article 56(5) immunity (although Article 56(2)(c) might still apply). A mine field would seem to come closest to being a purely defensive weapon, although its positioning could well mean that it is capable of more than just repelling hostile action against the protected object. It might, for example, be placed in such a way that it also blocks vital approach routes to another purely military objective while ostensibly guarding the protected object.

The wording of paragraph 5 also seems to raise a contradiction in logic. It provides that the defensive installations shall not be made the object of an attack provided they do not participate in hostilities other than in response to an attack. It appears that this means that a defensive installation shall not lose its immunity from attack for the reason that it has defended itself against attack. The apparent contradiction can be resolved by looking to practice. If a defensive installation is stumbled upon by an enemy force ignorant of its status and an attack ensues, the repulsion of such an attack does not deprive the installation of its legal immunity. In such an instance, once the installation's status has been established it would not be attacked again. There would be no point.

Obviously, if this is not the correct interpretation of this part of the paragraph, it has no practical significance for the reason that if the first attack was deliberate and in spite of the installation's status then the retention of its legal immunity would be irrelevant in that it would not prevent subsequent attacks. Its practical immunity desappeared with the first attack.[155]

In the opinion of the writer the effect of Article 56 will be that objects such as dams, dykes and nuclear generating stations shall not be the object of attack unless there is sufficient military reason for attacking them that will justify the resulting damage to civilians. What is a "sufficient" military reason will probably not require the protected object to have demonstrated its "effective" and "direct" capability for damaging the enemy on more than one occasion. A perceived potential for such support will be "sufficient".

And even this may be overstating the protection in some instances. Take the situation of a dyke that is not a military objective at all in that it is not defended and is not providing any support for military operations. All it does is contain a lot of water that, if released, would cause severe civilian losses. Prima facie this dyke is granted immunity from attack by Article 56, it is a protected object. But, developing the situation, suppose a party hostile to the nation controlling the dyke resolves to mount a major attack and decides that the best way of securing a vulnerable flank of its attacking force would be to flood the land adjacent to the flank by destroying the dyke.

155. Article 85 3(c) makes launching an attack against Article 56 Works in the knowledge that such attack will cause civilian loss

If this was indeed feasible a major military advantage would thereby be gained and it is difficult to conclude that the existence of Article 56 would prevent such a move. Article 52(2) could justify such a move as here the dyke's nature is providing an effective military contribution, but, as was discussed above, Article 56 is supposed to confer a higher standard of protection than Article 52.

It is submitted that the drafting of Article 56 is so complex that it could give rise to much ambiguity and uncertainty. Its avowed aim of providing a special degree of protection for particular objects has arguably resulted in a situation where the protection will be discredited by banning acts which military necessity will require being taken. In the opinion of the writer Article 56 attempts to regulate too many complex eventualities and so has constructed a network of unreal expectations. It would have been better to have drafted a simple proportionality rule bidding combatants to have a special regard to the consequences of their actions when attacking such objectives.

Similar comments may be directed at Articles 53, 54 and 55 which have just been examined. What protection do they add to that provided by Article 52?

As has been implied, very little. All of them raise a special protection for specific objects which would also be protected by Article 52. In so far as they elaborate the conduct that is considered internationally acceptable their provisions contribute usefully to the interpretation of Article 52. However in so far as they then try to exceed the protection of Article 52 they run the risk of misjudging the balance required between necessity and humanity. It is considered by the writer that this could result in the discrediting of the provisions with a consequential lessening of even the Article 52 protection.

H. Article 57 - Precautions In Attack.

Chapter 4 of Section 1 of Part 4 of Protocol I is entitled "Precautionary Measures" and is intended to ensure that Parties to a conflict take account of incidental or accidental damage to civilians or civilian objects in an attack.[156] They tie together the preceding battlefield Articles by providing planning considerations which are meant to ensure that

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that will be excessive to the military advantage to be gained a grave breach of the Protocol.

156. (1975) Document CDDH/III/SR. 13-40, 87.

attack planners will take proper cognizance of the principles incorporated in the Articles. This is an extremely important task of the Articles for, as Kalshoven says:

> "... what is needed is not a ruling that can be applied by an adjudicating body long after the event, but a standard for the assessment of contemplated actions prior to their being carried out."[157]

Article 57 deals with the precautions that should be taken by the initiators of an attack. They are responsible for (i) doing everything "feasible" to ensure that their targets are military objectives within the meaning of paragraph 2 of Article 52; (ii) taking all "feasible" precautions when deciding the mechanisms of the attack to ensure the minimal incidental loss of civilian life and property; (iii) to not launch the attack if the proportionality rule would be breached; and (iv) any attack shall be "cancelled or suspended" if it becomes apparent that any of the above factors apply. Effective warning must be given of the attack "unless circumstances do not permit",[158] and if a similar military advantage can be gained by attacking several military objectives, the objective attacked shall be the one likely to be least expensive in civilian terms.

Thus the Article has two phases; in one the commander must make an objective appreciation of the identity of his target, whether or not he can give warning of the attack, and the best choice of method and means of attack. Subjectively he must consider the proportionality rule and the choice of objectives.[159]

Paragraph 2(b) raises some practical problems with its requirement that if it becomes apparent that the civilian factors outweigh the military one then the attack must be cancelled or suspended accordingly. If the attack has not been launched no new considerations arise, but where the realisation that the target being attacked is not a militarily justified one occurs after the attack has already been launched then other tactical matters may have to be considered before the attack can be suspended.

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157. F. Kalshoven The Law Of Warfare (Geneva, 1973) 67.
158. Article 57(2)(c): c.f. Article 26 of the Hague Regulations of 1907.

> "The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities." J.B. Scott (ed.) supra note 4, 117.

159. (1975) Document CDDH/III/SR.13-40, 87.

An attack is not an isolated military exercise confined to a defined geographical region in which one side acts aggressively, the other parrying defensively. It is a process, a complex stream of action and reaction the effects of which are widespread and not easily controlled. Take the hypothetical situation of a police station located on the outskirts of a refugee-crammed town. The station is defended (for whatever reason) by a platoon of infantry equipped with small-arms and portable anti-tank weapons. An anti-tank/anti-personnel minefield strengthened with wire and other obstacles also screens the station.

The commander of the hostile party's forces in that area misinterprets the presemce of the platoon and regards it as an outpost of a larger force which he believes to be occupying the town and which he considers could be intended to threaten the flank of his next movement. He therefore decides to capture the town and destroy the force he mistakenly believes is defending it.

In his attack appreciation the commander takes note of the refugees but deduces that the concrete and direct military advantage that he expects to gain by capturing the town outweighs the probable civilian loss. There are several salient features and routes within the town that he deduces would be likely to be occupied by a defending enemy and these, he decides, will have to be bombarded as the attack progresses. He can see no way in which he can effectively minimize civilian damage other than by restricting artillery fire to these salient features.

Accordingly a battalion of infantry supported by a troop of tanks is moved under cover of darkness to a wood two kilometres from the police station. There the infantry debus, assemble, and then move to a forming up place about 400 metres from the station. The tanks move to one flank so that their attack will almost be at right angles to that of the infantry .

Ten minutes before first light Assault Pioneers who have gone in advance of the main body blow assault lanes in the minefield and the artillery battery in direct support of the battalion begins to bombard the platoon positions and other suspected strongpoints. At first light the infantry move over their start line and commence their assault across the gently rolling, sparsely wooded 400 metres of countryside separating them from the station. At a rate of advance of about 150 metres in three minutes it will take them nearly eight minutes to reach the

minefield. The tanks are providing direct fire support and will time their advance so as to arrive on target at the same time as the infantry.

One minute after first light the tank commander, because of his vehicle's superior optics system discovers the true nature of the objective that they are attacking and radios this information back to the attack commander. This officer immediately realises that he is attacking a target that he would not have otherwise contemplated treating as a military objective and that, under Article 57(2)(b) he should cancel or suspend the attack. Is there anything to stop him doing this?

Taking the situation in isolation there is not. It is a straightforward matter of stopping the expenditure of resources on an objective that does not warrant it. But an attack cannot be viewed in isolation; it would be folly to ignore the reactions of the opposing party.

As soon as the attack commenced the belcaguered platoon commander would have notified his superiors of the attack. Almost certainly he would have registered defensive fire tasks on likely assembly areas and forming up places (which probably include those actually being used by the attacking force) and he would request his supporting artillery to fire them. His superiors would then have to decide whether to withdraw the platoon or reinforce it. If they deduce the reason for the attack (i.e. that the attackers would be hampered in their operations if the town was held in force) then they would probably opt to reinforce the platoon if that was possible. In any event they would be likely to react vigourously to what they would regard as an enemy probe by moving troops to counter the threat, though they may not necessarily invest the town.

Whether the platoon is withdrawn or not the attackers will be subjected to artillery fire and (depending on relative air-strengths) the opposing party might well despatch ground attack aircraft. If the attack is cancelled the attackers will still sustain casualties as they withdraw, and as daylight strengthens they may find themselves caught in the open executing an unplanned manouvre and subject to intense artillery and air attack. Further, having withdrawn they may well find that as a result of their demonstration the opposing party has reinforced the town. Ironically this would leave the attack commander facing the tactical situation that prompted him to make

the attack in the first place, only now there would be no mistake as to the presence of enemy troops in the area, or the reason for them being there. Thus he would beconfronted with the necessity of repeating the whole performance with considerably less chance of success and at a considerably greater cost.

Against this there is the question of civilian loss if the attack proceeds. The attack commander could rationalise that the pre-dawn bombardment would already have inflicted the worst damage that the attack is likely to cause. The fire plan perhaps could be altered so as not to bombard the town as the attacking troops move in, depending of course on whether the opposing party reinforces or withdraws its platoon.

Faced with these factors the attack commander is not likely to call off his attack, but will modify it so as to deal with the new situation. Indeed he might well be legally justified in doing so since the fact of the attack so altered the tactical situation as to result in there being a concrete and direct military advantage in pursuing it that outweighs the civilian factors.

The above scenario is manifestly artificial and was contrived to illustrate selected principles of warfare that the writer believes to be relevant in the present context. There would be occasions when an attack could be cancelled or suspended after it had been launched, especially when the objective is undefended. However two practical points must be emphasised, the first is that an opposing party can be expected to respond vigourously to any aggressive military action no matter what it be directed against (and no commander will look very favourably at the probability of a withdrawal under fire); the second is that most attacks are preceded, and nearly all are accompanied, by as an intense a supporting fire from heavy weapons as is possible. It is this fire, and not the physical taking possession of an objective, that will result in the most damage to civilians. If an attack is called off after this bombardment has been commenced it will probably be too late to be of more than rhetorical benefit to the civilians concerned.

The text of Article 57 represents a compromise between those delegates who wished the requirements to be absolute and those who saw that realism demanded the inclusion of the proportionality rule. In this context it was stressed by several delegations that "feasible" shows that the Article is not one of absolute obligations,

but of precepts that should be followed if, and to the extent that, the particular circumstances permit.[160] That is to say when it is practicable or practically possible.[161]

The consideration process raised by Article 57 is a realistic one that a competent military planner[162] should follow in any event. He will naturally ensure that his objective is a military one whose liquidation is militarily attractive, and he will be likewise unwilling to attack a military objective that is not causing, and is not likely to cause, his forces any discomfort. To do otherwise would be to waste men and equipment to no point. However, in the opinion of the writer the formal inclusion in the planning process of a consideration of the Articles as per Article 52(2)(a)(i) offers the civilian the fullest, and perhaps the most realistic, form of protection that he is likely to get. For, by forcing the planner to formally recognise the "civilian factor", a threshold is raised which will not be crossed unless the military advantage to be gained by a course of action contrary to the letter or spirit of the Articles is of more than casual attractiveness. The greater the contemplated "violation" the higher will be the threshold and therefore the greater the military advantage necessary to sanction the proposed course of action.

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160. (1977) Document CDDH/SR 42, 12
161. (1975) Document CDDH/215/Rev, 1, 27
162. The question arises as to who takes the decisions required by Protocol I, who applies the proportionality rule? In many instances operations will be planned at a very senior level and those who actually put them into effect will be following detailed orders. In the Second World War the decision to shell the Monastery at Monte Casino was taken by the General Staff, and questions of reprisals were considered at the highest political level.
Of course the higher command cannot consider every detail, so to what level does the responsibility descend?
On signing Protocol I Switzerland made the following declaration. "With regard to Article 57(2) Protocol I only those persons over and above the rank of battalion commander would be required to take the precautions listed in the Article." Ministry of Foreign Affairs Document 108/11/27 (1977), 5.
It is not known to what extent this represents general opinion. Certainly below this level soldiers are acting according to very detailed orders that usually leave little room for discretion. A battalion commander should have the resources available to him to make the necessary decisions, his subordinates would not.

It may be said that such protection is scant indeed, and so it is, yet military necessity on a battlefield is paramount and the most that humanitarian provisions can do is to endeavour to inculcate an awareness of themselves in the minds of the military planners so that they will be considered as much as the exigencies of the situation allow. If Article 57 can achieve this then it will have made a useful contribution to the law of war.

I. Article 58 - Precautions Against The Effects Of Attacks.

Article 58 deals with the other side of the Article 57 situation. It refers to the Party about to be attacked and requires him (subject to Art. 49 of the Fourth Geneva Convention of 1949 which prohibits the forcible transfer of populations) to try to remove the civilian population under his control away from military objectives, and in any event to endeavour to avoid locating military objectives within or near densely populated areas and to do whatever else possible to protect the civilian population under his control from the dangers resulting from military operations. These are not absolute requirements but statements of principle that should be adhered to.[163]

J. Articles 59 & 60 Non-Defended Localities And Demilitarized Zones.

Article 59 provides for the establishment of non-defended localities which are protected from attack. Such a locality may be declared in respect of any inhabited place near or in a combat zone, which means in effect that it is open to the occupation of the adverse party. To warrant the status the locality must fulfil the following conditions: (i) it must be free of the declarer's mobile military presence; (ii) any fixed military establishments must be undefended; (iii) the authorities and the population must not commit acts of hostility, (iv) and no activities in support of military operations shall be undertaken.

A unilateral declaration by one Party can establish a locality's non-defended status, and the adverse Party is bound to recognise it so long as the above conditions are fulfilled. In fact this is a detailed version of Article 25 of the Hague Regulations of 1907 which forbids attacks on open localities, The theory is that since they are open to the occupation of the opposing forces there is no point in expending military energy against them.

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163. (1975) Document CDDH/215/Rev.1, 27.

The object of Article 59 is to confer absolute immunity on the civilian population against accidental or indirect effects of attacks directed at military objectives.[164] To do this it was necessary to remove a piece of territory from military calculations by ensuring that it contained no military objectives. The non-defended areas are limited to localities (cities and towns etc) and not zones because experience has shown that to do otherwise might lead to the forced transfer of the civilian population to assembly camps to the detriment of their health and society, and because if zones extended beyond localities the administrative difficulties would be too great to handle in an armed conflict.[165]

Article 60 provides for the establishment of demilitarized zones and is a direct result of aerial warfare pushing back the "front" to encompass the entire land area of an opposing nation. To protect non-combatants this Article encourages Parties to agree to define areas as "demilitarized", areas in which neither party will conduct military operations. Unlike the declaration of a locality's non-defended status a demilitarized zone cannot be established without express agreement between the parties, though such agreement may be concluded before and during war. Article 60 lays down conditions which should be agreed upon before a zone is given "demilitarized" status. They are virtually the same as those made mandatory in Article 59 for the establishment of a non-defended locality except that in a demilitarized zone no activities connected with the military effort are permissible.

The purpose of Article 60 is to preserve areas of a nation for the sake of their social, economic, cultural or scientific value and to spare inhabitants far behind the battle-lines from the effects of war.[166] In many ways Article 60 is only an extension of Article 15 of the Fourth Geneva Convention of 1949 to the present situation.

There are four main differences between the two categories of neutral areas with regard to the establishment of their respective statuses, control over them, their marking and the conditions which they have to fulfil. Under the Hague Regulations of 1907 a non-defended locality acquired that status as soon as the factual situation of "non-defence" came into being.

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164. (1975) Document CDDH/III/SR. 13-40, 107.
165. Ibid.
166. Ibid.

That situation is now expressly detailed by Article 59 which provides that any agreement between Parties as to non-defended status can only be declaratory. Article 60 however requires the agreement of the Parties as a constitutive factor in conferring protection. Because of this, and the stricter conditions that must necessarily apply if the system is to work, the marking and control of an Article 60 zone need to be more elaborate, whereas since non-defended localities would prima facie have to be recognised quickly as a conflict fluctuates marking and control would be optional and depend upon the circumstances.

Article 59 localities do not have the strict Article 60 requirement that no activities connected with the military effort will be permitted. This is because Article 59 localities would quickly be passing into the hands of the adverse parties so a new set of circumstances would apply.

Many delegates raised practical objections to these Articles. Mr Wolfe of Canada, with respect to Article 59, doubted if it could work since it is impossible to control the ebb and flow of battle so as to know which areas to declare undefended. Further, it would be difficult to imagine how a commander could resist the tempatation to stay in a locality in order to make use of the vast network of communications in an urban centre and the many other facilities which could help him in the defence of the region.[167]

In the Second World War both Paris and Rome were on occasions declared to be open cities and so were not attacked. However, as Mr Wolfe pointed out, the declarations were made while they were still occupied. He therefore proposed that the Article be amended to allow such a declaration to be made, which would permit orderly withdrawal of the defending forces. The amendment did not find favour with the majority of the delegates, possibly because of the fact that the law does not prevent the Paris/Rome situation from recurring. It is still open to a commander to make a declaration that he will not defend his present position and will withdraw by a certain date.

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167. Ibid., 110.
168. Ibid., 115.

It was also argued that Article 59 was irrelevant since undefended status was conferred in any case by the factual situation.[168] This is of course so, but by formalising the provision it will be accepted by combatants as a possibility to be expected and not to be necessarily regarded with suspicion. By formalising the detail mistakes resulting in civilian loss may well be avoided.

Whether Articles 59 and 60 will fulfil the hopes of the drafters in time of war is an open question. Much will depend on the type of conflict and the faith of the combatants in the adverse Party's credibility (the question of supervision).

IV. THE LIKELY EFFECT OF THE BATTLEFIELD ARTICLES.

A. Blurring The Combatant/Non-Combatant Distinction.

The basic principle enunciated by Article 48 is that in order to ensure the protection of the civilian population the Parties to the conflict shall at all times distinguish between the civilian population and combatants. Article 51 in particular gives effect to this statement of principle in the manner discussed above, and the other battlefield Articles also speak to the distinction with regard to civilian objects and military objectives. If the distinction between combatants and non-combatants is not maintained then the law of war counts for very little, if it is impossible to identify a combatant, to tell him from a non-combatant, then the battlefield Articles can have very little effect.[169]

The rules of law that state the requirements that must be met by those who wish to be considered as legitimate combatants, entitled to claim prisoner of war status on capture are thus very important. A great deal of controversy was therefore aroused when Article 44 of Protocol I purported to extend combatant status to categories of belligerents who might not previously have been eligible for it. Before discussing Article 44 it is necessary to briefly consider the existing law.

The Hague Conventions of 1899 and 1907 first formalised the conditions for qualification for combatant status. There were four basic requirements to be met: (1) the belligerents had to be commanded by a person responsible for his subordinates; (2) they had to have a fixed distinctive emblem recognisable at a distance; (3) they had to carry their arms openly; and (4) they had to conduct their operations in

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169. See R.Baxter supra note 6, 174.

accordance with the laws and customs of war.[170]

At the Geneva Conference of 1949 the experiences of resistance fighters in the Second World War led to the inclusion in the Third (Prisoners of War) Convention of a provision entitling to prisoner of war treatment "... members... of other organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied..."[171] Such members of course still had to meet the above four requirements so it is doubtful whether this liberalised the law much.[172]

Article 43 of Protocol I[173] provides that to be a combatant a belligerent must belong to the armed forces of a Party to the conflict, that is to say an organised armed force under a command responsible to that Party for the conduct of its subordinates. Such armed forces must have an internal disciplinary system which shall enforce compliance with the rules of war. Thus two of the four Hague requirements must still be met.

However Article 44(3) provides that although the protection of the civilian population obliges combatants to distinguish themselves from the civilian population while they are engaged in military operations, yet there are situations in armed conflicts where, owing to the nature of the conflict, a belligerent cannot always distinguish himself. But he shall:

> "... retain his status as a combatant. provided that, in such situations he carries his arms openly:
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate." [174]

On its face this provision appears to limit the requirements that arms be carried openly and that visible emblems be worn. Unfortunately the terms used in (a) and (b) above are not defined so it is a matter of interpretation, as will be discussed shortly, what the extent of the limitation is.

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170. Article 1, J.B. Scott (ed.) supra note 4.
171. Article 4 supra note 5.
172. R.Baxter supra note 6, 175.
173. For the texts of Articles 43 and 44 see Annex I.
174. Article 44(3).

Paragraph 4 states that a combatant who is captured while in breach of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall nevertheless be given treatment "equivalent in all respects" to that extended to prisoners of war.

At first glance this also appears to limit the necessity for a belligerent wishing combatant status to display his arms openly and wear identifying emblems.

Paragraph 5 states that any combatant "who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities." [175]

This appears to mean, when read with paragraph 3, that if a belligerent breaches the requirements of paragraph 3 so that if captured he would forfeit his prisoner of war status, but is not captured while he is acting in breach, but later, he does not lose his prisoner of war status by reason of his prior transgressions.

Paragraph 7 states that Article 44 is not intended to encourage armies to discard their uniforms, a curious provision when read with paragraph 3.

Why did this Article come to be adopted? The answer is rooted in politics. When the Geneva Conventions of 1949 were drafted the world community was relatively small and there were not many independent "Third World States". That situation changed rapidly and by the 1970s these nations had come to represent a very powerful force in international politics. Many of the group have experienced the turmoil of revolution, they have fought to break their colonial ties and so are extremely sympathetic to those "liberation" groups that are still fighting those ties. Thus when it came to drafting the rules of war applicable in international armed conflicts they used their influence to include in the definition of such conflicts:

> "... armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,..." [176]

However most of those engaged in such hostilities necessarily are guerilla fighters and since they fight stealthily and do not necessarily carry arms openly they often do not qualify for prisoner of war status when captured. Therefore their actions can be treated by the capturing

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175. Article 44(5).
176. Article 1(4). See Annex I.

Party as being offences against the civil law, and it can visit on the captives all the attendant consequences of that characterisation.

Article 44 therefore recognises the right of a guerilla fighter to wage war and attempts to respond to the reality of the world situation by extending humanitarian law to accord him combatant status, and hence entitle him to prisoner of war status on capture.

Unfortunately the crucial provisions of Article 44(3) are undefined and the differing interpretations immediately polarised the delegates to the Conference. In the final ballot, though the text of the Article was the result of much discussion and compromise, 21 states (including New Zealand) abstained from voting and Israel voted against it. The objections of the abstaining states are well summarised by the Israeli delegate Mrs Lapidoth.[177]

> "It was true that guerillas and irregular combatants deserved to be properly protected by humanitarian law, but Article (44), paragraph 3, could be interpreted as allowing the combatant not to distinguish himself from the civilian population, which would expose the latter to serious risks and was contrary to the spirit and to a fundamental principle of humanitarian law. In the case of guerilla warfare it was particularly necessary for combatants to distinguish themselves because that was the only way in which the civilian population could be effectively protected." [178]

Thus in future no civilian would be safe, since the regular combatant in uniform would no longer know who was the enemy and who was not. Moreover, once combatants were freed "from the obligation to distinguish themselves from the civilian population the risk of terrorist acts increased"[179] especially as they could enjoy prisoner of war status.

In the excitement of the debate many of the delegates lost sight of the real purpose of Article 44 which is not to enable guerillas, while combatants, to be camoflagued by the civilian population. The Article is only concerned with the treatment of combatants after they have been captured, and the treatment that they get depends on their behaviour before that capture.[180]

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177. (1977) Document CDDH/SR. 34-46, 121.
178. Ibid.
179. Ibid., 122.
180. See the explanation of vote by the New Zealand delegate (Professor Quentin-Baxter). Ibid., 131. And see the report of Committee III on the third session where it was made clear that Article 44 was not intended to protect terrorists who acted clandestinely to attack the civilian population. (1976) Document CDDH/236/Rev.1, para. 90.

For paragraph 4 means that the combatant who breaches paragraph 3 does not get the status of a prisoner of war, only the treatment. This means that he may be tried and punished for not carrying arms openly when required to.[181]

However the divergence of opinion as to the meaning of paragraph 3 means that it is arguable that the law is by no means clear. For example when signing Protocol I the United Kingdom stated that it will regard the word "deployment" in paragraph 3(b) (which requires arms to be displayed before an attack) as meaning "any movement towards a place from which an attack is to be launched."[182] This obviously limits the guerilla considerably.

On the other hand nations such as Nigeria,[183] Algeria[184] and Uganda[185] expressed themselves as being in favour of a very restrictive interpretation of Article 44 to the extent that Nigeria declared that:

> "The Government of Nigeria would not recognise any reservations by any Party to Protocol I in respect of Article (44) ... Those who voted against it ought to have a change of heart, particularly since they were directly responsible for the intolerable situation which compelled freedom fighters to resort to armed resistance in defence of human dignity and national liberation."[186]

And Mr Armali (Observer for the Palestine Liberation Organisation) made it quite clear that his organisation considered that:

> "The requirements in paragraphs 3(a) and (b) regarding the open carriage of arms could only be interpreted in the most restrictive manner: the phrase 'during such time as he is visible to the adversary ' must be interpreted as meaning 'visible to the naked eye'... Similarly the phrase 'while he is engaged in a military deployment preceding the launching of an attack' could only mean immediately before the attack, often coinciding with the actual beginning of the attack."[187]

In the opinion of the writer such conflicting statements mean that Article 44 cannot be regarded as expressing any concrete rule of

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181. Ibid., 123 per the Italian delegate Mr Di Bernido; and see R. Baxter supra note 6, 176.
182. Ministry of Foreign Affairs Document 108/11/27 (1978), 2.
183. (1977) Document CDDH/SR. 34-46, 125.
184. Ibid., 127.
185. Ibid., 129.
186. Ibid., 125; Algeria said much the same.
187. Ibid., 147 - 148.

international law and respectfully adopts the opinion of the Swiss delegate Mr Bindschedler:

> "... the explanations of vote by the delegations which had spoken on that article made it clearly apparent that no unity of view existed concerning it. Everyone interpreted it as he thought fit... Thus, Article (44) was not a rule of law, since it lacked the precision of a legal standard; furthermore, it was subject to reservations."[188]

In the opinion of the writer, given the above situation the distinction between combatants and non-combatants has not been blurred because of Article 44, most states will carry on as they did before the Article was drafted. It has not therefore rendered the battlefield Articles redundant, and if its proper nature was realised (that it is not intended to shield terrorists) it still would not do this.

B. The Battlefield Articles And The New Zealand Army.

Most of the points to be mentioned here have already been canvassed in more detail in the body of the paper. This section will therefore confine itself to general remarks.

It is arguable that the battlefield Articles realistically (for the most part) balance military necessity against humanitarian requirements. Yet this does not mean, it is submitted, that the New Zealand Army will have to radically change its training policies. This is because of the nature of the Articles as has been discussed. Despite an elaborate structure the Articles have few peremptory requirements, and none, it is contended, that will cause great changes in the conduct of combatants. The proportionality rule as expressed in relation to civilians by Article 51, to civilian objects by Article 52 and to attacks in general by Article 57 will be obeyed by a competent soldier in any event. In particular the process required by Article 57 is one that is basic, in a broad sense, to the training of all soldiers. Objectives are selected carefully on the basis of the military rewards that they offer, military resources will be carefully husbanded and not expended needlessly. It is well understood that the civilian population as such is not to be made the object of attack, and neither are civilian objects whose destruction does not offer some concrete military advantage. As to the special protection of cultural objects (Article 53),objects indispensable to the survival of the civilian population (Article 54), the natural environment (Article 55), and works and installations containing

188. Ibid., 131.

dangerous forces; as has been submitted above these would in any event receive a protection commensurate with the military realities of the particular situation and it is difficult to see how these Articles can change this.

However Article 83 requires the High Contracting Parties to disseminate the Conventions and Protocol I, in time of peace as well as in time of war, so as to include the study thereof in their programmes of military instruction.[189]

This provision will be implemented by the Army as far as is possible given the resources available,[190] and in the opinion of the writer this is clearly necessary if the Articles are to have their full ameliorating effect. For the Articles fulfil a valuable function by providing a comprehensive list of priorities, to be considered by military planners, that are additional to the purely military ones and which could create mental thresholds that must be crossed before civilian damage is acceptable. If the Articles are widely taught these priorities will be in the minds of the military planners of the Parties to any future conflict (and Article 82 requires that legal advisers be available when necessary to advise military commanders) thus ensuring that humanitarian considerations are not lightly disposed of. In other words similar expectations of conduct would be created in the minds of the belligerents which could alleviate the coarsening effect of prolonged war and generally promote the interests of non-combatants. Perhaps, given the nature of sovereignty in war-time as expressed by the term "military necessity", this is all that it is possible for any battlefield code to achieve.

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189. See Annex I.
190. See R. Baxter supra note 6, 183 for his discussion of what the Protocol should mean for the US forces. Sadly the New Zealand Armed Services just do not have the resources to contemplate anything similar.

PART I

GENERAL PROVISIONS

ARTICLE 1

General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants 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.

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the Protection of War Victims(1), shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

ARTICLE 2

Definitions

For the purposes of this Protocol:

(*a*) "First Convention", "Second Convention", "Third Convention" and "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; "the Conventions" means the four Geneva Conventions of 12 August 1949 for the protection of war victims(1);

(*b*) "rules of international law applicable in armed conflict" means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;

(*c*) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;

(*d*) "substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.

ARTICLE 42

Occupants of aircraft

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.

2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.

3. Airborne troops are not protected by this Article.

SECTION II

COMBATANT AND PRISONER-OF-WAR STATUS

ARTICLE 43

Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

ARTICLE 44

Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflicts, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant

PART IV
CIVILIAN POPULATION

SECTION I
GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

CHAPTER I
Basic Rule and Field of Application

ARTICLE 48
Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

ARTICLE 49
Definition of attacks and scope of application

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.

2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.

3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

CHAPTER II
Civilians and Civilian Population

ARTICLE 50
Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

ARTICLE 51

Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(*a*) those which are not directed at a specific military objective;

(*b*) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(*c*) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(*a*) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(*b*) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

CHAPTER III

Civilian Objects

ARTICLE 52

General protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

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

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

ARTICLE 53

Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

(*a*) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;

(*b*) to use such objects in support of the military effort;

(*c*) to make such objects the object of reprisals.

ARTICLE 54

Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

(*a*) as sustenance solely for the members of its armed forces; or

(*b*) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken

which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.

5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

ARTICLE 55

Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

ARTICLE 56

Protection of works and installations containing dangerous forces

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:

(*a*) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(*b*) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(*c*) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this Article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

CHAPTER IV

Precautionary Measures

ARTICLE 57

Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(*a*) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(*b*) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(*c*) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

ARTICLE 58

Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(*a*) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(*b*) avoid locating military objectives within or near densely populated areas;

(*c*) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

CHAPTER V

Localities and Zones under Special Protection

ARTICLE 59

Non-defended localities

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.

2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:

(*a*) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;

(*b*) no hostile use shall be made of fixed military installations or establishments;

(*c*) no acts of hostility shall be committed by the authorities or by the population; and

(*d*) no activities in support of military operations shall be undertaken.

3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol and of police forces retained for the sole purpose of maintaining law and order is not contrary to the conditions laid down in paragraph 2.

4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

ARTICLE 60

Demilitarized zones

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.

2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organisation, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:

(*a*) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;

(*b*) no hostile use shall be made of fixed military installations or establishments;

(*c*) no acts of hostility shall be committed by the authorities or by the population; and

(*d*) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in sub-paragraph (*d*) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.

5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.

7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

CHAPTER VI

Civil Defence

ARTICLE 61

Definitions and scope

For the purposes of this Protocol:

(*a*) "civil defence" means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are:

(i) warning;

(ii) evacuation;

(iii) management of shelters;

(iv) management of blackout measures;

(v) rescue;

(vi) medical services, including first aid, and religious assistance;

(vii) fire-fighting;

ARTICLE 83

Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

ARTICLE 84

Rules of application

The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.

SECTION II

REPRESSION OF BREACHES OF THE CONVENTIONS AND OF THIS PROTOCOL

ARTICLE 85

Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units, or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(*a*) making the civilian population or individual civilians the object of attack;

(*b*) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (*a*) (iii);

(*c*) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life,

injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (*a*) (iii);

(*d*) making non-defended localities and demilitarized zones the object of attack;

(*e*) making a person the object of attack in the knowledge that he is *hors de combat;*

(*f*) the perfidious use, in violation of Article 37, of the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(*a*) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(*b*) unjustifiable delay in the repatriation of prisoners of war or civilians;

(*c*) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(*d*) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (*b*), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(*e*) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

ARTICLE 86

Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

ARTICLE 87

Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

ARTICLE 88

Mutual assistance in criminal matters

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

ARTICLE 89

Co-operation

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

ARTICLE 90

International Fact-Finding Commission

1. (*a*) An International Fact-Finding Commission (herinafter referred to as "the Commission") consisting of fifteen members of high moral standing and acknowledged impartiality shall be established.

(*b*) When not less than twenty High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person.

(*c*) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting.

(*d*) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a while, equitable geographical representation is assured.

(*e*) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding sub-paragraphs.

(*f*) The depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.

2. (*a*) The High Contracting Parties may at the time of signing, ratifying, or acceding to the Protocol, or at any other subsequent time, declare that they recognise *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party, as authorized by this Article.

(*b*) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties.

(*c*) The Commission shall be competent to:

(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;

(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

(*d*) In other situations, the Commission shall institute an enquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.

(*e*) Subject to the foregoing provisions of this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.

3. (*a*) Unless otherwise agreed by the Parties concerned, all enquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:

(i) five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;

(ii) two *ad hoc* members, not nationals of any Party to the conflict, one to be appointed by each side.

(*b*) Upon receipt of the request for an enquiry, the President of the Commission shall specify an appropriate time-limit for setting up a Chamber. If any *ad hoc* member has not been appointed within the time-limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.

4. (*a*) The Chamber set up under paragraph 3 to undertake an enquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation *in loco*.

(*b*) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission.

(*c*) Each Party shall have the right to challenge such evidence.

5. (*a*) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate.

(*b*) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability.

(*c*) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.

6. The Commission shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an enquiry, they are exercised by a person who is not a national of a Party to the conflict.

7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an enquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of fifty percent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance fifty percent of the necessary funds.

ARTICLE 91

Responsibility

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.