LEGAL PROTECTION OF CIVILIANS AND PRISONERS IN NON-INTERSTATE ARMED CONFLICT

A study in international humanitarian law

by

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TO MY PARENTS

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ABSTRACT

This thesis is concerned with the controversial problem of the legal protection of civilians and prisoners in non-interstate armed conflicts, i.e., civil wars and wars of national liberation. It examines the lengthy discussions which took place at the Diplomatic Conferences of Geneva in 1949 and 1974 to 1977, and evaluates the outcome.

Chapters One and Two examine the problem with regard to civil wars, while Chapter Three examines the problem with regard to wars of national liberation. Chapter Four examines the fundamental principle of distinction between combatants and non-combatants, including the problem of prisoner-of-war status in wars of national liberation, as well as the distinction between civilian objects and military objectives. Chapter Five examines the more detailed rules affording protection to the civilian population and civilian objects against effects of hostilities, while Chapter Six examines the field of application of these rules with special reference to their application by a Party to the conflict to its own territory which is under the control of the adverse Party. The last, Chapter Seven, is a general assessment of the major solutions within the framework of the processes of law-making, law-determination, and law enforcement.

CONTENTS

CHAPTER ONE

APPLICATION OF THE GENEVA CONVENTIONS TO CIVIL WARS: THE PROBLEM AT THE GENEVA DIPLOMATIC CONFERENCE OF 1949

1. Introduction

The Geneva Diplomatic Conference of 1949 and its summary records are of particular importance to our study, for at least the following reasons:

First, the Diplomatic Conference of 1949 was the first conference of its kind to consider the application of all or part of the provisions of the Geneva Conventions to armed conflicts said to be 'not of an international character'.

Second, it was the first international conference to consider a proposal purporting to sever the applicability of international humanitarian law from such controversial political and legal criteria as the classification of the conflict, the legal status of the parties to the conflict and so forth.

Third, from a positivist point of view, the conference provided an opportunity to test certain claims said to be customary international law criteria for the application to civil war, of the rules of warfare customarily applicable to interstate armed conflicts. In other words, it provided an opportunity to test the claim that under traditional customary international law, the laws of war applicable to armed conflicts between states become applicable to civil war:

a) upon recognition of the insurgents as belligerents, by the government against which the armed conflict is waged, or,

b) upon recognition of the insurgents as belligerents by third states not taking part in the conflict, or,

c) upon fulfilment of the conditions said to justify recognition of belligerency by third states regardless of whether recognition of belligerency

has been granted or not.

Fourth, the Diplomatic Conference adopted one article - Article 3, common to the Geneva Conventions of 1949 - that expressly deals with armed conflicts "not of an international character". But this article has been subjected to so many distortions regarding its history and its field of application as well as its interpretation.

Fifth, more recently the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts held in Geneva in the years 1974, 1975, 1976 and 1977, adopted an additional protocol - Protocol II relating to the protection of victims of non-international armed conflicts. According to its own terms, the Protocol develops and supplements Article 3, common to the four Geneva Conventions of 1949, without modifying its existing conditions of application.

A study of the Diplomatic Conference of 1949 may thus contribute to our understanding of Protcol II and of the general trend in the protection of victims of armed conflicts said to be of a non-international character.

Finally, it may be remarked that the recent (1974-1977) Geneva Diplomatic Conference had also adopted Protocol I additional to the Geneva Conventions of 1949, relating to the protection of victims of armed conflicts of an international character. Paragraph 4 of Article 1 of Protocol I characterizes armed conflicts in which peoples fight against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as armed conflicts of international character. That is to say,

they are governed by the law of armed conflict in its entirety. Such armed conflicts, generally described as wars of national liberation, are discussed in Chapter 4 of this thesis. This Chapter, therfore, does not enter into the question of the legal status of wars of national liberation under the Geneva Conventions of 1949. Indeed, this question was not discussed by the Geneva Diplomatic Conference of 1949, and the question remained controversial until it was settled by the adoption of Article 1 of Protocol I additional to the Geneva Conventions.

Accordingly, the term "armed conflicts not of an international character" must be considered now a reference to civil wars in which peoples are not fighting in the exercise of their right to self-determination.

2. From the Stockholm Draft to Article 3 Common to the Four Geneva Conventions of 1949

In the present context the 'Stockholm Draft' refers to paragraph 4 of Article 2 of the Draft Conventions approved by the Seventeenth International Red Cross Conference held in Stockholm in 1948.[1] These 'Draft Conventions' were the basis of the discussions of the Geneva Diplomatic Conference of 1949.

Convention I is a convention for the amelioration of

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1. For the complete text see Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I pp. 47 et seq.

the conditions of the wounded and sick in armed forces in the field; Convention II, is a convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Convention III, is a convention relative to the treatment of prisoners of war; and Convention IV, is a convention relative to the protection of civilian persons in time of war.

Paragraph 4 of Article 2 of the 'Stockholm Draft' of the Third and Fourth Conventions contained the following common provision:

> "In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the Parties to the conflict shall be bound to implement the provisions of the present Convention, subject to the adverse party likewise acting in obedience thereto. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto."[1]

2.1. The Origin and Development of the Idea of Inserting in the Geneva Conventions a Provision Relating to Civil War

Traditional notions about sovereignty of the state and domestic jurisdiction have always militated against the extension of the law of armed conflict to civil war. Even

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1. Ibid., p. 73, and p. 113.

relief action by the ICRC was looked upon as an unfriendly act. The authors of the ICRC Commentary recorded the experience of the ICRC in the following terms:

> "In a civil war, the lawful government, or that which so styles itself, tends to regard its adversaries as common criminals. This attitude has sometimes led governmental authorities to look upon relief given by the Red Cross to the other Party to the conflict as indirect aid to those who are guilty. Applications by a foreign Red Cross or by the International Committee of the Red Cross have more than once been treated as unfriendly attempts to interfere in the internal affairs of the country concerned. This conception still prevailed when a draft Convention on the role of the Red Cross in civil wars or insurrections was submitted for the first time, to the International Red Cross Conference in 1912. The subject was not even discussed."[1]

It was natural therefore that the ICRC should seek some legal footing for its relief action. The question of the Role of the Red Cross was again placed on the agenda of the Tenth International Red Cross Conference in 1921, this time a resolution was passed affirming the right to relief of all victims of civil wars or social or revolutionary disturbances in accordance with the general principles of the Red Cross.[2] The resolution as such did not have the force of a convention. But it enabled the ICRC in at least two cases - the civil war

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1. Pictet (ed.), ICRC Commentary I, Geneva, 1952, p. 39.
2. Ibid., p. 40.

in the plebiscite area of Upper Silesia in 1921, and the civil war in Spain (1936-1939) - to induce both sides to undertake more or less to respect the principles of the Geneva Convention of 1929.[1]

Noting the results achieved by the International Committee of the Red Cross in these two cases, the Sixteenth (XVI) International Red Cross Conference in 1938 passed a resolution in which it requested the International Committee of the Red Cross and the National Red Cross Societies to endevour to obtain:

a) the application of the humanitarian principles which were formulated in the Geneva Conventions of 1929[2] and the Tenth Hague Convention[3] of 1907, especially as regards the treatment of the wounded, the sick, and prisoners of war, and the safety of medical personnel and medical stores;

b) Humane treatment for all political prisoners, their exchange and, so far as possible, their release;

c) respect for the life and liberty of non-combatants;

d) facilities for the transmission of news of a personal nature and for the reunion of families;

e) effective measures for the protection of children.[4]

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1. Loc. cit.
2. Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field; and Convention on Treatment of Prisoners of War - Geneva, July, 1929. See text in Friedman, The Law of War, A Documentary History, Vol. 1, pp. 471 et seq., and pp. 488 et seq.
3. Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1864. Text in Friedman, The Law of War, A Documentary History, Vol. 1, p. 354 et seq.
4. Pictet (ed.), ICRC - Commentary I, pp. 40-41.

According to the ICRC Commentary, the Conference was thus envisaging explicitly and for the first time, the application by the Parties to a civil war, if not of all the provisions of the Geneva Conventions, at any rate, of their essential principles.[1] But the ICRC Commentary goes on to tell us that this resolution encouraged the ICRC to 'reconsider' the possibility of inserting provisions relating to civil war in the Conventions themselves.[2] The word 'reconsider' indicates that a previous suggestion to this effect had been made, but we do not know for sure whether it was actually made, and if so, by whom. It is possible, however, that the suggestion was first made at the Fifteenth International Red Cross Conference, held in Tokyo in 1934. For we know from the Memorandum of 20 September, 1948, of the Swiss Federal Political Department to the signatories of the Geneva Conventions of 1929, that the Tokyo Conference had prepared a text which was known as the'Tokyo Draft', and which dealt with the status and protection of civilians of enemy nationality in time of war.[3]

It is also possible that the suggestion to insert provisions relating to civil war in the Geneva Conventions themselves was made by the Sixteenth International Red Cross Conference, held in London in 1938. For we also know from the same Memorandum that the Conference had revised the'Tokyo Draft', and had also considered that it had become necessary

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1. Ibid., p. 41.
2. Loc.cit.
3. For the text of this Memorandum, see Final Records of the Diplomatic Conference of Geneva of 1949, Vol. 1, pp. 147-148.

to revise the Geneva Conventions of 1929 and the Tenth Hague Convention of 1907. We also know from the same Memorandum that a Diplomatic Conference was in fact scheduled to take place at Geneva in the early part of 1940 to revise these Conventions, but it was prevented from doing so by the outbreak of the Second World War.[1]

However, as soon as the war ended, the work on revising the above mentioned Conventions was resumed. Indeed, even before hostilities had ended, the International Committee of the Red Cross, the various national Red Cross Societies and private associations had already collected the documents required for that revision.[2]

In 1946 a Preliminary Conference of National Red Cross Societies was convened. At that Conference the ICRC proposed that in the event of a civil war in the country, the Parties to the conflict should be invited to state that they were prepared to apply the principles of each of the Geneva Conventions.[3]

This suggestion was based on the belief that an invitation to the Parties to the conflict to make an explicit declaration (which it was believed would be difficult for them to refuse) would encourage them to line up with the advocates of humanitarian ideas, and the sufferings arising out of civil

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1. Ibid., p. 147.
2. Ibid., p. 147.
3. Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross (Geneva, July 26-August 3, 1946), 1947, cited in Picket (ed.), ICRC Commentary 1, p. 41.

wars would thereby be appreciably reduced. But such a suggestion would still leave civil wars outside the pale of international law. Further, it shows that the ICRC was still hesitant to make "substantive proposals" to be included in the Geneva Conventions, in which case there would be no legal basis even for the relief action of the Red Cross.

Be this as it may, the fact remains that the Preliminary Conference of National Red Cross Societies found the suggestion unsatisfactory. Instead, the Conference recommended to insert at the beginning of each of the Geneva Conventions an Article to the effect that:

> "In the case of armed conflict within the borders of a state, the Convention shall also be applied by each of the adverse Parties, unless one of them announces expressly its intention to the contrary."[1]

The Preliminary Conference of National Red Cross Societies, thus went out for the application of the Conventions as a whole, not merely their principles as the ICRC had suggested.

In 1947 the ICRC convened a Conference of Government Experts for the study of the Conventions. The Conference admitted the necessity of making provisions in the Conventions for at least a partial extension of their application to civil war, and thus drafted an Article under which principles of each of the Conventions were to be applied in civil war by the Contracting Party, provided the Adverse Party did the same.[2]

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1. Pictet (ed.), ICRC Commentary I, p. 42.
2. Pictet (ed.), ICRC Commentary I, Geneva, 1952, p. 42.

Obviously, the proposal of the Conference of Government Experts fell a long way short of that of the National Red Cross Societies. It spoke only of the application of 'principles', and even then - on the basis of reciprocity.

It is not clear from the ICRC Commentary whether the ICRC did in fact make any proposals to the Conference of Government Experts, and if so, what the Experts' reaction was. In view of the fact that the ICRC had thus far been sceptical, it seems likely that it did not make any proposals, and probably was happy with the Experts' proposal. Indeed, apart from the reciprocity clause, the ICRC seems to have adopted the view of the Conference of Government Experts and had made it its own at the Seventeenth International Red Cross Conference held in Stockholm in 1948 for the purpose of studying and approving the text of the Draft Geneva Conventions to be submitted the following year (1949) to the Geneva Diplomatic Conference.

The ICRC presented the following text to the Stockholm Conference as paragraph 4 of Article 2 common to the Draft Geneva Conventions:

> "In all cases of armed conflict which are not of an international character, especially cases of civil wars, colonial conflict, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend on the legal status of the Parties to the conflict and shall have no effect

on that status."

The ICRC Commentary on this draft proposal seems deliberately confusing,[1] and amounts to distortion of facts. Thus, the Commentary claims that the first part of this paragraph gave effect to the recommendation of the Red Cross Societies and had actually improved on it by omitting the condition which the latter had contemplated.

In order to refute this allegation it may be sufficient to recall the text of the recommendation of the National Red Cross Societies adopted in 1946. It reads:

> "In the case of armed conflicts within the borders of a state, the Convention shall also be applied by each of the Parties to the conflict unless one of them announces expressly its intention to the contrary."

This recommendation seems to differ from the ICRC proposal to the Stockholm Conference in at least four respects:

First, the recommendation of the Red Cross Societies speaks of the Coventions, not merely their principles, as did the ICRC proposal.

Second, omision of the words "unless one of them announces expressly its indication to the contrary" actually weakened the text and cannot be considered as an improvement.

Third, unless one takes too much for granted, the words "In the case of armed conflict within the borders of a State" which were used in the recommendation of the National Red Cross Societies cannot be read to mean "In all cases of armed conflict which are not of an international character,

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1. See Pictet (ed.), ICRC Commentary I, p. 43, Commentary III, p. 31, Commentary IV, p. 30.

especially cases of civil war, colonial conflict or wars of religion which may occur in the territory of one or more of the High Contracting Parties..."

Fourth, the qualification "not of an international character" was an absolutely new terminology, and as Tom Farer commented, "... at the time the Geneva Conventions were drafted, the words "not of an international character" had no precise reference point in international practice..."[1] Accordingly, it seems likely, that, by the long introductory statement (in all cases of armed conflict etc.) the ICRC meant to 'establish' a reference point, in particular, with regard to'colonial conflicts', which in the ICRC view, were armed conflicts not of an international character.

All this, however, was but one side of the distortion. The other side is the extreme brevity of the Commentary on the Stockholm Conference, as if in a deliberate attempt to conceal what had happened. The authors of the ICRC Commentary seem anxious to impress on their readers the view that the Stockholm Conference, after a lengthy discussion adopted the ICRC proposal. Indeed, all that the ICRC Commentary had to say about the Stockholm Conference was this:

> "The draft text (i.e., the ICRC proposal to the Stockholm Conference) was the subject of a lengthy discussion at the Stockholm Conference, at which Governments as well as Red Cross Societies were represented. In the end, the Conference adopted the proposals of the International Committee of the Red

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1. Tom Farer, Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict", Columbia Law Review, Vol. 71, 1971, p. 45.

> Cross for the First and Second Conventions, and in the case of the Third and Fourth Conventions made the application of the Convention subject to the proviso that the adverse Party should also comply with it.
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> It was in this form that the proposal came before the Diplomatic Conference."[1]

Did the Stockholm Comference really adopt the ICRC proposals? In this writer's view the Stockholm Conference rejected the ICRC proposal and had in fact reasserted the view of the Conference of the National Red Cross Societies. This clearly appears by juxtaposing the Stockholm Draft and the ICRC proposal, and making a comparison between them.

When thus juxtaposed and compared, the following differences seem obvious:

First, that the Stockholm Draft does not contain the words "especially cases of civil war, colonial conflicts or wars of religion." Why the Stockholm Conference had omitted these words is unclear. But it would be too simplistic and presumptious to consider such an omission as merely an omission of examples, the presence of which might restrict the field of application of the text. The question of when does a civil war become of international character was a very controversial issue in traditional legal thought. The question of the legal status of Non-Self-Governing territories (colonies) was even more controversial in the United Nations, and it was not within the competence of the Conference to settle through the law of armed conflict what under the

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1. Pictet (ed.), ICRC Commentary I, p. 43, Commentary III, p. 31, Commentary IV, p. 30.

Charter of the United Nations, was to be settled in accordance with the right of peoples to self-determination.

Second the ICRC proposal to the Stockholm Conference spoke simply of implementing the principles of each of the Geneva Conventions, while the Stockholm Draft which was adopted by the Conference spoke of implementing the Conventions, not merely their principles. Certainly this is not a negligable and insignificant difference.

Clearly t en, the Stockholm Conference did not adopt the proposal of the ICRC. In claiming that it did, the authors of the ICRC Commentary were merely propagandistic. This also transpires from the fact that they had given publicity to the ICRC propsql (probably because it contained a reference to colonial conflicts), while failing to produce to their readers the very text which was the basis of the discussion at the Geneva Diplomatic Conference, namely the Stockholm Draft of paragraph 4 of Article 2 Common to the Draft Geneva Conventions which were approved by the Stockholm Conference of 1948.

2.2. The Fate of the Stockholm Draft at the Geneva Diplomatic Conference

Speaking at the recent (1974 - 1977) Geneva Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conficts, the Norwegian

delegate, Mr. Ofstad, expressed the fillowing view of his Country. "All war victims", he said, "must be protected, regardless of the political and legal classification of the conflict, and that was only possible if the applicability of international humanitarian law were severed from all controversial political and legal concepts. The distinction between international and non-international conflicts", he said, "was not a convenient criterion for the application of international humanitarian law."[1]

If the applicability of humanitarian law were to be severed from all controversial political and legal concepts, then, in the words of Professors McDougal and Feliciano, humanitarian law must be applied

> "to all forms of hostilities, irrespective of the characterization of the resort to violence as lawful or unlawful; of the formal character of one or the other participant (i.e., Party to the conflict) as an intrastate rebel group or unrecognized government or authority, or international organization; of the intensity of the violence and its extension in time and space; and of the recognition or non-recognition of the existance of a technical state of war."[2]

Indeed, if as all legal literature on the law of armed conflict seems to contend, that the law of armed conflict is the result of a compromise between the requirement of military necessity and humanity (or standards of civilization, as Schwarzenberger prefers to call it);[3] that military necessity

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1. CDDH/I/SR. 14, para. 9.
2. McDougal and Feliciano, Law and Minimum World Public Order, 1967, p. 72.
3. Schwarzenberger, International Law, Vol. 2 1968, p. 13.

has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity;[1] and that the essence of prisoner-of-war status is custody, not revenge,[2] severing the applicability of the law of armed conflict from political and legal concepts must be regarded a matter of sound reason and principle.

There seem to be an increasing awareness outside governmental circles that this should be the case, especially as far as the protection of the civilian population against the dangers of hostilities is concerned. In this respect, the weighty resolution of the Institute of International Law adopted at the Session of Edinburgh (4-13 September, 1969) may be mentioned.[3] The Institute notes that the rules embodied in its resolution "form part of the principles to be observed in armed conflicts by any de jure or de facto government, or by any authority responsible for the conduct of hostilities." The resolution is concerned with "the distinction between military objectives and non-military objects in general and particularily the problem associated with weapons of mass destruction." The ICRC and the vast majority of experts consulted by the ICRC in 1969 and 1970 also felt that, in principle, "the protection due to the civilian population against the dangers of military operations should be the

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1. Whiteman, Digest of International Law, Vol. 10, pp. 298-299.
2. Schwarzenberger, ibid., p. 126, quoting Nuremberg Judgement, (1946).
3. See text in ICRC, Doc. CE/3b, entitled, Protection of the Civilian Population against Dangers of Hostilities, Geneva, January, 1971, pp. 76-77, (Documentary Annex). This will be referred to as: ICRC, Doc. CE/3b, Geneva, 1971.

the same in all situations and in all types of armed conflict."[1]

Accordingly, in preparing the two draft Protocols additional to the Geneva Conventions of 1949, the ICRC proposed almost the same rules for both international and non-international armed conflicts.[2] More importantly, it proposed that these rules should be applicable on the sole condition that the insurgents be organized under a responsible command.[3] The ICRC in this respect was supported by a small number of states on the 'threshold problem', and apparently by the majority of states on the substantive side during the Diplomatic Conference of Geneva (1974-1977). But in the last days of the Conference many delegations changed their position and the result was that the Protocol which was adopted at Committee level during the work of the Conference was transformed into a 'dwarf Protocol'. Nevertheless, the fact remains that there was an increasing awareness among governments that protection of the civilian population against the dangers of hostilities must be the same in all situations and in all types of armed conflict. This trend is bound in the end to prevail for the simple reason that respect for human rights is increasingly becoming an important element in international relations, and the realization that repressive governmental policies have often increased popular support to the anti-government forces. In wars of national liberation against colonial and alien and racist regimes the most that such

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1. ICRC Doc. CE/3b, Geneva, 1971, p. 8.
2. ICRC Draft Additional Protocols to the Geneva Conventions, Commentary, Geneva, 1973.
3. See Article 1 of Draft Protocol II, ibid., p. 132.

regimes can hope for is to find some collaborators among the peoples under their rule. The battle for winning the hearts and minds of the peoples in such cases is already won by the liberation movements concerned.

But while there seems to be a wide legal conviction that protection of the civilian population against dangers of hostilities must be the same in all situations and in all types of armed conflict, especially outside governmental circles, there seems to be less support for the view that captured insurgents should be given the rights of prisoners-of-war. All legal and political arguements in this respect revolve round one idea - the deterrent force of punishment. Sovereignty of the state, the right of the government to restore law and order, the duty of the government to execute the national laws and to punish the law-breakers are all too familiar defenses against the extension of the prisoner-of-war status or 'treatment' to captured insurgents. The tragedy of the sovereignty of the state and all ancillary concepts is that they are invoked by democratic and oppressive governments alike, without distinction as to the nature of the 'law and order' to be restored. When the very 'law and order' which is 'broken' is the origin of the cause of the insurection, how can one realistically speak of the deterrent force of punishment? Probably all insurgents know that the severest penalties await them if they are captured, and death or injury is by no means excluded when they go to battle. Yet they rebel and fight.

According to McDougal and Feliciano, experience in previous major wars would seem to point to the minimal

deterrent value of expectations of death upon capture. The very intensity and widespread character of guerrilla war in the occupied countries during the Second World War, in spite of the fact that neither the German nor the Japenese occupation forces were particularly lenient with captured guerrillas or partisans, "testify to the weak deterrent effect, if any, of the execution and torture upon capture."[1] The widespread character of guerrilla war in the post-World War era is even more to the point.

To this view, it may be added that the Occupying Power is also under obligation to keep law and order, yet, it has never been suggested by any state that the application of the Fourth Geneva Convention would prevent the Occupying Power from keeping law and order. So why should it hinder a government involved in civil war? Nor has it been suggested that the right of members of resistance movements operating in occupied territories to prisoner-of-war status, according to the Geneva Conventions, would prevent the Occupying Power from protecting its forces against guerrilla operations. So why should it prevent a government involved in civil war? For practical purposes, the occupying power and the government of a state in civil war are in similar positions. So why should governments involved in civil war be less subject to the law than a belligerent occupant?

Clearly then, the Stockholm Conference of 1948 was justified in deciding to rid the applicability of humanitarian law from most, if not all, controversial political and legal concepts.

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1. McDougal and Feliciano, op. cit., p. 86 and notes.

But reason seldom prevails when governments are asked to restrict their discretionary powers in dealing with insurgent movements which they regard as worse than common criminals. Thus, without reading the Summary Records of the Diplomatic Conferences held in Geneva in 1949 and the 1970s, one can imagine their reaction when asked to forego in advance their discretionary powers and subject themselves to 'already' prescribed rules. Of course they would not say that they were prepared to let Hell loose if need be. There are more subtle ways of saying and even putting it into practice and yet waving the 'olive branch' of the sovereignty of the state and even of public good. This is not intended as a judgement of those who were in favour or against the Stockholm Draft. The purpose is only to state that governments often say one thing and do another, and vice-versa.

So, let us proceed temperately to examine the fate of the Stockholm Draft; which, it may be recalled, states that:

> "In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the Parties to the conflict shall be bound to implement the provisions of the present Convention, subject to the adverse party likewise acting in obedience thereto. The Conventions shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto."

It is worthwhile recalling that this text was common to the Third Geneva Convention relative to the treatment of prisoners of war, and the Fourth Convention relative to the

protection of civilian persons in time of war.

This text was the subject of a lengthy discussion at the Diplomatic Conference. It was given a first reading in the Joint Committee. The discussion revealed widely divergent views. The delegations of Norway, Mexico, Hungary, Demark, Rumania, and the Union of Soviet Socialist Republics, mutatis mutandis, supported the Stockholm Draft of Article 2, paragraph 4, quoted above. On the other hand, the delegations of France, the United States of America, China, Canada, Italy, Spain, Greece, and Australia, mutatis mutandis, wanted to restrict the field of application of the text by additional conditions. Of all those who spoke in the Joint Committee the delegation of the United Kingdom was the only delegation which opposed the Stockholm Draft without proposing an alternative or indicating support to any of the proposals which hitherto had been advanced.[1]

After the first reading in the Joint Committee a Special Committee was set up to examine the problem of the application of the Conventions to "armed conflicts not of an international character." The Special Committee was composed of the delegations of Australia, United States of America, France, Greece, Italy, Monaco, Norway, United Kingdom, Switzerland, and the Union of Soviet Socialist Republics.[2] This Committee was set up at the third meeting of the Joint Committee. At its seventh meeting, the Joint Committee decided to include in the membership of the Special Committee, Burma and Uruguay,

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1. See the Final Record of the Diplomatic Conference of Geneva of 1949, (published by the Swiss Federal Political Department), Vol. 2B, pp. 9-16.
2. Ibid., p. 16.

"so that Asia and Latin America might be represented on it."[1] The very composition of the Special Committee meant that the Stockholm Draft of paragraph 4 of Article 2 was 'clinically' dead, since most of the members of the Special Committee had already pronounced themselves against its adoption in the form it was presented. As to the outcome expected of such a Special Committee, the views of its members in the Joint Committee could easily foretell.

In the Joint Committee, the first speaker was Mr. Lamarle of France. He started his speech by pointing out that he did not contest the necessity of providing for the situations envisaged in paragraph 4 of Article 2, but he felt that the positive phraseology of the text might be dangerous in certain connections. The Stockholm Conference in his view had been mainly concerned with the protection of the rights of individuals but it was also necessary not to loose sight of the rights of the States. It was impossible in his view to carry the protection of individuals to the point of sacrificing the rights of states. In order to protect the rights of states, the French delegation proposed an amendment which he said, would make it impossible for "forms of disorder, anarchy or brigandage to claim the protection of the Conventions." The amendment indicated that

> "the forces concerned must be organized military forces belonging to a responsible authority capable of respecting or enforcing respect for the Conventions, in a given territory."[2]

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1. Ibid., p. 120.
2. Final Records of the Diplomatic Conference of Geneva of 1949, Vol. 2B, p. 10.

The Italian delegation was disposed to support the formula suggested by the French delegation, but the Italian delegation suggested that the French formula should be accompanied by a recommendation stipulating that "the humanitarian principles which are the essence of the Conventions should guide the conduct of states."[1]

The Greek delegation was also in agreement with the French formula and remarks. With regard to suggestions made by some delegations that the application of the Conventions should be made conditional upon the recognition of belligerency, he wondered who would be competent to recognize belligerency in the case of civil wars? He suggested that a simple majority of members of the Security Council of the United Nations should be competant for that purpose.[2]

The delegation of the United Kingdom seem to have understood the term 'armed conflict not of an international character' as refering to both interstate armed conflicts in which a state of war was not recognized as well as civil war.

> "In the United Kingdom Delegation's view, paragraph 4 of Article 2 was a source of serious difficulties, not only because the Conventions would be applicable to situations which were not war, but because the application of the Conventions would appear to give the status of belligerents to insurgents whose right to wage war could not be recognized. Even if paragraph 4 were confined in its application to situations in which one of the combatants was the lawful government (e.g. in

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1. Ibid., p. 13.
2. Ibid., pp. 10-11, and p. 16.

the case of civil war) the difficulties would still exist. Careful consideration of the provisions of the Convention concerning civilians, in particular, left little room for doubt that their application to civil war would strike at the root of national sovereignty and endanger national security."[1]

The remarks made by the delegation of the United States of America make a good summary of the various trends in traditional legal thought. "Every government", said Mr. Leland Harrison, "had a right to put down rebellion within its borders and to punish the insurgents in accordance with its penal laws. Conversely, premature recognition of the belligerency of insurgents was a tortious act against the lawful government and a breach of international law."[2] The United States of America therefore considered that the Conventions should be applicable only where the parent government had extended recognition to the rebels or where those conditions obtained which would warrant other states in recognizing the belligerency of the rebels,whether or not such recognition was accorded by the government against which the insurgents were fighting. The conditions which should obtain before the Conventions would be applicable were stated by the delegation of the United States as follows:

1. The insurgents must have an organization purporting to have the characteristics of a state.

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1. Ibid., p. 10.
2. It is not understood where did this 'right' come from, and whether 'conversely', premature recognition of the belligerency of the insurgents would also constitute a tortious act against the 'unlawful' government.

2. The insurgent civil authority must exercise de facto authority over persons within a determinate territory.
3. The armed forces must act under the direction of an organized civil authority and be prepared to observe the ordinary laws of war.
4. The insurgent civil authority must agree to be bound by the provisions of the Convention.[1]

The Canadian delegation was in favour of "complete suppression of the proposed application of the civilian Convention to civil war", but it was ready to support a formula covering only a limited type of civil war, as suggested by the delegation of the United States of America. However, the delegation of Canada qualified his support to the United States' proposal by considering that the test as to whether the conditions suggested by the United States were fulfilled or not should be: recognition of belligerency of the rebels by the lawful government. In other words, the delegation of Canada would have liked to make the Conventions applicable to civil war if five conditions were fulfilled: the four listed by the Delegation of the United States, plus recognition of belligerency of the rebels by the lawful government.[2]

The Australian delegation pointed out that at that time the Australian government was of the opinion that the Conventions should apply when an armed conflict became a full-scale war and when there was an organized form of government which effectively controlled definite portions of the national territory and the inhabitants therein.

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1. Final Record, op. cit., p. 12.
2. Final Record, op. cit., p. 13.

To distinguish between the aforementioned state of affairs and local uprisings, the delegation of Australia considered that 'the principles' of each of the Conventions should be applied to the Parties to the conflict, provided:

1. The de jure government had recognized the insurgents as belligerents; or
2. The de jure government had claimed for itself the right of belligerent; or
3. The de jure government had accorded the insurgents recognition as belligerents for the purpose only of the present Conventions; or
4. The dispute had been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.[1]

The latter proviso, according to the delegation of Australia, indicates the fact that the matter was not one coming within the domestic jurisdiction of a state according to the terms of Article 2, paragraph 7, of the Charter of the United Nations. Moreover, no difficulty would arise with regard to the veto because the placing of a conflict on the Agenda was purely a matter of procedure.[2]

According to the "Seventh Report drawn up by the Special Committee of the Joint Committee", the delegation of Australia suggested that the expression 'armed conflict not of an international character', or 'non-international conflict'

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1. Final Records, Vol. 2B, p. 121.
2. Ibid., p. 15.

should not be used, but be replaced by the terms 'civil war in any part of the home or colonial territory of a Contracting Party.'[1] But the Report says nothing about the fate of this suggestion, nor does there seem to be anything about it in the final record. However, point 4 of the Australian proposal, if accepted, would have involved the United Nations effectively in the protection of human rights in armed conflict at an early stage, and would have made it clear that colonial wars were governed by at least the principles of each Geneva Convention.

There seems to have been a general trend to suppress any role to the United Nations in this respect. Indeed, as early as the Second Meeting of the Joint Committee, Mr. Bolla, the delegate for Switzerland said that he was of the opinion that the Conference should refrain from any restrictive condition or reference to the United Nations Organization.[2]

Burma, as noted above, was chosen by the Joint Committee to represent Asia. At the second meeting of the Joint Committee the Burmese delegate, General Oung, uttered only one sentence in connection with the Stockholm Draft of paragraph 4 of common Article 2. "The proposed Convention should not give legal status to insurgents who sought by undemocratic methods to overthrow a legally constituted government by force of arms"[3], he said. This sentence, however, appeared later to have meant too much. At the 39th meeting of the Special Committee, General Oung explained that the Eastern countries he represented in the

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1. Ibid., p. 121.
2. Ibid., p. 15.
3. Final Records, Vol. 2B, p. 15.

Special Committee could not agree to an extension of the Conventions to civil war, and if such a provision were included, they would not be able to sign the Conventions.[1]

The delegation of Monaco was in favour of amending the Stockholm Draft according to the French proposal.[2] Uruguay did not seem to have expressed any view on the Stockholm Draft before it was chosen as a member of the Special Committee, it appeared later however, that it was not in favour of the Stockholm Draft as it stood.

The delegation of Norway hoped that the proposals adopted at Stockholm would be upheld. "It was a step forward in international law", said the Norwegian delegate, Mr. Catsberg, "to say that, even if war was not recognized, the rules concerning the conduct of war should be applied."[3] As to civil war, he added, "the term 'armed conflict' should not be interpreted as meaning 'individual conflict', or 'uprising'. Civil war was a form of conflict resembling international war, but taking place inside the territory of a State."[4] Such an interpretation, however, seems inconsistent with the wording of the Stockholm Draft which expressly speaks of "all cases of armed conflict not of an international character." With such an interpretation, the delegation of Norway came actually

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1. Ibid., p. 102.
2. Ibid., p. 14.
3. Final Record, Vol. 2B, p. 11. It is not clear whether he was speaking with reference to paragraph 1 or paragraph 4. If the latter, this would suggest that the delegation of Norway, like that of the United Kingdom and China, seem to have understood the term 'armed conflict not of an international character' as refering to civil war as well as interstate wars where a state of war was not recognized.
4. Loc. cit.

closer to the French proposal which it later supported in the Special Committee, as a matter of 'compromise'.[1]

The Soviet delegate, General Slavin was not the last to speak at the Joint Committee, but his speech serves as a round up. He criticised the delegation of the United Kingdom for implying (or so he understood the UK delegation as saying) that civil and colonial wars were not regulated by international law and therefore that decisions in this respect would be out of place in the text of the Conventions. This theory, said the Soviet delegate was unconvincing, since although the jurists themselves were divided in opinion on this point, some were of the view that civil war was regulated by international law. However, in his view, since the creation of the Organization of the United Nations this question seems settled. The Charter of the United Nations, he said, provided that member States must ensure peace and world security. They could therefore not be indifferent to the cessation of hostilities, no matter the character or localization of the conflict. Colonial and civil wars, he concluded, came therefore within the purview of international law.[2]

With regard to the French proposal, the Soviet delegate said that if the French proposal were followed, there would be a danger of one party declaring, without proof, that the other was not in a position to ensure order, and thus of any violation of the basic humanitarian principles of the Conventions.[3]

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1. Ibid., p. 41.
2. Final Record, Vol. 2B, p. 14.
3. Loc. cit.

The Greek amendment[1] was inacceptable to the Soviet Union because it subordinated the application of the Conventions in cases of armed conflicts of non-international character,to formal recognition of the status of belligerents to the parties to the conflict. This amendment restricted the scope of the text of the Draft which was approved at the Stockholm Conference and sapped its humanitarian basis.[2]

With regard to the proposal of the United States, the Soviet delegate said that that proposal, by subordinating the application of the Conventions to the decision of one party, was no longer in harmony with the humanitarian principles governing these Conventions.[3]

In conclusion, the Soviet delegation pointed out that civil and colonial wars were often accompanied by violations of international law and were characterized by cruelty of all kinds. The suffering of the population in the instance of civil and colonial wars was as distressing as that which led Henry Dunant to realise the need for regulating the laws of warfare. Accordingly, the Soviet delegation considered it necessary to maintain the text of Article 2 of the Conventions, as it was drafted at the 16th and 17th Red Cross Conferences and which extended the application of the Conventions to "all cases of armed conflict."[4]

These, in brief, were the views of the 13 members of the Special Committee, before the Committee was set up. It is

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1. The Final Record does not seem to have given prominence to this proposal. See the speech of the Greek delegation, ibid., p. 10-11.
2. Ibid., p. 14.
3. Loc. cit.
4. Final Record, Vol. 2B, p. 14.

probably obvious that at best, no more than two delegations were in favour of the Stockholm Draft as it stood.

At the third meeting of the Special Committee the Chairman of the Committee felt that the time had come to classify the views and that the Committee should in the first place express itself on the following principles:[1]

1. Should the Conventions be extended to cases of armed conflict which were not of an international character?
2. Would it be appropriate to define more clearly than was in the case in the Stockholm text the cases of armed conflict which were not of an international character?
3. Which of the following criteria should be adopted: formal criteria, factual criteria, or a combination of formal and factual criteria?

The delegations for Burma and Uruguay were not yet members of the Special Committee and therefore could not take part in the voting.

On the first question, by 10 votes to 1, with 1 abstention the Committee pronounced in favour of the extension of the Conventions to cases of armed conflict not of an international character.[2]

With regard to the second question the Chairman suggested to the Committee that they pronounce either in favour of the Stockholm text or of the new text which would define more clearly the cases of armed conflict not of an international character.[3]

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1. Ibid., p. 44.
2. Ibid., p. 45.
3. Loc. cit.

By 10 votes for, 1 against, and 1 abstention, the Committee was of the opinion to abandon the Stockholm text and to define more clearly the cases of armed conflict which were not of an international character to which the Conventions should apply.[1]

The Committee then went on to the examination of the factors which should be included in the definition under consideration. This question, together with such questions as the application of the Conventions to the letter or by analogy; the question of reciprocity; the situation of the insurgents at the close of a conflict; and above all the lack of political will, not only killed the Stockholm Draft, but also prevented agreement in the Special Committee even on the present text of Article 3 of the Geneva Conventions. It will not be necessary for the purposes of our discussion to examine the work of the Special Committee in detail. Such a discussion could make a dissertation on its own. It is deemed sufficient therefore to review the different proposals which the Working Parties of the Special Committee had prepared at different stages of the work of the Special Committee, although none of them had actually been accepted by the Special Committee itself. Besides their historical value, the proposals made by the Working Parties of the Special Committee have a great evidential value regarding the application of the law of armed conflict to civil wars under traditional customary international law. Indeed, this is the main reason for reviewing them here. An additional purpose is to correct the history of Article 3,

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1. Loc. cit.

which some writers, including the ICRC Commentary on the four Geneva Conventions seem to confuse with the Stockholm Draft. These are the purposes of the following section.

2.3. The Search for and Alternative to the Stockholm Draft

It has been noted above that the Special Committee, had decided by 10 votes to 1, with 1 abstention, to abandon the Stockholm Draft and to define more clearly the cases of armed conflict not of an international character to which the Conventions should apply. The Special Committee then went on to the examination of the factors which should be included in the definition of such cases.

As soon as the discussion began the French delegate, Mr. Lamarle, retreated from the position which he held at the First meeting of the Joint Committee. He said that he was of the opinion that civil war was a political and not a legal concept, and that each case should be dealt with separately. The Conference in his view was not competant to define civil war, nor to confer competency on a body of a political character. It was necessary, in his opinion, to allow the normal play of international politics. He recalled in this connection the non-intervention policy followed during the Spanish Civil War.[1]

Similarly, the Italian delegate, Mr. Marcesa, considered that the Conference was not competent to pronounce itself when the laws of war should be applied.[2]

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1. Final Record, Vol. 2B, p. 45.
2. Ibid., p. 47.

Mr. Catsberg of Norway did not share such opinions regarding the competancy of the Conference. He considered that a text which had come into force could attribute competency to a specific body, on the sole condition that the said body agreed to accept it. It might also be envisaged that the decision relating to implementation of the Conventions might be entrusted to an arbitrator, but the task of the latter would be facilitated if precise criteria were specified in the Covention.[1]

Mr. Yingling of the delegation of the United States of America said that his country would not be willing to give a free hand to any organism, whether the Security Council or any other, with regard to deciding whether the Conventions should come into effect. They were, however, not adverse to the proposal that under certain circumstances some body should be called upon to act as a fact-finding agency to determine whether the conditions governing the application of the Coventions were fulfilled or not.[2]

Thus from the very beginning, the question of the conditions upon which the application of the Conventions would depend seems to have been closely associated with the question of who would be competent to determine whether the conditions for the application of the Conventions were fulfilled or not. But behind this facade of argumentation about the competency of the Conference and who would decide what, there was a fundamental difference of approach. The Rapporteur of the Special Committee tells us that after the decision to abandon

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1. Ibid., p. 45.
2. Ibid., pp. 45-46.

the Stockholm Draft and to define more clearly the cases of armed conflict of non-international character to which the Conventions should apply, two ways were then open to the Special Committee:

> - either limit the cases of conflicts not of an international character, to which the Conventions would apply;
> - or restrict the provisions of the Conventions which should be applied in conflicts not of an international character.[1]

He goes on to tell us that the two ways did not exclude each other, and the possibility of solving the problem in different ways in the four Conventions increased the number of solutions to be envisaged. While in principle this appeared to be the case, the fact remains that there was a growing tendency to subvert any such compromise solution and to utilise the second alternative to the exclusion of the first. In other words, there was a growing tendency to abandon the idea of extending the application of the Conventions, as a matter of law, to any armed conflict not of an international character. The opportunity for this 'minimalist' tendency came when the Australian delegation suggested the creation of a Working Party to work out a compromise formula. The suggestion was accepted and a Working Party (later known as the first Working Party) was set up of the delegations of; the United States of America, Australia, France, Norway, and Switzerland.[2]

After four meetings, the Working Party submitted to the

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1. Final Record, Vol. 2B, p. 122.
2. Ibid., p. 46, p. 122.

Special Committee the following Draft Article:

"1. In the case of armed conflict not of an international character occuring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to implement the provisions of the present Convention, provided:

a) that the de jure government has recognized the status of belligerency of the adverse party, without restrictions, or for the sole purposes of the application of the present Convention, or

b) that the adverse party presents the characteristics of a State, in particular, that it possesses an organized military force, that it is under the direction of an organized civil authority which exercises de facto governmental functions over the population of a determinate portion of the national territory, and that it has the means of enforcing the Convention, and of complying with the laws and customs of war; application of the Convention in these circumstances shall in no wise depend upon the legal status of the parties to the conflict.

2. This obligation presupposes, furthermore, in all circumstances, that the adverse party declares itself bound by the present Convention, and, as is the de jure government, by the laws and customs of war (and that it complies with the above conditions in actual fact).

3. The provisions relating to the Protecting Powers shall, however, not be applicable, except in the

instance of special agreement between the Parties to the conflict. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer to the Parties to the conflict to undertake the duties conferred by the present Convention on the Protecting Powers.

4. In the case of armed conflicts which do not fulfil the conditions as determined above, the Parties to the conflict should endevour to bring into force, by means of special agreements, all or part of the provisions of the present Convention, or, in all circumstances, to act in accordance with the underlying humanitarian principles of the present Convention.

5. In all circumstances stipulated in the foregoing provisions, total or partial application of the present Convention shall not affect the legal status of the Parties to the Conflict."

The 'minimalist tendency' raised its head as soon as the discussion on this Draft Article began in the Special Committee at its fifth meeting.

This text, as the Chairman of the Working Party noted, had been drawn up, taking into consideration, as far as possible, the amendments, proposals and reservations submitted by the delegations.[1] Yet, it drew criticism from most of the members of the Special Committee.

The French delegation, although a member of the Working

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1. Final Record, Vol. 2B, p. 124.
2. Final Record, Vol. 2B, p. 47.

Party itself was the first to criticise the text, and thus lead the 'minimalist tendency' in the Special Committee. The French representative, Mr. Lamarle, said that he remained in favour of humanizing "all forms of armed conflict." His delegation was in support of the extension of the humanitarian principles of the Conventions to cases of armed conflict not of an international character, "but he did not feel it was possible to extend automatically all the clauses of the Conventions to internal conflicts." This impossibility in his view was particularly obvious in the case of the Civilian Convention. Mr. Lamarle therefore reserved the point of view of his government on the Article, as a whole, and proposed to submit further suggestions at a later stage of the discussion.[1]

Mr. Hart of the United Kingdom, "strongly supported the remarks made by the Delegate for France with regard to the danger in applying the provision of the (Civilian) Convention as a whole to certain classes of conflict not of an international character."[2]

Mr. Maresca of Italy, considered that the words "without restriction", in sub-paragraph (a) of the first paragraph were redundant. Concerning sub-paragraph (b), he proposed to delete the terms "present the characteristics of a State", which, in his view, "gives the impression that the rebels already constitute a subject in international law." Likewise, in the second paragraph, the declaration to be made by the rebels presupposes a legal personality which they could not possess. Lastly, Mr. Maresca considered that the Conference was not

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1. See Final Record, Vol. 2B, p. 47.
2. Ibid., p. 47.

competent to pronounce itself when the laws of war should be applied.[1]

Mr. Yingling of the United States of America said that his delegation was opposed to the insertion of the clause contained within brackets at the end of the second paragraph. The Conventions as they stood contained no conditions in this respect with regard to war between states, and there seemed no reson to include provisions of this kind to civil war.[2]

Mr. De la Pradelle of Monaco made a constructive suggestion. In his view the text drafted by the Working Party was indefinite, whereas the Stockholm text was unsound in aiming at applying to civil war all the provisions of the Conventions. He proposed that the Working Party, "should recast its text, endevouring to eliminate the impracticable conditions, and to determine which provisions of the Conventions would be applicable in the case of civil war."[3]

The representative of the ICRC, Mr. Pilloud, was clearly unhappy with the text drawn by the first Working Party. He said that the text could never have been applied in any recent case of civil war. It therefore did not represent a progress with regard to the present situation. Moreover, he said that it would often be difficult to determine which was the legal government, since each Party to the Conflict would pretend to be the legal government.[4]

With regard to paragraph 3 of the text of the first Working Party which states that provisions relating to the

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1. Ibid., p. 47.
2. Ibid., p. 48.
3. Ibid., p. 49.
4. See Final Record, Vol. 28, p. 47-48.

Protecting Power shall, however, not be applicable, the ICRC representative said that the value of the Conventions depends largely upon the means of controlling their application, hence the need to provide for the intervention by a Protecting Power. The latter would obviously act only with the approval of the Detaining Power.[1] The ICRC, however, was in favour of the Stockholm Draft.

In addition to the remarks made by the ICRC representative the delegate for the Soviet Union, Mr. Morosov, was of the opinion that the proposal submitted by the Working Party rendered more difficult the application of the Conventions to civil war. He also pointed out that the last sentence of paragraph 3 and paragraph 4 were mere recommendations, for they did not stipulate any obligation. The Soviet delegation were therefore not in favour of the Draft submitted by the Working Party and preferred the Stockholm Draft.[2]

The Draft of the Working Party was discussed by the Special Committee at its fifth, sixth and seventh meetings and at the close of the seventh meeting it was referred to the same Working Party with the request to submit a new text taking into account, in so far as possible, the many comments made.[3]

Before leaving the First Draft drawn up by the first Working Party, it may be noted that when at a later meeting the Special Committee voted on the various drafts submitted to it, the Draft drawn up by the First Working Party was

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1. Ibid., p. 48.
2. Ibid., p. 48.
3. Ibid., p. 122.

rejected by 7 votes to 4. There was no abstention.[1] The Stockholm Draft itself was rejected by Nil vote for, 9 against, with 1 abstention.[2]

The Second Draft drawn up by the first Working Party was characterized by the fact that it comprised different regulations for the Civilian Convention on the one hand, and for the Wounded and Sick, Maritime, and Prisoners of War Conventions on the other hand. With regard to the latter three Conventions they were to apply in their entirety in case of an armed conflict of non-international character, provided:

a) that the de jure government has recognized the status of belligerency of the adverse party, even for the sole purpose of the application of the present Convention, or

b) that the adverse party possesses an organized civil authority exercising de facto governmental functions over the population of a determinate portion of the national territory, an organized military force under the direction of the above civil authority, and the means of enforcing the Conventions and the other laws and customs of war; application of the Conventions in these circumstances shall in no wise depend on the legal status of the Parties to the conflict.[3]

Paragraphs 2, 3, 4, and 5, of the first Draft drawn up by the first Working Party were also retained in the Second Draft, and therefore it is unnecessary to reproduce them here.

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1. *Ibid.*, p. 102.
2. Loc. cit. The 'Nil' vote is explicable by the fact that the Soviet Union formulated its own alternative of the Stockholm Draft.
3. Final Record, Vol. 2B, p. 125.

With regard to the Convention relative to the Protection of civilians, the Second Draft drawn up by the first Working Party had the following stipulation:

Civilian Convention (new Article 2a)

"In the case of armed conflict not of an international character occuring in the territory of one of the High Contracting Parties, the parties to the conflict should endevour to bring into force, by means of special agreements, all or part of the present Convention and in all circumstances shall act in accordance with the underlying humanitarian principles of the present Convention.[1]

Thus, with regard to the protection of civilian persons and their property, only the unspecified 'underlying humanitarian principles' of the Convention were to be applied according to the Second Draft of the first Working Party, even if the de jure government had recognized the status of belligerency of the adverse party (the insurgents), or, alternatively, the adverse party (the insurgents) fulfilled the conditions as stipulated in (b) above.

The Chairman of the first Working Party, Mr. Plinio Bolla of Switzerland, who was also Chairman of the Special Committee justified this approach to the Civilian Conventions on the ground that:

"The application of the Civilian Convention raised the greatest difficulties. After having successively abandoned the idea of an application by analogy - which

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1. Final Record, Vol. 2B, p. 76.

> was considered dangerous, because it permitted too much freedom of interpretation - and that of enumeration of the Articles which would be inapplicable in the case of civil war - a system which appeared complicated and of doubtful efficacy - the Working Party decided to impose on the Contracting State only one obligation; that of complying in all cases with the underlying humanitarian principles of the Convention."[1]

It seems doubtful whether the Chairman himself felt convinced when he was uttering these words which stop just short of admitting the legitimacy of total war. Why application of the Convention by analogy was dangerous even if it permitted too much freedom of interpretation? The ICRC which originally proposed that the Civilian Convention should be applied by analogy to occupied territories did not consider it dangerous. Further, why the most rational approach,namely, enumeration of inapplicable Articles, or, alternatively, enumeration of applicable Articles of the Civilian Conventions was "complicated and of doubtful efficacy"? Is it complicated and of doubtful efficacy to say, for instance, that the humane treatment due to the civilian population and individual civilians is laid down, inter alia, in Articles 27 to 34 of the Fourth Geneva Convention; in Article 50 regarding the protection of Children; in Article 53 regarding the prohibition of destruction of property; in Article 55 regarding food and medical supplies for the population; in Articles 79 to 131 regarding the treatment of internees and the conditions

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1. Final Record, Vol. 28, p. 76.

regarding places of internment, and so forth? Indeed, unless the underlying principles of the Convention were to be devoid from any substance it seems difficult to see how the violation of any of the provisions of the Fourth Geneva Convention would not at the same time be a violation of the principles underlying the Convention. Tyrany and repression do not cease to be so by describing them as being not illegal. It is ridiculous that only by means of special agreements with 'outlaws' that governments become 'legally' bound by detailed regulations regarding treatment of civilian detainees and internees or other rules contained in the Convention.

But even assuming that the difficulties alluded to by the Chairman were real difficulties, there was still the more proper method of formulating the rules of the Convention in a language that is more suitable to the situation. After all, the civilian does not cease to be a civilian whether the war is international or non-international.

At any rate 'the minimalist tendency' was apparently gaining ground, for immediatly after, or apparently concomitant to, the Second Draft of the Working Party, amendments to that Draft were submitted by the delegations of France, Italy, Greece and Norway. The amendments submitted by the delegations of Greece and Norway were withdrawn and nothing is said about their contents in the Final Record. Similarily, there is no no trace of the Italian amendment. The French amendment was apparently submitted orally, and after a general discussion on that amendment a Second Working Party including representatives from France, which had the Chairmanship, Italy, Monaco, the United Kingdom, and the Soviet Union, was set up to examine

the French amendment and to report to the Special Committee.[1] The presence of the Soviet delegation in such a Working Party was extremely odd. The Soviet Union had so far supported the Stockholm Draft and therefore was a 'maximalist', while the other four represented the 'minimalist tendency' which not only opposed the Stockholm Draft, but were also against the application of the Conventions to any armed conflict not of an international character under any circumstances other than the hypothetical case of special agreements. It was this 'minimalist tendency' which in the end prevailed, as the present Article 3 common to the Geneva Convention of 1949 testifies.

The Second Working Party submitted its Draft Article to the Special Committee at the latter's 28th meeting. That Draft, with minor drafting changes became the text of present Article 3 common to the Four Geneva Conventions of 1949 which will be reproduced and commented on in the following section. It is therefore unnecessary to reproduce the text of the Draft drawn up by the Second Working Party.[2]

The 28th meeting of the Special Committee was characterized by what amounts to a boycot by the delegation of the Soviet Union. The Chairman of the Special Committee indicated that the delegation of the Soviet Union had asked for instructions from their government regarding the new Draft drawn up by the Working Party and that they were unable to take part in the discussions on that day because their members

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1. See Final Record, Vol. 2B, pp. 76-79.
2. See text in Final Record, Vol. 2B, p. 125-126.

were occupied in other Committees.[1] There followed an exchange of views between Mr. Lamarle (France), Sir Robert Craigie (United Kingdom), Commander Smith (Australia), and General Oung (Burma), on the "advisability of continuing the examination of the new text in the absence of the Soviet Delegation"[2] - which suggests that the law making process with regard to the application of the Geneva Conventions to armed conflicts not of an international character was surrounded by an air of ideological warfare. The Committee, however, decided to continue the discussion of the new text, but it postponed its vote.[3]

It would be unnecessary to review the discussion on the Draft drawn up by the Second Working Party under the Chairmanship of France, since most of the discussion actually concentrated on whether the Conference was competent to impose obligations on the insurgents. Opinions on this issue were divided and it is deemed more appropriate to review the different views in the context of our discussion of Article 3 common to the Four Geneva Conventions of 1949.

The Draft drawn up by the Second Working Party which ultimately became Article 3 of the Geneva Conventions was examined by the Special Committee at its 28th, 32nd, 35th and 38th meetings.[4] At the 37th meeting the delegation of the Soviet Union proposed to reword the Stockholm Draft of paragraph 4 of Article 2 in the Four Conventions as follows:

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1. Ibid., p. 83.
2. Loc. cit.
3. Loc. cit.
4. See Final Record, Vol. 2B, pp. 82-84, 89-90, 93-95, 100-101. See also the Seventh Report drawn up by the Special Committee of the Joint Committee, ibid., pp. 120-127, at 123.

A. Wounded and Sick and Maritime Conventions.

"In the case of armed conflict not of an international character occu ing in the territory of one of the States Parties to the present Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:
Humane treatment for the wounded and sick; prohibition of all discriminatory treatment of wounded and sick practised on the basis of differences of race, colour, religion, sex, birth or fortune."

B. Prisoners of War Convention.

"In the case of armed conflict not of an international character occuring in the territory of one of the States parties to the present Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:
Humane treatment for prisoners of war; compliance with all established rules connected with the prisoners of war regime; prohibition of all discriminatory treatment of prisoners of war practised on the basis of differences of race, colour, sex, birth or fortune."

C. Civilians Convention.

"In the case of armed conflict not of an international character occuring in the territory of one of the States parties to the present Convention each Party to the conflict shall apply all the provisions of the Convention guaranteeing:
Humane treatment for the civilian population; prohibition

on the territory occupied by the armed forces of either of the parties, of reprisals against the civilian population, the taking of hostages, the destruction and damaging of property which are not justified by the necessities of war, prohibition of any discriminatory treatment of the civilian population practised on the basis of differences of race, colour, religion, sex, birth or fortune."[1]

In introducing his delegation's proposal, Mr. Morosov of the Soviet Union said that the guiding principle of his delegation's proposal was that the obligation should be laid down on both Parties in all the Conventions. Special emphasis was laid in the Civilian Convention upon prohibition to exterminate populations. The novel features of the Soviet proposal, he said, were that the paragraph concerning special agreements was deleted (i.e. paragraph 3 of the Draft drawn up by the Second Working Party). This deletion, in his view, was preferable to the proposal drawn up by the Second Working Party tending to set up a universal Convention in minature to be applied in the case of civil war. It would hardly be possible to summarise in twenty-five lines the four hundred Articles of the four Conventions as the working Party had tried to do. Such a procedure inevitably entailed the renunciation of many provisions drawn up by the Conference for the protection of war victims. In the Soviet delegation's view, "inhuman treatment of human beings and other acts which would be condemned in the case of international wars between States

1. See Final Record, Vol. 2B, p. 127.

should likewise be condemned in the instance of civil war."

In the view of the delegation of the Soviet Union, the paragraph concerning the legal status of the Parties to the conflict appeared redundant, since the legal status of the Parties would in no way be affected by the application of the Conventions. It also did not seem necessary to mention the ICRC in the Soviet Proposal since the ICRC or any other body would always be free to offer their services to perform humanitarian duties.[1]

Sir Robert Craigie of the United Kingdom felt that the Soviet proposal offered greater elasticity than the Stockholm text. owever, he felt that the term "all the provisions", in the Wounded and Sick and Maritime Conventions was not appropriate, as the governments, as he put it, "would find difficulty in applying all these provisions to insurgent's leaders."[2] Also, in his view, difficulty would be found in determining which provisions of the Conventions concerning humanitarian treatment would be applied.[3] He also could not accept the deletion of the paragraph on the legal status of the Parties to the conflict, the omission of the reference to the ICRC and the deletion of the paragraph concerning special agreements.[4]

Mr. Lamarle of France considered that the Soviet Proposal was an "interesting suggestion by reason of its concision and its purpose in reconciling the various points of view." He

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1. See Final Record, Vol. 2B, p. 98.
2. It is not understood why such a difficulty should exist.
3. A government which cannot solve such a problem should not be a government at all.
4. See Final Record, Vol. 2B, p. 98.

was therefore in agreement with Section 'A' of the proposal. But like the British delegate, he took the term "all the provisions" out of context and added:

> "The French Government, however, could not see their way to applying all the rules contained in the Conventions to a non-i ternational war. The concept of national sovereignty was intimately bound up with the idea of civil war, and, in such cases, all governments would insist that their sovereignty remains intact... Likewise, all rules governing the regime of the treatment of prisoners of war could not be applied in a civil war because, here again, the mandates conferred upon the Protecting Powers would thereby impair the sovereignty of governments. The same remarks would hold for the Civilian Conventions."[1]

Such remarks are reminiscent of the past absolute monarchies of the 18th century and the famous phrase of Louis XIVth "I am the State". It is extremely out of place to speak of the "sovereignty of the government" in the age of the "sovereignty of the people" and the right of peoples to self-determination. Besides, as the representative of Denmark, Mr. Cohn pointed out, "the sovereignty of the state would remain intact although humanitarian treatment was given to war victims." Denmark herself was in favour of the Soviet proposal.[2]

However, in reply to the criticism made by the British and French delegates, the delegate of the Soviet Union, Mr. Morosov said that he would be in agreement with the

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1. Final Record, Vol. 2B, p. 98.
2. Ibid., p. 99.

maintenance of the paragraph on special agreement, and with the mention of the ICRC. With regard to the treatment of prisoners of war and civilians, he said that the Soviet proposal aimed at the application of the most humane treatment possible, but this did not involve the application of all the contractual provisions. The purpose was to apply the general provisions, but not the technical ones, such as those relating to courts and penal sanctions.[1]

The Soviet proposal may appear to have left unsettled the question of the conditions under which the Conventions would apply. The Australian delegation understood it as leaving to each of the Parties to the conflict to evaluate the conditions under which the Conventions would apply.[2] But apparently this was not the intention of the Soviet Union. In his criticism of the Draft drawn up by the first Working Party, the Soviet delegate, General Slavin said that the Draft did not give satisfaction because, in his view,

> "The object of the Conventions was to provide for their immediate application in case of a conflict of non-international character. It was not for the Parties to the conflict to decide whether the Conventions should be applied or not. It was of paramount importance that upon the outbreak of a conflict, the application of the Conventions should be automatic."[3]

Having now reviewed the work of the Special Committee (not thoroughly of course), it is time to see what were the

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1. Final Record, Vol. 2B, p. 99.
2. Loc. cit.
3. Ibid., p. 79.

results.

The Soviet proposal, despite all its merits was rejected by the Special Committee by 1 vote for, with 9 against.[1]

The Committee then voted on the text drawn up by the Second Working Party as amended by the Special Committee. This text, it should be recalled, constituted a new Article 2A which finally became Article 3 common to the four Geneva Conventions of 1949. It was voted on paragraph by paragraph; paragraph 1 of Article 2A was rejected by 5 votes for, with 5 against; paragraph 2 was rejected by 4 votes for, 5 against, with 1 abstention; paragraph 3 was rejected by 5 votes for, with 5 against; paragraph 4 fell because of the preceding vote. Article 2A as a whole (i.e. present Article 3) was therefore rejected by the Special Committee.[2]

The Draft drawn up by the First Working Party considered as an amendment to the Stockholm Draft, was rejected by 4 votes for and 7 against.[3]

Article 2, fourth paragraph, of the Stockholm text, was rejected by Nil vote for, 9 against with 1 abstention.[4]

The Chairman of the Special Committee concluded that the Committee had decided that Article 2, fourth paragraph, (of the Stockholm Draft) should be deleted and should not be replaced by another text.[5] The delegations of Australia and the Soviet Union objected to the Chairman's ruling on the ground that the Special Committee was not competent to decide whether a text

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1. Final Record, Vol. 2B p. 100.
2. Ibid., p. 101.
3. Ibid., p. 102.
4. Loc. cit.
5. Loc. cit.

to cover the case of civil war should be inserted or not. It was therefore agreed that the Special Committee should submit a report to the Joint Committee about its work. And so it was; the Special Committee submitted its report[1] to which it was appended:

a) the first Draft drawn up by the First Working Party;

b) the second Draft drawn up by the First Working Party;

c) the Draft drawn up by the Second Working Party;

d) the Draft drawn up by the Second Working Party as amended by the Special Committee;

e) the proposal submitted by the delegation of the Soviet Union.

Apparently, there was no discussion in the Joint Committee of these Drafts. In the Report drawn up by the Joint Committee and presented to the Plenary Assembly we read the following:

"The first and second Drafts of the First Working Party reduced to their simplest terms, make it obligatory for both Parties to apply the Conventions but subject to one of the following two conditions: the recognition of belligerent status by the legitimate government to its adversary (the formal criterion), or the existance of the features of a state on the rebel sides (the material criterion). The Joint committee rejected them."[2]

The Report does not say why they were rejected, nor does it indicate the method by which the rejection took place.

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1. See the Seventh Report drawn up by the Special Committee of the Joint Committee, Final Record, Vol. 2B, pp. 120-127.
2. Final Record, Vol. 2B, p. 129.

However, in view of the fact that even Western Powers could not agree among themselves on *these criteria in the Special* Committee, even as a matter of lex ferenda, it must be admitted that neither recognition of belligerency, nor the fulfilment of certain conditions by the insurgents, were customary international law criteria for the application of the law of armed conflict to the mutual relations of the Parties to the conflict. This conclusion is further supported by the fact that the Soviet proposal was rejected by the Joint Committee by 25 votes to 9 with 3 abstentions.[1]

It is extremely unfortunate that the Soviet proposal was rejected, but it seems that the majority of delegations in the Joint Committee were reluctant to go further than the text drawn up by the Second Working Party. This text, as mentioned earlier, abandoned the idea of applying the Geneva Conventions as a whole except by means of special agreement. It was adopted by the Joint Committee by 21 votes to 6 with 14 abstentions.[2] This text as stated before, constituted a new Article 2A and has finally become Article 3 common to the four Geneva Conventions of 1949.

In the Plenary Assembly of the Diplomatic Conference the Soviet delegation submitted its proposal as an alternative to the text which was adopted by the Joint Committee and recommended by it to the Plenary Assembly. The Soviet proposal was introduced by an impressive speech by the Soviet delegate, Mr. Morosov,[3] but the majority of delegations were obviously

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1. Final Record, Vol. 2B, p. 129.
2. Loc. cit.
3. Ibid., pp. 325-327.

unimpressed. The Soviet proposal was this time rejected by 20 votes to 11, with 7 abstentions.[1]

The Plenary Assembly then voted on a proposal submitted by the delegation of Burma to delete Article 2A, but the proposal was defeated; Article 2A was finally adopted by 34 votes to 12, wit 1 abstention.[2] Article 2A is the present Article 3 common to the Four Geneva Conventions of 1949.

It provides as follows:

"In the case of armed conflict not of an international character occuring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply. as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

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1. Ibid., p. 338.
2. Final Record, Vol. 2B, p. 339.

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensible by civilized peoples.

(2) The wo nded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endevour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Clearly, this Article does not envisage the application of the Geneva Conventions of 1949 in their entirety, except by the very remote possibility of a 'special agreement' between the Parties to the conflict.

In the light of the above discussion the following concluding remarks seem to be justified:

First, the term 'armed conflicts not of an international character' was a completely new term. Nothing wrong with introducing it if the Geneva Conventions gave a definition, or, which comes to the same thing, if the term 'armed conflict

of an international character' was used and defined in the Conventions. But since neither term was defined, the distinction between international and non-international armed conflicts remained controversial, with the inevitable consequence that the efficacy of the Geneva Conventions in alleviating the sufferings of the victims of armed conflicts is reduced to the minimum.

Second, it appears from the above discussion that what international lawyers have traditionally claimed to be rules of customary international law pertaining to the applicablity of the law of armed conflict in its entirety between the contending parties, were no more than mere theories. This is evidenced by the fact that the proposals of the First Working Party to make the application of the Geneva Conventions in their entirety mandatory, if the government against which the armed conflict was waged recognized the insurgents as belligerents, or if certain conditions of fact were fulfilled, were rejected in all the Committees of the Conference. It would be difficult to explain this rejection if the rules under discussion were really rules of international law.

Third, it is probably fair to attribute the failure of the Conference to go beyond the provisions of Article 3 to the lack of political will on the part of Western States.

It is true that underneath the legal arguments for and against every proposal made at the Diplomatic Conference there were the traditional notions of the sovereignty of the state and domestic jurisdiction, but probably the most powerful factor which determined the result was the fact that the atmosphere of the Conference was one of cold warfare between

East and West. The reader of the summary records of the Conference may not fail to observe that the Soviet Union had advocated the widest possible application of the Conventions to armed conflicts not of an international character. From a Western point of view, and from the point of view of Third World countries, which were at the receiving end of whatever restraints the Conference might put on their freedom of action, this meant interference in what they regarded as domestic affairs. This may explain why the most traditional theories generally advocated by Western writers, and even claimed to be rules of customary international law, seemed too revolutionary and have been abandoned. Although as we have seen, initiially at least, most Western delegations seemed in favour of a regulation of the application of the Geneva Conventions in their entirety, on the basis of traditional legal thought.

Fourthly, and last, even the adoption of Article 3 in such an atmosphere must be regarded as a revolutionary step. The importance of Article 3 is not so much the fact that it prohibits certain acts at any time and in any place whatsoever; it is the fact that for the first time in the history of international law the international regime of human rights had turned to the offensive, and had penetrated the traditional defences of sovereignty of the state and domestic jurisdiction.

3. Field of Application of Article 3

To some writers, the words 'armed conflicts not of an international character' are a mystery. Tom Farer wrote:

> "One of the most assured things that might be said about the words 'armed conflict not of an international character' is that no one can say with assurance precisely what meaning they were intended to convey. ... There clearly was a compromise. But only the arts of divinatio seem capable of establishing beyond dispute its true nature."[1]

Protocol I dditional to the Geneva Conventions of 1949 relating to the protection of victims of armed conflicts of international character may at least partly solve the problem of the definition of armed conflicts not of an international charact r. Prtocol I applies to interstate armed conflicts and, according to tbe terms of its Article 1, paragraph 4, to armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination.[2]

There is some controversy as to whether 'all' armed conflicts in which peoples fight for their right of self-determination are of international character, or only armed conflicts in which peoples fight against "colonial domination and alien occupation and against racist regimes." In this writer's view, all armed conflicts in which peoples fight for their right of self-determination should be considered armed conflicts of international character for purposes of international humanitarian law.

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1. Tom Farer, Humanitarian Law and Armed Conflicts: Toward the Definition of International Armed Conflict, Columbia Law Review, Vol. 71, 1971, pp. 43 and 51.
2. This subject is examined at length in Chapter 3 of this thesis.

Accordingly, one may reasonably start from the premise that armed conflicts of non-international character are civil wars in which peoples are not fighting for self-determination.

Factually, such armed conflicts may range from minor and separate incidents to full-fledged civil war between well organized parties to the conflict, each in control of a significant part of national territory in which it exercises the functions of a 1 cal government. It is therefore important to determine the point at which Article 3 becomes applicable.

The authors of the ICRC Commentary, without a shred of evidence, state that:

> "it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities - conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the parties is in possession of a portion of the national territory, and there is often some sort of front." [1]

Paradoxically, however, the authors of the ICRC Commentary think that the scope of Article 3 must be as wide as possible. "What government", they say, "would dare to claim before the world, in case of civil disturbances which would justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take Hostages?" [2]

1, Pictet (ed.), Commentary on the Fourth (civilian) Convention of 1949, Geneva, ICRC, 1958, p. 36.
2. Loc. cit.

in the view of the authors of the Commentary, "no government can object to observing, in its dealing with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which in fact it observes daily, under its own laws, even when dealing with common criminals."[1]

However, e n with the most charitable interpretation of the ICRC's conception of armed conflicts of non-international character, as q ted above, it would be impossible to claim that Article 3 applies to cases of internal disturbances and mere acts of banditry.

Baxter also criticises the contradictory attitude of the ICRC C mmentary, but he does not say when Article 3 becomes applicable. He says that he is sure of one thing:

"There is no consensus as to the application of Article 3 to what are, in comparative terms, the lower levels of violence."[2] But he did not explain what the"lower levels of violence" are.

Draper notes that the current tendency is to consider an Article 3 conflict to be in existence whenever the police are no longer able to enforce the criminal law in a particular area by reason of the rebel action, and a sustained troop action is taken against the rebels, even though the rebels' organization and control of any area is minimal.[3] This seems reasonable.

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1. Loc. cit.
2. R.R.Baxter, Jus in Bello Interno, in J.N.Moore (ed.), Law and Civil War in the Modern World, Princeton, 1975, p. 526.
3. Draper, The Geneva Conventions of 1949, Recueil des Cours of the Hague Academy of International Law, 1965, Vol I, p. 94.

A similar view was expressed by the representative of Switzerland, Mr. Bolla, during the debate in the Plenary Assembly of the Diplomatic Conference of 1949. "An armed conflict, as understood in this provision (Article 3)", he said, "implies some form of organization among the Parties to the conflict. Su h organization will, of course, generally be founded on the governmental side; but there must also be some degree of organization among the insurgents."[1]

A similar view was also adopted by the Institute of International Law in its resolution on the principles of non-inter ention in civil war. Article 1 of this resolution defined the 'concept of civil war' as follows:

"1. For the purposes of this resolution the term civil war shall apply to any armed conflict not of an international character which breaks out in the territory of a state and in which there is opposition between: (a) the established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic, or social order of the state; or (b) two or more groups contend with one another for the control of the state.

2. Within the meaning of this resolution the term civil war shall not cover local disorders or riots."[2]

It should be noted that all the above mentioned criteria still fall within the traditional approach which distinguishes

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1. Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 2B, p. 335.
2. See in the Annuaire of the Institute of International Law, 1975, pp. 545 - 47.

between 'armed conflicts' and 'civil disturbances and tensions', an approach which also found expession in the second paragraph of Article 1 of Protocol II additional to the Geneva Conventions of 1949, and relating to the protection of victims of armed conflict of non-international character. The Protocol went so far as to state that:

> "i ternal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, are not ... armed conflicts."

From a humanitarian point of view, this provision was a set back even by the standards of the 1949 Diplomatic Conference, because it implies that Article 3 does not apply to situations of internal disturbances and tensions, riots, sporadic acts of violence and the like. It is true that governments are in the habit of glossing over the scale of armed opposition and even dehumanize their opponents who take to arms by calling them 'terrorists' - a term which is in vogue these days. But that should not be at the expense of humanity. No one in 1949 had said that sporadic acts of violence carried out by an organized insurgent movement is not an armed conflict. It will be useful therefore to quote some of what has been said at the Diplomatic Conference with regard to the application of Article 3 common to the Geneva Conventions of 1949.

The text of Article 3 was drafted by the Second Working Party with Mr. Lamarle of France as Chairman. Introducing the text which became Article 3, Mr. Lamarle said that, "it offered in all cases and circumstances the chief advantage of permitting the automatic implementation of concrete and precise

provisions which were the essence of humanitarian rules to be observed in cases of armed conflict not of an international character. ... The text, moreover, contained no clause of a political character which could possibly lead to contestation."[1]

At another meeting Mr. Lamarle said: "The French Government was prepared to apply the principles contained in the text of the Second Working Party (i.e. Article 3), even to bandits."[2]

The Australian delegate Colonel Hodgson considered that "the de jure government would be bound to carry out all the provisions of the Article even if the insurgents were mere bandits, whereas no obligation whatsoever would rest on the latter.

The representative of Greece, Mr. Agathocles said that "any insurgent or bandit would be a national of a Signatory State, and would ipso facto be bound by the Convention (i.e. Article 3).[4]

No delegate had objected to these statements, and it is not in vain that it was insisted that Article 3 is applicable even when insurgents are described as mere bandits and even to bandits proper. This simply means that the treatment required by the Article is applicable whatever may be the intensity of the conflict. The Conference seem to have acted on the premise that the humane treatment and the particularized prohibitions

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1. Final Records, Vol. 2B, pp. 82-83. This, however was belied by the attitude of France during the Algerian War of Independence, see, Arnold Fraleigh, The Algerian Revolution as a Case Study in International Law, in Falk (ed.), The International Law of Civil War, pp. 179 et seq., esp. pp. 194 - 203.
2. Final Records, Vol. 2B, p. 99.
3. Ibid., p. 94.
4. Loc. cit.

referred to in paragraph 1 of Article 3 are underogable human rights which apply in peace and continue to apply in armed conflicts. No more definite language could have been chosen for the purpose be ter than the words: "To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons." The phrase "at any time and in any place whatsoever" was deliberately added, and was the subject of a special vote. Certainly it cannot mean that until the armed conflict had reached a certain degree of intensity, or until the Parties to the conflict had reached a certain degree of organization, no obligation would devolve on the Parties to the conflict. After all, persons protected by Article 3 are persons who do not take an active part in the hostilities.

In brief, notwithstanding the term 'armed conflict not of an international character, the protection due to the persons referred to in Article 3 remains due to them, irrespective of the intensity of the conflict; of the organization of the insurgents; of their control of any part of the national territory; or of the general or local character of the conflict. Those who are still obsessed with the distinction between the concept of 'armed conflict' and the concept of internal disturbances and tensions are well advised to absorb the basic and simple fact that what is prohibited by the laws of armed conflict is afortiori prohibited when there is no armed conflict at all. Moreover, the humane treatment and the particularized prohibitions in paragraph 1 of Article 3, all constitute human rights from which no derogation is permissable even "in time of public

emergency which threatens the life of the nation."[1]

4. Obligations of the Parties to the Conflict

One may read in the text of Article 3 common to the Four Geneva Conventions of 1949 too much or too little, depending on one's conception of the definition of persons protected by the Article nd of the humane treatment to which they are entitled.

The definition of protected persons is all the more important since among the prohibitions which have to be obser 'at any time and in any place whatsoever" is the prohibition of "violence to life and person."

According to its o n terms, Article 3 protects "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause."

The phrase 'taking no active part in hostilities' must be understood to mean 'taking no active part in military operations'. This interpretation is supported by the fact that members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, are protected by the Article. Afortiori, therefore, civilians who support the insurgents cause by words or deeds but otherwise do not take part in military operations,

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1. Article 4, of the International Covenant on Civil and Political Rights.

and passive civilians, are also protected by the Article. But this does not solve the problems of the definition of protected persons.

According to tne French representative, Mr. Lamarle, who was the architect of Article 3, the Article protected "all persons, except combatants at the time they were engaged in fighting."[1] This seems imprecise inasmuch as it suggests that even members of t e armed forces (other than those who have laid down their arms and those placed hors de combat) are also protected by Article 3, while not taking an active part in the hostilities. Of course, from a governmental point of view, all violence committed by the insurgents is illegal, and all action taken by governmental forces is usually classified as 'police action' to keep law and order. But it is unlikely that members of the armed forces on either side, other than those expressly included in the definition of protected persons, were intended to be protected by Article 3. However, exclusion of the members of the armed forces on both sides (other than those expressly included in the Article) does not solve the problem of the definition of protected persons.

Nor does the suggestion that the Geneva Conventions are not concerned with the conduct of hostilities, which however, is controversial, solves the problem, for it is still necessary to determine who are the persons against whom "violence to life and person" is prohibited at any time and in any place whatsoever. Moreover, some rules relating to the conduct of hostilities may be read in Article 3 without doing

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1. Final Records of the Diplomatic Conference of Geneva of 1949, Vol. 2B, p. 84.

violence to its wording. Furthermore, neither customary international law, nor any treaty on the law of armed conflict affords absolute protection to persons taking no active part in the hostilities. Article 3, therefore, seems contradictory.

In order to remove this apparent contradiction the protection afforded by Article 3 must be read subject to the rules relating to the conduct of military operations. Where such rules do not interfere with the protection afforded by Article 3, as for instance in the case of persons detained or interned for reasons related to the armed conflict, whether they were civilians or members of the armed forces of the Parties to the conflict, the absolute minimum of prohibited acts referred to in sub-paragraph 1 (a) to (d) remains operative.

As for the rest of the population who do not take a direct part in military operations, the prohibitions also remain operative for each Party to the conflict, with regard to such persons in the territory under its control, as well as in the territory under the control of the adverse Party, subject to the rules regulating the conduct of military operations.

In no other way the phrase 'persons taking no active part in hostilities' can be reconciled with the absolute character of the acts prohibited by paragraph 1 of Article 3. Moreover, the above analysis is compatible with the human rights approach to Article 3.

Article 4 of the International Covenant on Civil and Political Rights allows states to derogate from their obligations under the Covenant "in time of public emergency which threatens the life of the nation and the existence of

which is officially proclaimed", only to the extent strictly required by the exigences of the situation. Nevertheless, there are certain human rights from which no derogation is allowed even in time of public emergency, prominent among which is the right to life (Article 6), and the right to humane treatment (Article 7).

Article 6, paragraph 1 of the Covenant provides:

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

It is clear from the last sentence that protection of the right to life is not absolute; what the provision seems to prohibit is the arbitrary deprivation of life, but it did not elaborate on the cases where the deprivation of life is not to be regarded as arbitrary. In this respect, Article 2 of the European Convention on Human Rights[1], is more detailed. It states in paragraph 2 that "deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

"(a) in defence of any person from unlawful violence;

(b) in order to affect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action taken for the purpose of quelling a riot or insurrection."

Article 15 of the European Convention on Human Rights, like Article 4 of the International Covenant on Civil and

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1. Text in Brownlie (ed.), Basic Documents in International Law, second (revised) edition, 1978, pp. 206 et seq.

Political Rigths, allows for derogation from human rights in time of war or public emergency. But no derogation from Article 2 (the ri ht to life) is allowed "except in respect of deaths resulting from lawful acts of war." As Professor Draper had noted, "in Article 15(2) of the European Convention, dealing with derogat' n from the right to' life - the most fundemental of all human rights, the whole of the law of war as to killing has been 'ncorporated by reference."[1]

T us t e human rights approach to Article 3 common to the Four Geneva Conventions clearly supports the view stated above - that the prohibition of violence to life and person in that Article should be read subject to the laws regulating the conduct of military operations.

Admittedly, this conclusion modifies the wording of the Article - "To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with regard to the above-mentioned persons", - with regard to violence to life and person, which in any case is modified by the Conventions on human rights. If, however, one has to insist on the absolute nature of the prohibition, the price would be to limit the definition of "persons taking no active part in the hostilities" to those who have been detained or interned for reasons relating to the conflict, which, in the light of general international law, would be a clear distortion.

It should be noted, however, that even within the absolutist approach one may still read in the text of Article

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1. Draper, The Relationship Between the Human Rights Regime and the Law of Armed Conflict, in Israel Year Book on Human Rights, Vol. 1, 1971, pp. 191 et seq. at p. 197.

3 some of the rules relating to the conduct of hostilities without doing any violence to the wording of the Article. This is particularly true of the fundemental rule that attacks directed exclusively at the civilian population or individual civilians are prohibited[1], and of the rule which prohibits attacks against rsons placed hors de combat.[2]

Thus, which ever way one looks at Article 3 common to the Geneva Conve tions, it seems difficult to escape the conclusion that, at least, some of the rules relating to the conduct of military operations also apply in the case of armed conflicts of non-international character governed by Article 3, even before the conflict reaches the level required by Protocol II.[3]

So far, we have focused on the prohibition of violence to life as regulated in Article 3 common to the Geneva Conventions and in international conventions on human rights. Closely connected to the prohibition of violence to life is the prohibition of the taking of hostages. Until the Geneva Coventions of 1949 the taking of hostages was not prohibited under customary international law, and the taking of hostages was closely integrated with reprisals.[4] The following are excerpts from "The Hostage Case" decided by the United States Military Tribunal V at Nuremberg, on February 19, 1948:

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1. This rule is now codified in Article 13(2) of Protocol II, and in Article 51(2) of Protocol I, additional to the Geneva Conventions of 1949.
2. See Article 41 of Protocol I. A corresponding provision in draft Protocol II was adopted in Committee but was deleted in Plenary.
3. On Protocol II, see Chapter 3 of this thesis.
4. See Whiteman, Digest of International Law, Vol. 10, pp. 321 - 324.

"Hostages under the alleged modern practice of nations are taken (a) to protect individuals held by the enemy, (b) to force the payment of requisitions, contributions, and the like, and (c) to ensure against unlawful acts by enemy forces or people. We are concerned here only with the last provision. That hostages may be taken for this purpose cannot be denied."[1]

.....

"Nationality or geographic proximity may under certain circumstances afford a basis for hostage selection, depending upon the circumstances of the situation. This arbitrary basis of selection may be deplored but it cannot be condemned as a violation of international law, but there must be some connection between the population from whom the hostages are taken and the crime committed."[2]

.....

"It is essential to a lawful taking of hostages under customary law that proclamation be made, giving names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason the hostages will be shot. The number of hostages shot must not exceed in severity the offences the shooting is designed to deter. Unless the foregoing requirements are met, the shooting of hostages is in contravention of international law and is a war crime in itself."[3]

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1. Ibid., p. 321.
2. Ibid., p. 322.
3. Ibid., p. 323.

For the purposes of the judgement the term 'hostages' was used to refer to persons of the civilian population taken into custody for the purpose of guaranteeing with their lives the future good conduc of the population of the community from which they were taken. The term 'reprisal prisoners' was used to refer to persons taken from the civilian population to be killed in retaliation for offences committed by unknown persons within th occupied area.[1]

The Nure berg Tribunal notes that the taking of hostages and 'prisoner reprisals' was practised extensively by Germany during the two World Wars. "The right to do so", said the Tribunal, was "recognized by many nations including the United States, Great Britain, France and the Soviet Union."[2]

That was 'state terrorism' par excellence, and it was rightly prohibited by the Geneva Conventions of 1949 with regard to both international and non-international armed conflicts. Nevertheless the taking of hostages is still widely practised by insurgent movements, and it is clearly insufficient to say that the practice is illegal, and to denounce it as acts of terrorism. It has proved to be an effective weapon in the hands of insurgents and it is unlikely to be abandoned by them until governments change their treatment of captured insurgents. Every time a 'hostage case' arises governments are caught in the dilema of negotiating with persons they regard as mere 'terrorists' or endangering the safety of the hostages. In many cases governments have had to swallow their pride and negoiate either openly or by proxy, and in some cases hostages have in fact been killed before negotiations began. The practice

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1. Ibid., p. 322.
2. Ibid., p. 323.

is unlikely to stop simply because governments have decided to make it illegal or because public opinion finds it repugnant. What is needed is a more realistic approach to the treatment of captured insurg nts, since in most cases the taking of hostages was actually done for the purpose of either improving the treatment of captured insurgents or securing their release. In view of this fact, it may be the best remedy in case of an armed conflict of non-international character is to grant prisoner-of-war status to all captured insurgents irrespective of the intensity of the conflict; of the legal staus of the parties to the conflict; of control of territory by the insurgents; or of any other consideration. Indeed, in so far as the prisoner-of-war status does not exempt the prisoner from prosecution for war crimes, it might prove to be one of the most effective weapons in countering insurgency, and at the same time, of humanizing the armed conflict. This may be done in the knowledge that denial of prisoner-of-war status always, politically, plays into the hands of the insurgents, and in the knowledge that nothing would disgrace a combatant more than proving him in a fair trial to be a war criminal.

Unfortunately for humanity in warfare, governments have not yet realized the importance of humanity in warfare as a weapon in countering insurgency, and the importance of 'granting', rather than 'denying' the prisoner-of-war staus in particular.

However, Article 3 does not contemplate the prisoner-of-war status except by means of a special agreement between the parties to the conflict. Indeed, it does not contemplate the application of any of the other provisions of the Geneva

Conventions except by means of special agreement. All that Article 3 affords to persons taking no active part in the hostilities is the minimum of humane treatment that actually provides no incentive to the insurgents to abide by the Conventions. It may be noted in this respect that the recent Geneva Diplomatic C nference (1974-1977), a provision making it mandatory for courts to take into consideration the fact that the person pro cuted for the sole reason of having taken part in hostilities, having respected the Protocol, that in such a case the death penalty should not be carried out until the end of the armed conflict, was rejected in Plenary by 26 votes to 12 with 49 abstentions. The provision was considered an interference in t e so e eignty of the state.[1] All that Article 3 pro ibits in this respect is "the passing of sentences and t e carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispens ble y ivilized p ol s."

In addition to the prohibition of violence to life, in particular murder of all kinds, Article 3 also prohibits violence to person, particularly mutilation cruel treatment and torture. These acts are prohibited by Article 7 of the Covenant on Civil and Political Rights also, from which no derogation is allowed even in public emergency. It provides:

> "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to

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1. See CDDH/SR.50, para. 56 - 86.

medical or scientific experimentation."

The prohibition of torture is particularly important since it is often used by interrogators to extract confessions and to collect information a out the insurgent movement and its members.

Article 3 also protects the dignity of persons. Outrages upon personal dign'ty, in particular, humiliating and degrading treat ent are prohibited.

T e wounde , sick and shipwrecked, merited one line in the Article: they shall be collected and cared for.

The s - alled right of umanitarian initiative is guaranteed y t e Article; an impartial humanitarian body, suc as t e Internat'onal Committee of the Red Cross, may off r its services to the Parties to the conflict. But there is no obligat'on on th Parties to the conflict to accept the services of suc a manitarian body. Similarly, the Article exhorts the P rties to t e conflict to endevour to bring into force, by means of a special agreement, all or part of the other provisions of t e Geneva Conventions. But no government had endevoured to do so, probably for fear that its action might be interpreted as implying some sort of recogntion of the insurgents' movement. This seems to have been so, although expressly states that the application of its provisions "shall not affect the legal status of the Parties to the conflict."

In conclusion, it may be stated that the obligations of the Parties to the conflict under Article 3 have been kept to an absolute minimum. But there is no international machinery to supervise the application of that minimum which, in many cases, has remained a pie in the sky.

CHAPTER TWO

PROTOCOL II ADDITIONAL TO THE GENEVA COVENTIONS OF 1949 RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS

1. Introduction

No doubt Article 3 common to the Four Geneva Conventions of 1949 did not work well in practice, partly because governments tended to deny the existence of an armed conflict, and partly (in this writer's view) because the standards of respect for human rights demanded by Article 3 are higher than that which many governments would be prepared to concede under their emergency laws or perhaps even in time of peace. The paradox of Article 3 of the Geneva Conventions becomes evident from the fact that, while almost all states are parties to the Geneva Conventions of 1949, the International Covenants on Human Rights had collected only 35 accessions or ratifications by 1976, and thus entered into force, although these Covenants were in fact adopted in 1966.

Yet, the International Conference on Human Rights which was held in 1968 in Teheran to commemorate the twentieth anniversary of the Universal Declaration of Human Rights called out for more 'law' for respect of human rights in armed conflicts.[1] Thus, in Resolution No. XXIII, the Conference considered (incorrectly I think), that the Geneva Conventions "are not sufficiently broad in scope to cover all armed conflicts"[2], when in fact the question was not one of breadth or scope, but one of interpretation and classification - that is, a question of determining whether the armed conflicts in

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1. Of course the laws of armed conflict needed revision; what is suggested is that governments should bring into force the International Covenants On Human Rights and by doing so prevent most, if not all, civil wars from happening.
2. For the text of resolution (XXIII) of the International Conference on Human Rights, see Schindler and Toman, The Laws of Armed Conflict, 1973, pp. 189 - 190.

which peoples are fighting in the exercise of their right of self-determination are of international or non-international character. This was a question that had not been decided by the Geneva Diplomatic Conference of 1949 and aroused much controversy at the Teheran Conference itself, at the United Nations and at the International Conferences on the reaffirmation and development of international humanitarian law applicable in armed conflicts, held in Geneva in 1971 and 1972, and on and off from 1974 to 1977.

However, the fact remains that the Teheran Conference set in motion the process of reaffirmation and development of international humanitarian law applicable in armed conflict by requesting the General Assembly of the United Nations to invite the Secretary-General of the United Nations to study:

> "(a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;
>
> (b) The need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare."[1]

The General Assembly of the United Nations gave effect to this request by its famous resolution 2444 (XXIII) of 19 December 1968, in which it also recognized "the necessity of applying basic humanitarian principles in all armed conflicts",

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1. Ibid., p. 190.

and affirmed the following principles "for observance by all governmental and other authorities responsible for action in armed conflict:

(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

(b) That it is prohibited to launch attacks against the civilian population as such;

(c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."[1]

In the equally famous resolution 2675 (XXV) of 9 December, 1970, the General Assembly, "bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types", affirmed "basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict."[2]

To cut it short, without going into matters of detail of the process of reaffirmation and development of international humanitarian law applicable in armed conflict, it may be sufficient to note that although for the first time the United Nations played an important role in the process, the ball, as may be expected, had finally rested in the court of the International Committee of the Red Cross. In preparing the two

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1. Ibid., p. 191.
2. Text in ibid., pp. 195 - 196. See also Section 1 of Chapter 4 of this thesis.

draft Protocols which served as a bais for discussions at the Conference of Government Experts (1971 and 1972) and then at the Diplomatic Conference (1974 to 1977), the ICRC took the General Assembly of the United Nations at its word - that protection of the civilian population should in principle be the same in all types of armed conflict.[1] Moreover, in an attempt to curb the authority of governments in denying the existence of an armed conflict requiring the application of Article 3 and the additional Protocol II which "develops and supplements Article 3 without modifying its existing conditions of application", the ICRC proposed a definition of armed conflicts of non-international character for purposes of Article 3 and the Additional Protocol II.

Protocol II had a strange fate at the Diplomatic Conference with regard to both; its field of application (i.e., the problem of threshold) and its substantive rules. It is the purpose of this Chapter to examine that fate, to explore the curious relationship between Article 3 common to the Geneva Conventions and Protocol II and to comment on the latter's substantive rules which afford protection to civilians and prisoners in armed conflicts of non-international character.

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1. See ICRC, Doc. CE/3b - Protection of the Civilian Population against Dangers of Hostilities, Geneva, January, 1971, p. 8.

2. The Problem of the Material Field of Application of Protocol II at the Conference of Government Experts

2.(1) The First Session (1971)

Introducing the subject, the representative of the ICRC stressed that Article 3 of the Geneva Convention did not define non-international armed conflicts. Governments therefore were left considerable discretion in respect of events occuring on their territories. In order to improve the situation the representative of the ICRC considered that the concept of non-international armed conflicts should be made mor precise by a non-exhaustive list of examples, inter alia, of situations in which the existance of the armed conflict could not be disputed by the government.[1]

From the outset, the idea of a definition was contested by some experts on several grounds. One expert firmly opposing such an attempt considered that a correct definition would entail rights and duties and that it would have to be applicable and applied. Another expert stated that it would be difficult to reach a consensus on the criteria to be specified in the definition. A third expert reminded the Commission[2] of the difficulties which the Conference of 1949 had encountered and which in his opinion were still existing. Some experts feared that a definition might come into conflict with state sovereignity.[3]

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1. ICRC Report, 1971, p. 36.
2. The Conference constituted four Commisions, Commision 2 discussed the problem of the protection of victims of non-international armed conflicts. See Ibid., p. 17.
3. For these opinions, see Ibid., p.37.

In general, the experts were at pains to stress the complexity of the matter and the wide variety of types of conflict situations.[1]

However, the majority of experts considered it necessary to define n n-international armed conflicts[2], and the adoption of a lexible general formula accompanied by a non-exhaustive list of cases to which it would apply was recommended.[3]

The discussion then concentrated on the proposal submitted by the ICRC which reads as follows:

"The following situations, among others, will be idered non-international armed conflicts entailing the application of the provisions of the present Protocol when they occur on the territory of one of the High Contracting Parties and involve military or civilian victims:

1. A hostile organised action;

a) Which is directed against the authorities in power, by armed forces.

b) Which constrains the authorities in power to have recourse to their regular armed forces to cope therewith.

2. Hostile organised actions which take place between the armed forces of two or more factions, whether or not these hostile actions entail the intervention of the authorities in power."[4]

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1. ICRC Report, 1971, p. 34.
2. Ibid., p.37.
3. Ibid., p.38.
4. ICRC, Document CE5, p. 76.

Though simple and clear, this proposal provoked a host of criticisms and a large number of amendments and formal proposals.[1]

Regarding the text of the ICRC, the idea of a 'hostile organised action', was the subject of a criticism calling for supplimentary definition. The words 'involve military or civilian victims', were thought by one expert to be superfluous. One expert regreted that the alternative character of (a) and (b) in paragraph 1 of the ICRC proposal was not clearly specified. One expert wondered whether any government in the world would accept such a definition, while another considered paragraph 2 to be academic.[2] It seemed to him inconceivable that such a state of anarchy should remain unquelled by some form of intervention. One expert proposed that the 'hostile organised action', be defined as 'military operations on a scale and of a duration comparable to those of a conflict between states."[3]

Faced with such complexities and a wide variety of proposals, the Chairman of Commision 2 suggested the setting up of a Drafting Committee to examine the different proposals, and to put forward a proposal which would enable the Commision resume discusion on the subject.[4]

The Drafting Committee submitted the following text which it considered as "no more than a satisfactory starting

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1. The proposals were submitted by experts from: Norway, Canada, Spain, France, Belgium, United Kingdom, Indonesia, Austria, Australia. For texts see ICRC Report, 1971, pp. 61-65.
2. The civil war in the Lebanon in 1958 is an example of paragraph 2 situations, and therefore it is not academic.
3. See ICRC Report, 1971, pp. 38-39.
4. Ibid., p. 39.

point for further debate on the question of definitions".[1]

"This Protocol shall apply to any case of armed conflict not of an international character which is carried on in the territory of a High Contracting Party for a substantial period of time and in which,

1. Organis d armed forces carry on hostile activities in arms against the authorities in power and the authorities in power employ their armed forces against such persons, or,
2. Organised armed forces carry on hostile activities in arms against other armed organised forces, whether or not the authorities in power employ their armed forces for the purpose of restoring order."

The view was also expressed within the Drafting Committee that there should be a third category of non-international armed conflicts to which the Protocol would also apply, to be described as follows:

3. "Hostilities have reached such a level as to make application of the Protocol a humanitarian need."[2]

Evidently, this text with the exception of the phrase "for a substantial period of time", is but another version of the initial proposal of the ICRC. It was natural therefore that it raised once again a similar criticism. In addition, one expert pointed out the impossibility of discussing, or subsequently of voting on a proposed definition refering to a Protocol whose nature and extent were unknown.[3]

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1. Ibid., p.63.
2. ICRC Report, 1971, p. 63-64.
3. Ibid., p. 40 para. 174.

Some experts felt that paragraph 2 should be struck out, while others felt that (1) and (2) could be combined.[1] Some experts considered the phrase 'for a substantial period of time' as being vague.[2] Some wanted to include in the definition the notion of the occupation of a territory over which each of the Parties to a conflict exercised authority.[3]

The idea of'intensity' as indicated by paragraph 3 was also contested by some experts. They wondered who could be the judge of the degree of violence.[4]

At the conclusion of the discussion, no vote was taken even to indicate the general sentiment.[5] The Chairman of the Drafting Committee summarised the train of thought expressed during the debate as follows:

1. Some experts continued to be hesitant in accepting a protocol to Article 3.
2. The majority of the experts subscribed to the idea of a protocol and some f them considered that such an instrument should not contain any definition or at most should contain only a summary definition. Others however, were in favour of a precise definition but could not fully support that proposed by the Drafting Committee.
3. Only a few experts were in favour of the third part of the Committee's tripartite definition and most were opposed to the second part.
4. There seemed to be a substantial amount of sentiment

1.Ibid., p. 40, para. 176.
2.Ibid., p. 40, para. 185.
3.Ibid., p. 40, para. 186.
4.Ibid., p. 40, para. 187.
5.Ibid., p. 40, para. 190.

in favour of an express statement excluding the types of lower-level conflicts, (e.g. riots and disturbances), from the scope of the Protocol.[1]

The Chairman of the Drafting Committee regreted the fact that the Commision had not been able to go any further and stressed that it lay with the ICRC to decide how the work on the subject was to continue.[2]

Thus the first session of the Conference of Government Experts came nowhere.

2.2. The Second Session of the Conference of Government Experts 1972

At the second session, the ICRC presented the Conference with two draft Protocols on which the work of the Conference focused.[3] Article 1 of Draft Protocol II defined the material field of application as follows:

> "The present Protocol which elaborates and supplements Article 3, common to the four Geneva Connventions of August 12th, 1949, shall aoply to conflicts not of an international character, refered to in Article 3, and in particular, in all situations where in the territory of one of the High Contracting Parties, hostilities of collective nature are in action between organized armed forces under the command of

1. ICRC, Report, 1971, p. 41.
2. Loc. cit.
3. For the texts of the two Draft Protocols and an account of the work of the second session, see ICRC, Report, 2 volumes, Geneva, July, 1972.

a responsible authority."[1]

This text seems to be another, but elaborated version of the initial proposal of the ICRC cited above. The notion of the use by the government of its military forces has been restated. The notion of 'organized hostilities', is more fully elaborated by requiring that the hostilities be of a 'collective nature' and that the insurgents be organized under the command of a responsible authority. These conditions obviously exclude the so-called lower levels of violence from the Protocol as the majority of experts desired. Thus the text seems simple, clear, and could be objectively substantiated.

In spite of these merits the text provoked a host of criticisms, amendments, and new proposals. Suffice it to mention that 13 formal proposals were submitted throughout the discussion.[2]

As to the extent and nature of the criteria embodied in these proposals, they seem to range from simple objective, to subjective-objective, or subjective in disguise, to clearly subjective criteria, that make the application of the Protocol subject to recognition by the government of the internal armed conflict, its character, and its constituent elements. As to their extent, they seem to range from criteria that cover simple internal disturbances to criteria which according to the classical view

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1. ICRC Report, 1972, Vol. 1, p. 67.
2. See the texts of these proposals in the ICRC Report, 1972, Vol. 2, pp. 33-36.

would have justified a recognition of belligerency and which according to some writers would have entailed the application of the law of armed conflict as a whole.

The Commision referred the written proposals to its Drafting Committee, but instead of submitting a compromise text, the Drafting Committee examined the proposals and submitted them again in the form of "six options and four possibilities."[1] These options, as the Chairman of the Drafting Committee pointed out, "reduced to systematic form the 13 amendments introduced," and "attempted to present the issues in a logical way."[2]

The Chairman's remark sounds more ironical than serious; the disagreement on the type of conflict to be regulated was the very reason for having such a number of proposals. It was natural therefore that the Conference of Government Experts could not make any progress.

The various proposals and the contradictory comments evoked thereby, as the Report of Commision 2 pointed out:

> "created a general feeling that the final decision to be taken depended on two basic hypotheses. Either the definition chosen could allow for a wide field of application, in which case the rules for protection would no doubt be more limited, or the definition could be narrower, in which case greater latitude might be allowed in applying the protection."[3]

By way of answer to the latter option the Report of

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1. See ICRC Report, 1972, pp. 70-71, (Vol. 1).
2. Ibid., p. 71.
3. Ibid., p. 69.

Commission 2 noted that:

> "the explicit omission of internal disturbances, the need for clearly-defined territorial limitations, and the reduction of the concept to the notion of civil war definitely expressed in terms of intensity and duration, met with the favour of some experts."[1]

Others however, favoured a broader definition, but one which would cover only provisions of humanitarian law, but not the conduct of military operations.[2]

Thus once again, the Conference of Government Experts failed to agree on a proposed text, and once again the text to be sub itted to the Diplomatic Conference was left to the ICRC.

3. The Problem of the Material Field of Application of Protocol II at the Diplomatic Conference

On the eve of the Diplomatic Conference, the Twenty Second International Conference of the Red Cross met in Teheran and discussed the question of the field of application of Protocol II. There also, widely divergent views were expressed. Some delegates favoured a narrow field of application in which the Protocol would take effect in conflicts of great intensity only, along with a complete set of regulations. Others favoured a wide field of

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1. Ibid., p. 69
2. Loc. cit.

application, with the Protocol applying to all non-international armed conflicts, including those of minor intensity, along with regulations limited to the most basic provisions.[1]

As a compromise between these two divergent views, the ICRC submitted to the Diplomatic Conference the following provisions as Article 1 of Draft Protocol II:

"Article 1 - Material Field of Application.

1. The present Protocol shall apply to all armed conflicts not covered by Article 2 Common to the Geneva Convention of August, 1949, taking place between armed forces or other organized groups under resposible command.
2. The present Protocol shall not apply to situations of internal disturbances and tensions, inter alia, riots, isolated and sporadic acts of violence and other acts of similar nature.
3. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of August 12, 1949."[2]

Introducing the Protocol in general, the representative of the ICRC emphasised the need to strengthen the protection of victims, to prevent an increase in violence, and to prevent the opposing forces from taking action that would render national reconciliation difficult.[3]

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1. ICRC Report, 1977, submitted to the 23rd International Conference of the Red Cross, p. 27.
2. ICRC, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary, Geneva, Oct. 1973, p. 132.
3. CDDH/I/SR., 17-41, p. 71.

Taking into account the particular material conditions in which hostilities take place because of the inequality of the opposing Parties, the ICRC had endevoured to draw up simple rules which all the Parties to a conflict should apply to the entire population affected by it, thus avoiding the establishment of special categories of protected persons.[1]

As to the material field of application of the Protocol, the representative of the ICRC pointed out that a broad field to cover all non-international armed conflicts had been chosen. For that purpose, the ICRC had endevoured to specify the characteristics of a non-international armed conflict by means of objective criteria, so that the Protocol could be applied when those criteria were met and not be made subject to other considerations.[2]

The text of the ICRC was subject to a lengthy discussion[3] very similar to that of the Conference of Government Experts.

At its 24th meeting, Committee 1 decided on the Chairman's proposal to refer Draft Article 1, together with the whole of Part one of Protocol II, to Working Group B. The Working Group spent the greater part of 15 meetings discussing Draft Article 1. At its fourth meeting it set up a sub-working group, "to carry out informal consultations among delegates with a view to agreeing a text for Article 1."

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1. Ibid., p. 72.
2. Ibid., p. 74.
3. See ICRC Doument CDDH/SR1/17-41, p. 70 et seq.

The Sub-Working Group met six times and submitted the result of its work to Working Group B, which decided by consensus to approve the text submitted by the Sub-Working Group.

At its 29th meeting, Committee 1 adopted the text submitted by Working Group B, by consensus, without discussion and then heard the explanation of votes by a number of delegates.[1] The same text was finally adopted by the Diplomatic Conference.[2]

It reads as follows:

"Article 1 - material field of application.

1. This Protocol, which develops and supplements Article 3 Common to the Geneva Conventions of 12th August, 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol additional to the Geneva Conventions of 12th August, 1949, and relating to the protection of victims of international armed conflict, (Protocol I), and which take place in the territory of a High Contracting Party, between its armed forces and dissident armed forces or other organized groups, which under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement

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1. See Document CDDH/219/Rev. 1 p. 21-22.
2. By 58 votes to 5 with 29 abstentions, CDDH/SR.47-59, plenary meetings Vol. 2, p. 70. See in particular CDDH/SR. 49.

this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

It is probably obvious, that the field of application of Protocol II is narrower than any of the ICRC proposals in this respect.

The material field of application of Protocol II, has thus been delimited by a combination of negative and positive conditions.

Negatively, or by way of exclusion, the Protocol shall not apply to armed conflicts covered by Article 1 of Protocol I. These include, in addition to interstate armed 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, as enshrined in the Charter of the United Nations and the declaration of the Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations.

The Protocol does not apply to situations of internal disturbances and tension, such as riots, isolated and sporadic acts of violence and other acts of similar nature, as not being armed conflicts.

Moreover, armed conflicts in which the government concerned does not use its armed forces are also excluded from the scope of the Protocol.

Positively, or by way of inclusion, two conditions are expressly required for the application of the Protocol. They are:

1. That the anti-government forces be they dissident armed forces or other armed groups, be organized under a responsible command; and
2. Exercise such a control over a part of the national territory.

At the 49th plenary meeting the issue which dominated the discussion was, who would determine whether the conditions for the application of the Protocol have been fulfilled and whether a decision by a third state would constitute an intervention in the internal affairs of the state on whose territory the internal conflict occurs.

To some Latin American, African, Asian, and East European countries, the determination of whether the conditions of Article 1 were fulfilled was a matter exclusively reserved for the state in which the conflict occurs, and therefore, any determination by other states constituted an illegal intervention in the internal affairs of that state.[1]

Strictly speaking, such a condition cannot be read in Article 1 of Protocol II. Moreover, to make the application of the Protocol subject to such a condition amounts to no less than the abrogation of the protection of civilians and prisoners in armed conflicts of non-international character, or at least make that protection purely a matter of convenience.

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1. See CDDH/SR. 49.

In the following sections a critical analysis of these conditions will be made. Also, the relation between Protocol II and Article 3 common to the Geneva Conventions will be discussed as well as the notion of internal disturbances and tensions which has become of crucial importance to the concept of armed conflicts of non-international character.

4. A Critical Analysis of the Field of Application of Protocol II

4.1. The Condition that Anti-Government Forces be Organized U r a Responsible Command

Organization and the political purpose are *sine qua non* of any political movement. It is natural therefore, that the Protocol requires that the insurgents, or the 'dissident armed forces or other organized groups', as the Protocol refers to them, must be organized.

According to the ICRC Commentary, organization implies that these armed forces opposing the government, are subject to a sufficiently firm discipline that will ensure respect, in the conduct of hostilities, of the provisions laid down in the Protocol.[1] It should be noted, however, that disrespect of the provisions of the Protocol is no proof that the insurgents are not organized. Discipline, whether on the part of the government, or on the part of the insurgents, is no guarantee that the Protocol will be respected.

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1. ICRC, Commentery on the Draft Additional Protocol, Geneva, 1973, p. 132.

'Organization', necessarily presupposes the existance of a responsible command. This, according to the ICRC Commentary, means a commanding authority, whose leadership is recognized by its subordinates and is able therefore, to assume responsibility for their acts.[1]

Here again, it should be noted, that unified command is not a condition. The insurgents may consist of several organizations each having its own commanding authority or leadership. It is also immaterial whether the commanding authority consisted of one man, or it was collective leadership.

4. 2. The Condition of Territorial Control by Anti-Government Forces

This condition was not included in any of the ICRC drafts of Article 1. It was added by the Diplomatic Conference despite the objection of many states.

The apparent justification for this condition, as appears form the text of Article 1, is to enable the insurgents "to carry out sustained and concerted military operations and to implement this Protocol."

Obviously the proponents of this condition were thinking in terms of classical war with territrial lines of confrontation and conventional armed forces on both sides. However, it is gravely doubtful - in view of modern guerrila warfare - whether the exercise of control over a part of the national territory by the insurgents is necessary for sustained and concerted military operations, or even for the

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1. Loc. cit.

implementation of the Protocol.

The prerequisites of sustained and concerted military operations in guerilla warfare, are the organization and means of communication, rather than the exercise of control over a part of the national territory, by the insurgents.

As for the implementation of the Protocol, an examination of the Protocol article by article, reveals that the dependence of its implementation on the control of a part of a territory by the insurgents, is a fallacy. No stretch of imagination can establish a link between the exercise of control over a part of the national territory and the prohibition to attack the civilian population, individual civilians, objects indispensible to the survival of the civilian population, works and installations containing dangerous forces, cultural objects and places of worship.[1]

Similarily, the protection of medical and religious personnel, the protection of medical units and transports, respect for the distinctive emblems of humanitarian bodies, (such as the Red Cross, Red Crescent, Red Lion and Sun), the prohibition of forced movement of civilians and the protection of relief societies and relief action is not dependent on territorial control by the insurgents.[2]

Articles 19 to 28 are 'final provisions', relating to dissemination, signature, ratification, accesion, entry into force, amendment, denunciation, notification, registration and authentic texts of the Protocol. Obviously these matters

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1. See Articles 13 to 16 of Protocol II.
2. See Articles 9 to 12 and Articles 17 and 18 of Protocol II.

have nothing to do with the control of a part of the national territory by the insurgents.

Articles 7 and 8 provide for the protection, care and search for the wounded, sick and shipwrecked and Article 4 provides for fundemental guarantees, to which all persons who do not take part, or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled. These fundemental guarantees, already provided for in Article 3 Common to the four Geneva Conventions of 1949, are enlarged to include the prohibition of collective punishment, the prohibition of slavery and terrorism, as well as detailed provisions for the protection of children under the age of 15 years. In addition to Article 4, Article 5 specifies the rights of persons whose liberty has been restricted, while Article 6 enumerates the judicial guarantees and principles that should govern the prosecution and punishment of criminal offences related to the armed conflict.

It is undeniable that the control of a part of the national territory of the insurgents enables them to implement some of the fundemental guarantees enumerated in Articles 5 and 6. But the irony is that the insurgents would not be in a position to violate some of the requirements of these provisions before they control a part of the national territory. In other words, Article 5 relating to the treatment of persons whose liberty has been restricted, and Article 6 relating to the penal prosecution and punishment of criminal offences relating to the armed conflict, are addressed to the party to the conflict who is in a position to establish detention or internment centres and to prosecute and punish

those who commit acts prohibited by the Protocol. Yet, by a strange fate, or so the condition of territorial control suggests, the government would not be required to implement the Protocol before the insurgents control a part of the national territory.

This preliminary survey of the provisions of Protocol II clearly reveals the fallacy of the governmental argument that the requirement of territorial control by the insurgents had a humanitarian purpose in view.

It is important to note here that the ICRC had not required the condition of territorial control in any of its proposals regarding the field of application of Protocol II. Had the control of a part of the national territory by the insurgents been necessary for the implementation of the Protocol the ICRC would have insisted on that condition.

Even more significant is the fact that resistance movements in occupied territories are required to respect the laws and customs of war, and so are the national liberation movements in armed conflicts in which peoples are fighting against colonial and alien domination and against racist regimes. Yet, no territorial control by these movements was considered necessary for the implementation of provisions which far exceed their scope those of Protocol II.

It is indeed a strange governmental logic that makes the protection of the civilian population dependent on the success of those whom the government concerned consider as criminals.

Clearly then, the condition of territorial control was not needed for humanitarian reasons; it was needed for

political reasons. The heart of the matter is that the majority of the delegations present at the Diplomatic Conference did not want a 'Protocol' relating to the protection of victims of armed conflicts of non-international character.

It is not suprising therefore that one delegation to the Diplomatic Conference thought that, "no convincing arguement had been put forward to justify the need for 'Draft' Protocol II, the provisions of which would not be acceptable to his delegation."[1] He reiterated his position at a plenary meeting. In his view, "the application of an international instrument in an internal situation, militated against the sovereignty of the country concerned and constituted an interference in that countries internal affairs."[2]

Other delegates, also, explicitly objected to the material field of the Protocol, on the grounds that it infringed the sovereignty of the state.[3]

It was proposed that the text of the ICRC be supplemente by the 'territorial condition', and even more, by the subjective condition "that the Protocol applies only upon an express recognition by the government concerned, of the existence of armed conflict and its constituent elements.[4]

But what sovereignty is for, if not to make laws to

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1. See the speech of the Indian Delegate, Doc. CDDH/I/SR. (17-41), p.94. See in particular the Indian explanation of vote in plenary, CDDH/SR. 49, Annex.
2. ICRC Document CDDH/SR. 47-59, Plenary Meetings, Vol, 2 p.72.
3. E.G. Argentina, German Democratic Republic, Romania, Mexico, Brazil, for the texts of their speeches respectively, see ibid., p.75, 76-77. 102, and 158.
4. See in this regard the proposals submitted by: the experts of Romania, Doc. CE/COM 11/4, Indonesia, CE/COM 11/6, Argentina, CE/COM 11/16, p. 36, ICRC Report, 1972, p.33,34, 36, respectively. In plenary, this remained the position of e.g. Colombia, Brazil, Saudi Arabia, Chile, Iraq, (cont.)

protect those who take no direct part in hostilities? And is not the making of law an exercise of sovereignty?[1]

Thus, the inclusion of the territorial condition represents a compromise among the objectionists, but not between them and the other extremes, which favoured the same protection to all victims, regardless of their legal or political classification,[2] nor between them and the moderates,[3] who favoured a lower threshold for the Protocol, than the one which was finally adopted. It is true that Committee 1 adopted Article 1 by consensus and without discussion, but the explanation of the votes which followed, revealed once again the divergence of views.[4] In plenary it appeared that there was no consensus.[5]

The territorial condition, however objective it may appear, fell just short of the aspirations of the extreme objectionists, who wished to have the Protocol applied after an express recognition by the government of the existence of armed conflict in its territory. In fact it is a subjective condition in objective disguise, providing governments with a considerable manouvering capacity. The government may always

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(cont. from note 4, previous page), Indonesia, Ecuador, Philipines, India, Canada, and Tanzania, see CDDH/SR.49, and Annex.

1. See in this sense the speech of the Norwegian Delegate, ibid, pp. 87-88. See also Kalshoven, Humanitarian Law, Netherland Year Book of Int, Law, (N.Y.I.L.), 1977, pp.110-115.
2. E.g. Norway, see CDDH/SR.1, 17-41, p. 87 and 163-64.
3. E.g. U.S.A., Egypt, U.K., New Zealand, W.Germany, Austria, Yugoslavia, Ukrain, Italy, see ibid., p.71 et seq. and 16-62.
4. See ibid., p. 155 et seq.
5. See the remarks of the delegation of Syria. CDDH/SR.49, para. 47. The Rapporteur of Committee I said: It would be truer to say that there had been approval by the majority and silence on the part of others." CDDH/SR.49, para. 49.

contest the claim by insurgents, that a territory has come under their control. The absence of a fact finding body competent to ascertain the facts of the situation, may also encourage the game of claim and counter claim of controlling a territory, if only for the sole purpose of psychological warfare. Territorial control, is of course de facto control. But what degree of control is required ? Is it a control analgous to that required by international law for the application of the law of occupation?[1]

In an interstate armed conflict, it is usual to distinguish invasion from occupation. Thus according to Oppenheim's international law, "the differencebetween mere invasion and occupation, becomes apparent from the fact that an occupant sets up some kind of administration whereas the mere invader does not."[2] Does it follow,by analogy, that the setting up of some kind of administration isa constitutive element of the control of a part of a territory by the dissident armed forces or other groups?

The Protocol does not seem to exclude a positive answer. If so, it would always be open to the government concerned to contest the fulfilment of the territorial condition, at least until the exercise of control over a part of national territory by the dissident armed forces, or other organized armed groups had gained a certain degree of stability. Moreover, if the territorial condition, among others, had once been fulfilled and the Protocol was applied, would it later

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1. See below, Chapter 6, Section 5.
2. Oppenheim - Lauterpacht, International Law, Vol. 2, 7th ed., p. 434.

cease to apply if the insurgents lost control of the territory?

The Protocol does not answer this question. But in the view of at least one delegate the Protocol ceases to apply when the conflict ceases to possess those characteristics refered to in Article 1.[1]

In conclusion, it appears that the territorial condition was not a good idea. "In armed conflict situations characterized by high mobility," as the Egyptian Delegate observed, "territorial control continuously changed hands, sometimes alternately between day and night to the point of becoming meaningless."[2] Moreover, urban guerrilla armed conflict would not fulfil the requirement of territorial control. Consequently, such a requirement would exclude from the ambit of Protocol II, many if not most of the contemporary types of armed conflict of non-international character and would confine it to the relatively rare cases of, as he put it, "characterized civil war."[3] That is to say, cases which on the merits of the classical doctrine, would have justified recognition of belligerency and the application of the interstate law of armed conflict as a whole.[4]

The curiosity of the situation is that, while defending this restrictive position on the pretext of defending the sovereignty of the state, delegates have required that the insurgents possess the constituative elements of a state: organization, population, territory.[5]

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1. See text in ICRC Report, 1972, Vol. 2, p. 37, Doc. CE/COM. 11/20, Proposal submitted by the Experts of Romania.
2. Doc., CDDH/SR.1, (17-41), p. 105.
3. Loc. cit.
4. See Jean Dupuy et Leonetti, La Notion de Conflit Arme a Caractere non-International, pp. 258-276, at 269, in Cassese, (ed.), The New Humanitarian Law of Armed Conflict
5. Loc. cit.

But once these conditions were fulfilled, would that not bring into question the competence of the government to speak for the state ?

In conclusion of the above discussion, it may be maintained with the delegation of the Syrian Arab Republic that:

> "The concept of 'armed conflicts' was very restrictive and the requirement that the armed groups should exercise such control over a part of the State's territory as to enable them to carry out sustained and concerted military operations was useless. Moreover, it opened the door to conflicting interpretations which would make it impossible to implement draft Protocol II. In his delegation's opinion, that Protocol should apply to all organized armed groups with the exception of common law bandits, without the requirement that they should exercise control over a part of the territory. That would be more in keeping with the general and universal character of humanitarian law. Such factors as the scale of the conflict did not constitute valid criteria for depriving revolutionaries of protection. Furthermore, Article 1 was retrogressive when compared with the provisions of Article 3 common to the Geneva Conventions of 1949.

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1. CDDH/SR. 49, para. 47.

4.3. Determination of the Existence of an Armed Conflict and of its Constituent Elements

At the fourty-ninth plenary meeting of the Diplomatic Conference during which Article 1 of Protocol II was adopted, the Colombian representative, Mr. Charry Samper asked what was the precise interpretation to be given to the last part of paragraph 1 relating to the dissident armed forces, and who would decide when the condition laid down in that conection should be applied.[1]

Mr. Obradovic of Yugoslavia who also was Chairman of Working Group (B) of Committee I which worked out the text of Article 1 of Protocol II through private consultation and secured its adoption on Committee level by consensus, replied that Article 1 represented a very fragile consensus reached only after lengthy considerations. In the circumstances, he felt that it would be extremely inadvisable to seek to interpret its provisions.[2]

The Colombian delegate said that, in that case, he would propose the addition at the end of paragraph 1, of the following sentence, which he said would make the text clearer;

> "The determination of the conditions referred to above shall be a matter for the state in which the conflict occurs."[3]

The Colombian oral amendment (or proposal) was supported by some delegates mostly, although not exclusively, from

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1. CDDH/SR. 49, para. 37.
2. CDDH/SR. 49, para. 38.
3. CDDH/SR. 49, para. 39.

Latin American Countries.[1]

After a brief discussion the Colombian delegation decided to withdraw its amendment "in order to meet the wishes of the ICRC representative and of the President who feared to compromise the approval of Protocol II at that stage of the Conference", as the Colombian delegation put it in its explanation of the vote on Article 1.[2]

The President of the Conference did in fact ask the Colombian representative "not to press his amendment."[3] But the Article was not adopted by consensus as some delegations had hoped; it was adopted by roll-call vote of 58 to 5, with 29 abstentions. Thus, formally at least, Article 1 of Protocol II was adopted by a comfortable majority. Analysis of these figures, however, is like the analysis of 'opinion polls'; it is everyone's guessing. For example, Saudi Arabia voted in favour of Article 1 of Protocol II. But in the explanation of vote, the Saudi representative, Mr. Nematallah said that in view of the rejection of the Colombian amendment, he wished to make clear that any definition of the terms of Article 1 was solely the concern of the state on whose territory the armed conflict was taking place. "Decision by any other country", he said, "would constitute interference in the domestic affairs of the State concerned and an infringement

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1. e.g., Brazil, CDDH/SR.49, para. 43; Saudi Arabia, CDDH/SR.49 para. 45; Chile, ibid., para. 48; Iraq, ibid., para. 57; Philipines, ibid., para. 63; Indonesia, ibid., para. 70; Argentina, CDDH/SR.49, (Annex). Ghana, CDDH/SR.49, (Annex), (explanation of vote); India, ibid., explanation of vote. Actually, India was against the Protocol altogether. Also in support of the Colombian view, Kenya, ibid., explanation of vote; and the United Republic of Tanzania, ibid., explanation of vote.
2. CDDH/SR. 49, Annex., (Colombia, explanation of vote).
3. CDDH/SR. 49, para. 44.

of that states sovereignty."[1]

By contrast, Argentina and Chile voted against the Article because "it includes no safeguard clause providing for a mechanism or reasonably objective parameters for determining in each case whether the conditions for the application of the Protocol have been met."[2]

Suprisingly Colombia and Brazil abstained, together with Iraq, Indonesia, Kenya, Philipines, and the United Republic of Tanzania.[3]

The Colombian explanation of vote was more detailed and therefore merits quotation. It reads, inter alia, that:

> "The field of application of Article 1 remains subject to unilateral interpretation in view of the impossibility of including a norm to determine who would decide the following:
>
> a) When a dissident group or an organized armed group acts under responsible command,
>
> b) Who would clearly define that control was exercised over part of the territory?
>
> c) Who would decide when sustained and concerted military operations were involved?
>
> Within the context of this Article the insertion of subjective elements gives rise to difficulties of interpretation and my delegation believes that in the exercise of sovereignty resides the right to determine such situations. The text approved does not contradict that in any way."[4]

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1. CDDH/SR. 49, para. 67.
2. From the explanation of vote by Argentina, CDDH/SR. 49 Annex.
3. See CDDH/SR. 49, para. 65.
4. CDDH/SR. 49, Annex, written explanation of vote.

One may wonder how many delegations had voted on this understanding. The majority appears to have preferred to remain silent on this issue. One may also wonder what would have been the answers to these questions if the Colombian delegation pressed its amendment to the vote.

It would not be necessary to speculate on what was in the minds of the different delegations. For what they had in mind was clearly demonstrated by the fact that during the same plenary meeting (the 49th meeting), a mini-Protocol worked out by the delegations of Canada and Pakistan was submitted as alternative to the more detailed and comprehensive Protocol which was worked out during six years of hard labour - first by the Conference of Government Experts, and then by the Diplomatic Conference itself. The result speaks for itself; one only needs to read the two texts (the one adopted by the Conference at Committee level, and the alledgedly simplified version submitted by the delegation of Pakistan) to realise what was in favour of governments was retained and what was in favour of the civilian population was largely deleted.

This question will be discussed later, but let us first see whether the text of Article 1 of the Protocol, or for that matter, the text of Article 3 of the Protocol regarding 'non-intervention' do really justify the interpretation made by the supporters of the Colombian view.

Of course, the best way of clarifying the issue was to put the Colombian amendment to the vote, but this did not happen, apparently for fear that such a procedure could have killed the very idea of a protocol relating to the protection

of victims of armed conflicts of non-international character. Moreover, there was the'simplified' Canadian-Pakistani draft which actually served as a face-saving formula. Therefore, there was no need to wreck Protocol II altogether.

On the other hand, the representatives of Italy and the ICRC reminded the Conference that an identical ammendment to that of the Colombian delegation had in fact been put forward before a small working group, and then in Committee I, and that it had been discussed thoroughly but was not endorsed by either.[1] If so, then it is reasonable to conclude that the amendment had in fact been rejected. Accordingly, those who insisted that the determination of the terms of Article 1 was solely the concern of the government of the State on whose territory the armed conflict takes place, may only stick to their guns by means of reservations at the time of accession or ratification, and even then they would have to wait for the reaction of other states. The question of whether the decision by any other country would constitute an intervention in the domestic affairs of the state on whose territory the armed conflict takes place will be discussed in the following sub-section.

4.4. Protocol II and Non-Intervention

As noted in the previous sub-section, a number of delegations stated that in their view, it was a matter solely for the state on whose territory the armed conflict

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1. See CDDH/SR. 49, para. 41, (Italy), and para. 51, (ICRC rep.)

takes place to determine whether the conditions of the application of Protocol II had been fulfilled. It was also stated that any decision by any other country would constitute an interference in the domestic affairs and an infringement of the sovereignty of the state on whose territory the armed conflict takes place.

At the first sight, Article 3 of the Protocol might seem to support these contentions. It provides:

> "1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the resposibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
>
> 2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs."

On the authority of such statements and of Article 3 of Protocol II, a Professor of International Humanitarian Law - Kalshoven - went so far as to state that Protocol II, "although moulded in the form of an international instrument complete with a ratification procedure and all its trappings, bears a close resemblance to a non-binding declaration of principles for non-international armed conflicts."[1]

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1. Kalshoven, Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts, Netherlands Yearbook of International Law, 1977, pp. 112-115, at p. 115.

Indeed, a similar view was expressed by the Sudanese delegate Mr. El-Hasseen El-Hassan who said that "Protocol II entailed no international obligations, but represented a commitment by a State to its citizens for humanitarian purposes, without infringing its sovereignty."[1]

It must be emphasised that all the above-mentioned statements regarding the nature of Protocol II and interference in the domestic affairs of the state whose territory the conflict occurs have nothing to support them in public international law.

As an international agreement, Protocol II entitles third states to expect that it be implemented in good faith. Surely, any subjective interpretation of the kind expressed in the above mentioned assertions is inconsistent with the principle of good faith. Moreover, the very effect of regulating a matter by international agreement is the taking of that matter out of the domestic jurisdiction of individual states.[2] Thus, the assertion that Protocol II entailed no international obligations, is tantamount to a denial of the force of international agreements to generate international obligations, and must be rejected.

It is true that Protocol II is to be applied within, not between states, and that third states parties to the

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1. CDDH/SR. 49, para. 73.
2. See Quincy Wright, Non-Military Intervention, in Deutsch Hoffman, (ed.), The Relevance of International Law, where he states that "International law has defined domestic jurisdiction as a matter concerning which the state is under no obligation of international law or treaty." See also Schwarzenberger, International Law, Vol. 2, p. 116.

Protocol are not direct bearers of the rights sanctioned in the Protocol, but this does not detract from the fact that the obligations laid down in the Protocol are international obligations. The international concern in what takes place within the boundries of a given state, and above all, the international concern in humanizing the armed conflict, is the very reason underlying the Protocol.[1].

The prohibition of intervention in matters which are essentially within the domestic jurisdiction of the state, (Article 2, para. 7, of the U.N. Charter), does not exclude action short of dictatorial interference undertaken with a view to implementing the purposes of the U.N. Charter.[2] Indeed, Article 2, paragraph 7 of the Charter of the United Nations expressly states that the principles of domestic jurisdiction shall not prejudice the application of enforcement measures under Chapter VII of the U.N. Charter.

Thus with regard to the protection of human rights and freedoms - a prominant feature of the Charter - the prohibition of intervention in matters essentially within the domestic jurisdiction does not preclude study, discussion, investigation and recomendation on the part of the various

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1. In the past, international concern in cases of gross violation of human rights found expression in the use of force by third states according to thre so-called "right of humanitarian intervention." See Greenspan, The Modern Law of Land Warfare, 1958, p. 623, and the authorities there cited, note 17, to the effect that this alledged 'right' is inconsistent with Article 2, para. 4. of the U.N. Charter, and for the survey of the practice of states since 1945, see Akehurst, The Use of Force to Protect Nationals Abroad, International Relations, Vol.V, No. 5, May, 1977, p. 3 et seq. especially pp. 1-9.
2. See Oppenheim-Lauterpacht, International Law, Vol.2, p. 320, 416.

organs of the United Nations.[1] Thus, despite Article 2 (7), of the U.N. Charter, it is arguable that the United Nations is entitled to take whatever measures it deems proper to compel a government to respect its obligations under international humanitarian law, which by definition are not essentially within the domestic jurisdiction of the state. Third states, in the absence of a United Nations action, are probably entitled individually and collectively, to take measures, short of the use of force, to prevent gross systematic violations of humanitarian law, but no use of force, or threat of the use of force, is permitted. As Dr. Akehurst convincingly argues, "claims by some states that they are entitled to use force to prevent violations of human rights may make other states reluctant to accept legal obligations concerning human rights. What is needed is more effective international machinery for the protection of human rights. Humanitarian intervention is an inadequate substitute for such machinery and may even delay or discourage its establishment."[2]

In brief the claim that Protocol II entailed no international obligations, has no grounds in international law.

Similarly, the claim that the government on whose territory the armed conflict takes place is alone competent

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1. Ibid., p. 320; see also Rosayn Higgins, The Development of International Law through the Political Organs of the U.N. p. 118 et seq., especially p. 128 et seq., where the author convincingly argues that, "human rights questions, cannot be essentially within the domestic jurisdiction of the state."
2. Akehurst, The Use of Force to Protect Nationals Abroad, International Relations, Vol. 5, No. 5, May, 1977, p.19.

to pronounce on the fulfilment of the conditions of the Protocol have nothing to support it in international law in general or in Protocol II in particular. Further there is nothing to support the view that pronouncements by other states on the fulfulment of the conditions required by the Protocol constitutes an interference in the internal affairs of the state on the territory of which the armed conflict occurs.

It should not be forgotten that, according to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, (adopted by the General Assembly of the United Nations in 1970):

> "Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundemental freedoms in accordance with the Charter."

It should not be forgotten that according to the same Declaration on Principles, the principle of non-intervention should be construed in the context of the principle of equal rights and self-determination of peoples, as well as the other principles elaborated in the Declaration.

Thus, if in the judgement of the General Assembly of the United Nations, the state on the territory of which the armed conflict occurs was proved to be not conducting itself in accordance with the principle of equal rights and self-determination of peoples, and not possesed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour, conflict becomes ipso facto, one of international character

to which the Geneva Conventions as a whole and their and their additional Protocol I become applicable.

In brief, it seems that all the fuss created by the Colombian amendment, and all the obsession with the sovereignty of the state and non-intervention was 'ado about nothing'. Indeed, Article 3 of Protocol II itself requires the government concerned to "maintain or re-establish law and order in the State or to defend the national unity and the territorial integrity of the State" - "by all legitimate means." Certainly, no government is its own judge as to what constitutes 'legitimate means'. The legitimacy of means has to be judged by others in accordance with the law of human rights and the law of armed conflict regardless of any recognition of the existance of an armed conflict by the government of the state on whose territory the armed conflict occurs, and regardless of whether conditions of the application of the Protocol were fulfilled or not. Indeed, the underogable human rights and the very concept of derogation from the full respect for and observance of human rights have rendered any talk about armed conflicts in terms of intensity, superfluous and illogical.

5. The Relationship between Protocol II and Article 3 of the Geneva Convention

Article 3 and Protocol II are concerned with armed conflicts of non-international character. But, while Article 3 deals with non-international armed conflicts in general, Protocol II applies to one type of armed conflict, whose

characteristics are defined in the first article of the Protocol. Thus, Protocol II does not regulate a new kind of armed conflict, but it does regulate a particular type of non-international armed conflict, already existing within the domain of Article 3.

Nevertheless, the title of Protocol II as "additional to the Geneva Conventions", and not merely to Article 3, might look somewhat ambiguous, as Article 3 is the only article of the Geneva Conventions which explicitly deals with armed conflicts of non-international character. The Protocol also develops and supplements Article 3, without modifying its existing condition of application. Thus it might appear more logical to consider Protocol II as additional to Article 3 of the Geneva Conventions.

To be sure, Protocol II was initially intended to 'elaborate' and supplement' Article 3 common to the four Geneva Conventions.[1] That is to say, it was initially intended to define the scope of application of Article 3 and to supplement its provisions. It was not untill the Second Session of the Conference of Government Experts, that it was suggested to 'dissociate' the Protocol from Article 3. The suggestion was first made by the delegation of the United States of America and was supported by some other experts.[2] Illogical as it seems, the suggestion was not without some practical value, although it kept the relation between Article 3 and Protocol II in a state of flux.

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1. See ICRC Report, 1972, Vol. 1, pp. 61-72.
2. See ICRC Report, 1972, p. 68, para. 2.59 and 2.60.

The preliminary debate of the Conference of Government Experts, revealed that a considerable number of delegations preferred a 'high threshold', for the application of Protocol II. This eventually raised the fear that the Protocol might be interpreted as defining the field of application of Article 3,[1] which however, is believed to be wider than that of the Protocol.[2] Accordingly, the formula that the Protocol "develops and supplements Article 3, without modifying its existing conditions of application", seems to have been intended to dispel that fear.

Two corrollaries may follow from this relationship. First, the provisions of Article 3 which are not reproduced in the Protocol, such as the provision concerning the services of a humanitarian body, the conclusion of special agreements, and the provision that the conclusion of special agreements and the services of a humanitarian body, shall not affect the legal status of the parties to the conflict remain also operative under the Protocol.[3] Second, Article 3 being of a general nature, will continue to cover all types of armed conflict of non-international character, while Protocol II covers only one particular type, defined by its first article.

While these may seem to be advantages, it nevertheless seems difficult to argue that Protocol II has left the field of application of Article 3 intact. Even in 1949 it was not

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1. See ICRC Report, 1972, p. 62.
2. See ICRC Report, Geneva, August, 1977, p. 28, (a report submitted to the 23rd International Conference of the Red Cross, Bucharest, October, 1977.).
3. To this effect, see the written explanation of vote by Belgium CDDH/SR. 49, (Annex), Italy, CDDH/SR. 50, (Annex).

difficult to argue that, Article 3 should be applied in "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of simiar nature". We have already cited, in the previous chapter, several statements made at the Diplomatic Conference of 1949, in conection with the field of application of Article 3. Now by the 'vice' of paragraph 2 of Article 1 of Protocol II, which unequivocally declares situations of internal disturbance and tension, "as not being armed conflicts", it has become more difficult than ever before to argue that Article 3 as such, covers internal disturbances and tensions.

Even more drastic is the stipulation itself in Article 1 paragraph 2, that this Protocol "shall not apply to situations of internal disturbance and tensions..., as not being armed conflicts." Does this simply state the obvious in relation to the conditions laid down for the Protocol to apply?

The delegation of the Federal Republic of Germany thought it does. In a written explanation of vote on Article 1 of Protocol II, *the delegation of the Federal Republic* of Germany stated that:

> "This Article constitutes a compromise solution which was difficult to reach. An essential element of this compromise is the fact that the existing conditions of application of Article 3 common to the Geneva Conventions are not modified. This is clearly expressed in Article 1, paragraph 1, of Protocol II. It also applies to paragraph 2 of the same article. Consequently, the negative definition of the term 'armed conflict' in paragraph 2 applies only to Protocol II, not to Article 3 common to the Geneva Conventions. This is the under-

> standing of the Federal Republic of Germany as to the interpretation of Article 1 of Protocol II. It does not, however, intend to express any view, be it only by implication, on the meaning of the term 'armed conflict' as used in Article 3 common to the Geneva Conventions.[1]

Actually the answer may swing between 'yes' and 'no', but no one can confidently assert either. Where it approaches 'yes' one may be tempted to think of the unexhaustive examples of internal disturbances and tensions, as setting the tone for Article 3 to step in once the conflict crossed that threshold. But when it approaches 'no', it signals to Article 3 to stay away until the Protocol's conditions have been fulfilled. In either case, the fact remains that paragraph 2, of Article 1, of Protocol II would provide governments with a legal pretext not to recognize the application of either Article 3, or Protocol II, as long as the conflict is labelled "internal disturbances and tensions."

Indeed, as early as the Second Session of the Conference of Government Experts, the Canadian *delegation said that*, "*it* would not be wise to include an explicit provision in Article 1, of Protocol II, to the effect that the Protocol should not be applied to isolated incidents and situations of internal tensions", as there, he feared,"governments might find a loophole to limit the application of the Protocol."[2] It should be noted that at that stage, Protocol II was still intended to define the scope of application of Article 3 and to develop and supplement its provisions.

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1. CDDH/SR. 49, (Annex).
2. ICRC Report, 1972, Vol.1, p. 69, para. 2.63.

It is likely that 'disqualifying' internal disturbances and tensions as armed conflicts was intended to appease governments, in order to rally their support to the ICRC's proposed field of application of Protocol II. Whether this was the case or not, the fact remains that ill-intentioned governments (and there were many) grasped the opportunity to narrow the field of application of Article 3, and at the same time kept the relation between the Protocol II and Article 3 in a state of flux. As one writer commented after the adoption of the text of Article 1 of Protocol II, by Committee I, in 1975, "the alledgedly compromise text that was adopted by consensus is but an expedient way to hide the fundemental disagreement which still persists among the governments as to the relationship between draft Protocol II and Article 3 common to the four Geneva Conventions."[1]

Perhaps the clearest language in this regard was that of Mr. De Icaza of Mexico, speaking as Rapporteur of Committee I. In reply to an innocent view expressed by the delegation of Cameroon that the words "*without modifying its existing* conditions of application" in Article 1, paragraph 1, of Protocol II, were unecessary and could be deleted,[2] the Rapporteur said that "Committee I had considered the phrase to be very important, inasmuch as it ensured that the application of Article 3 common to the Geneva Conventions of

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1. Dan Ciobanu, The Attitude of the Socialist Countries, in Cassese (ed.), The New Humanitarian Law of Armed Conflict, p. 441. Indeed, many delegates expressed the view that there actually was no consensus.
2. The delegation of Cameroon voted against Article 1 of Protocol II because of its high'threshold'. In particular, it wanted the deletion of the condition of territorial control by insurgents. CDDH/SR. 49, para. 46.

1949 should not be jepordized." But at the same time, he appealed to delegations, irrespective of their attitude towards draft Protocol II, to safeguard Article 3 common to the four Geneva Conventions of 1949.[1]

Thus, while it may be fair to state that the attempt to make the material field of application of Protocol II coincide with that of Article 3 of the Geneva Conventions of 1949, had failed, and therefore each retained its field of application, it seems also fair to state that the point at which Article 3 becomes applicable has remained uncertain, as it always has been. This requires a clarification of the notion of internal disturbances and tension.

6. Protocol II: Substantive Protection

6.1. General Remarks

The substantive rules of Draft Protocol II as adopted by the Diplomatic Conference at Committee level had a strange fate in the Plenary. In the course of its four sessions in the period from 1974 to 1977 the Diplomatic Conference adopted an elaborate set of rules dealing with such topics as the humane treatment of persons in the power of the Parties to the conflict; treatment of the wounded, sick and shipwrecked persons, medical units and transports, and medical and religious personnel; methods and means of combat; protection of the civilian

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1. CDDH/SR.49, para. 50.

population and civilian objects; civil defence; relief action in favour of the civilian population; and a set of final provisions relating to the execution of the Protocol. In Plenary, in the last week of the Conference, the delegation of Pakistan proposed an alternative Protocol which, with minor modifications was adopted by the Diplomatic Conference and thus constituted the present Protocol II. As the speech of the head of the Pakistani delegation, Mr. Hussain, summarizes very well the motives behind its move and the philosophy underlying the present Protocol II, it seems more approoriate to quote the relevant parts of the speech as they appear in the summary records of the Conference.

"Mr. Hussain (akistan) said that his delegation had played a significant part in negotiating the various texts submitted by the Committees to the Conference in Document CDDH/402, with the aim of producing an instrument which could alleviate the human misery associated with non-international armed conflicts. During contacts with many other delegations of both *developed* and under-privileged countries, it had realized that there was considerable dissatisfaction with the length of the text as well as with the fact that it ventured into domains which they considered sacrosanct and inappropriate for inclusion in an international instrument. A cross section of opinion held the view that the text entered into unnecessary details, rendering it not only cumbersome but difficult to understand and to apply in the peculiar circumstances of a non-international conflict.

"Perceiving, therefore that such a view might endanger its adoption or ratification, and after consultation with other

delegations, the delegation of Pakistan had prepared a version of Protocol II (CDDH/427 and Corr. 1) which, while simplified, adhered to the original language ... It was based on the following theses: its provisions must be acceptable to all and, therefore, of obvious practical benefit; the provisions must be within the perceived capacity of those involved to apply them and, therefore, precise and simple; they should not appear to affect the sovereignty of any State Party or the responsibility of its Government to maintain law and order and defend national unity, nor be able to be invoked to justify any outside intervention; nothing in the Protocol should suggest that dissidents must be treated legally other than as rebels; and lastly, there should be no automatic repetition of the more comprehensive provisions, such as those of civil defence, found in Protocol I. To i clude such provisions would risk changing the material field of application to such an extent that states would either fail to ratify Protocol II or tend to argue for its non-application in situations falling within its scope, thereby leaving the victims of those conflicts without adequate protection."[1]

It does not seem necessary to quarrel with this philosophy which degrades governments more than anything else. Peoples are presumed to know the law. More importantly, governments are under obligation to disseminate the law of armed conflict as far as possible. It is not understood, for instance, how the civilian population can be presumed to know and understand the detailed rules of the Fourth Geneva Convention relative to the

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1. CDDH/SR.49, para. 10 - 11.

protection of civilians in time of war, and not be able to understand the concept of military objective, the basic rule of distinction between civilians and combatants, the prohibition of indiscriminate attacks, the definition of the wounded, sick, shipwrecked, medical personnel, medical units and transports, and so forth. Such were the matters of detail which, according to the Pakistani thesis ventured into domains which governments considered sacrosanct and interfere with the sovereignty of the state. No one in 1949 had considered that the reference to anti-government forces as a 'Party to the conflict' or even concluding an agreement with them to bring all or part of the Geneva Conventions into force as being interference in the sovereignty of the state. Yet, the sensitivities in the Diplomatic Conference in 1977 were such that the term 'Party to the conflict' was considered an interference in the sovereinty of the state and therefore was deleted from the Protocol. Similarly, the definition of military objectives and the basic rule of distinction between civilians and combatants were deleted because they give the *impression that there are objects* which it is permissable to attack. Even the rule which protects objects indispensable to the survival of the civilian population did not figure in the Pakistani draft; it was retained only after a strong attack by the representative of the Holy See. Such were the matters which in the view of many delegations were unnecessary details and infringed upon the sovereignty of the state.

Ironically, the deletions were effected by a so-called 'gentlemans agreement' whereby rules on which there was no consensus were deleted, or, which comes to the same thing,

delegations were not to vote in favour of articles opposed by other delegations. Consequently, although the Pakistani draft Protocol was treated as an amendment to the draft Protocol adopted by the Committees, any rule which was not included in the Pakistani draft was either deleted by consensus, or failed adoption as a result of too many abstentions.

Nevertheless, it is still fair to say that, notwithstanding its deplorable high threshold, Protocol II is a far more advanced step t an that of Article 3 common to the Geneva Conventions of 1949. It is also fair to say that, although simplified, Protocol II has much in common with Protocol I. Of course, Protocol II does not even contemplate prisoner-of-war status to the insurgents, but it does contain details of the humane treatment due to all persons who do not take a direct part or who ave ceased to take part in hostilites, whether or not their liberty has been restricted. The humane treatment of persons whose liberty has been restricted is also laid down in considerable detail. There is also a part (Part III) on the protection of t e wounded, sick and shipwrecked which also regulates the protection of medical and religious personnel, medical duties and medical units and transports, as well as the respect due to t e distinctive emblem of the red cross, red crescent or red lion and sun. Part IV of the Protocol which deals with the protection of the civilian population and civilian objects is of course less detailed than its counterpart in Protocol I since it was this part which suffered more, as a result of the deletion of some important rules, particularly the rule prohibiting indiscriminate attacks.

Finally, it is important to emphasize that what is

prohibited in time of armed conflict is necessarily and afortiori prohibited in time of peace and in the absence of armed conflict. And since derogation from repect of human rights is only permitted by international law "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,"[1] and since, even then, there are rights from which no derogation is permitted, it logically follows that the protection provided by Protocol II is in addition to the underogable human rights. Moreover, since the Protocol's provisions and the underogable human rights are nothing else than human rights in time of armed conflict, it is difficult to see how they can legally be denied to persons in time of peace. In other words, the 'threshold problem' of Protocol II as laid down in Article 1 of the Protocol may be considered not only as an exercise in irrelevance, but also unconstitutional and may be declared as such in the courts of any law-abiding state.

Indeed, in coutries where human rights are protected by law the problem of threshold may not arise at all. It is in countries whose peacetime laws or practices are at variance with the substantive rules of Protocol II that the 'threshold' problem of the Protocol is really a problem.

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1. See Article 4 of the United Nations Convention on Civil and Political Rights.

6.2. Humane Treatment of Persons in the Power of the Parties to the Conflict

Part II of Protocol II is entitled "Humane Treatment". It consists of three articles; Article 4 provides for fundemental guarantees for all persons who do not take a direct part or have ceased to take a direcr part in hostilities, whether or not their liberty has been restricted, while Articles 5 and 6 provide for an additional 'minimum' standard of treatment of persons whose liberty has been restricted and persons who are liable for prosecution and punishment for criminal offences related to the armed conflict. By and large the provisions of these Articles are self-evident; only occasional remarks to clarify the texts may be needed. Indeed, as the representative of Pakistan had noted, the provisions of Protocol II are "within the perceived capacity of those involved to apply them and, therefore, precise and simple." The student of law, afortiori, should have no problem in understanding them. We begin with Article 4 since its scope is more general.

According to paragraph 1 of Article 4, "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious pratices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors."

The term "take a direct part... in hostilities" must be understood to mean taking a direct part in military operations. Accordingly, all persons who do not take part in military

operations and persons who have ceased to take part in military operations, whether or not their liberty has been restricted, are entitled to the protection of Article 4 without adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.

Without prejudice to the generality of paragraph 1 of Article 4, the following acts against the persons referred to in paragraph 1 "are and shall remain prohibited at any time and in any place whatsoever": violence to life, health and physical or mental wellbeing of persons, in particular murder as well as cru l treatment such as torture, mutilation or any form of corporal punishment; collective punishment; taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; slavery and the slave trade in all their forms; pillage; and threats to commit any of the foregoing acts.[1]

It should be noted that *the content of paragraphs 1 and 2* of Article 4 of Protocol II corresponds to Articles 27, 29, 31, 32, 33 and 34 of the Fourth Geneva Convention of 1949. Indeed, the ICRC Commentary refers to these articles in its interpretation of Article 3 common to the Geneva Conventions of 1949, which suggests that the acts prohibited under Article 4 of Protocol II are already prohibited by Article 3 common to the Geneva Conventions.[2] It should also be emphasized that the acts

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1. Article 4(2) of Protocol II.
2. See ICRC Commentary, (Pictet (ed.) Commentary on the Fourth Geneva Convention of 1949, Geneva, 1958, pp. 38-40.

prohibited by Article 4 are prohibited "at any time and in any place whatsoever." This clearly indicates that the prohibitions are absolute and are applicable irrespective of the level of the conflict. The remainder of Article 4 is devoted to the protection of children. It requires that all appropriate steps be taken to facilitate the reunion of families temporarily separated. It also stipulates that children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilites. If nevertheless they were recruited, took part in hostilities and were captured, they remain entitled to the special protection provided by Article 4, but it is not clear whether they would be liable to prosecution and punishment for taking part in military operations. Another measure for the protection of children is their evacuation temporarily from the area in which military operations are taking place, if necessary, and whenever possible with the consent of their parents. The party taking such a measure, which is usually the government, has to ensure that the children are accompanied by persons responsible for their safety and well-being.

Turning now to the treatment of persons whose liberty has been restricted we find that Article 5 of Protocol II provides that in addition to the provisions of Article 4, the provisions of Article 5 "shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

The wounded and the sick persons whose liberty has been restricted, whether or not they have taken part in hostilities are entitled to be respected and protected. In all circumstances

they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition, without distinction among them founded on any grounds other than medical ones.[1]

With regard to the treatment of persons deprived of their liberty, Article 5 says that they shall, "to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict." They shall also be allowed to receive individual or collective relief; practice their religion and, if requested and appropriate, to receive spiritual assistance from persons such as chaplains, performing religious functions; and, if made to work, they shall have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.[2]

It should be noted that the criterion "to the same extent as the local civilian population" is a very vague one; There are rich and poor civilians. Moreover, local civilians may get what they need from various sources, while the detainee or internee cannot. The standard therefore ought to have been that of the armed forces of the party in whose power the prisoners are. But it seems that the local civilian population was chosen as a standard in order not to give the impression that the insurgents are equal to the members of the armed forces in any

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1. See Article 5(1) (a) and Article 7 of Protocol II.
2. Sub-paragraphs (b), (c), (d) and (e) of para. 1 of Article 5 of Protocol II.

respect.

In addition to the above mentioned, detainees and internees shall be allowed to send and receive cards, the number of which may be limited by competent authority if it deems necessary; they shall have the benefit of medical examination; and, more importantly, their physical or mental health and integrity s all not be endangered by any unjustified act or ommisssion. Accordingly, it is prohibited to subject persons deprived of their liberty for reasons related to the armed conflict "to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent wit the generally accepted medical standard applied to fr e persons under similar medical circumstances."[1]

Finally, Article 5 requires that, except when men and women of a family are accomadated together, women are to be held in quaters separated from those of men and are to be put under the immediate supervision of women. It also reqires that places of detention or internment not be located close to the combat zone and that the detainees or internees be evacuated when the places of detention or internment become exposed to danger arising out of the armed conflict, if the evacuation can be carried out under adequate conditions of safety.[2]

Turning now to 'penal prosecutions' (Article 6), it may be noted first that Protocol II does not envisage prisoner-of-war status to combatants of either party to the conflict. But it may be useful to note that the ICRC had submitted to the

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1. See sub-paragraphs (b), (d) and (e) of paragraph 2 of Article 5 of Protocol II. Quotation from sub-paragraph (e).
2. See sub-paragraphs (a) and (c) of paragraph 2 of Article 5 of Protocol II.

Conference of Government Experts two proposals which envisaged the application of the four Geneva Conventions of 1949. The first proposal was formulated as follows:

> "When in the case of armed conflict not of an international character in the territory of one of the High Contracting Parties, the Party opposing the authorities in power has a government which exercises effective power, by means of its administration and adequately organized forces, over a part of t e territory, the Parties to the conflict shall apply all the provisions of the four Geneva Conventions of August 12, 1949 and the Additional Protocol to the said Conventions."[1]

The second proposal related to the case when the authorities in power or both parties to the conflict receive foreign aid in troops from other states. In such a case also the Four Geneva Conventions of 1949 and the Additional Protocol I would be applicable.[2]

To the first proposal, the main objection raised by many experts was that *states could not be expected* to sign an instrument whereby they would be obliged, as soon as certain conditions implying a high degree of intensity of the struggle had been met, automatically to grant the rebels the benefit of the Four Geneva Conventions, in particular prisoner-of-war status to captured combatants, as in conflict between states.[3]

The second proposal was objected to by numerous experts on the ground that its adoption would place the authorities

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1. ICRC Report on the Work of the Conference of Government Experts, Second Session, 1972, Vol. 2, p. 97.
2. Loc. cit.
3. Ibid., p. 98, para. 2.336.

in power in a difficult position whenever they felt obliged to seek foreign aid, since such intervention would entail treating their rebels as prisoners of war.[1]

In brief, the Conference of Government Experts rejected the ICRC proposals, and the subject was not raised at the Diplomatic Conference where, predictably, it would have met the same doomed fate.

Protocol II, thus, did not envisage prisoner-of-war status, except perhaps as may be inferred from Article 3 common to the Geneva Conventions, that is to say, only by special agreement between the parties to the conflict.

Accordingly, captured insurgents are liable to prosecution and punis ment for criminal offences related to the armed conflict as the penal co e of the authorities in power may provide, and irrespective of whether the authority against which the armed struggle is being waged was a dictatorship or a democracy. Violations of the Protocol are of course also punishable, alt ough the Protocol does not expressly say so. *Thus, at least as far as the violations of the Protocol are* concerned, both Parties to the conflict are entitled to prosecute and punish the offenders, although, here again, the Protocol does not expressly say so. Summary justice, however, is prohibited. Article 3 common to the Geneva Conventions of 1949 prohibits "at any time and in any place whatsoever" the *passing of sentences and the carrying out of executions* without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which

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1. Ibid., p. 98, para. 2.345. For other arguments, see ibid., pp. 97-99.

are recognized as indispensable by civilized peoples.

Those judicial guarantees, whose respect during armed conflicts is usually the exception rather than the rule, are now elaborated (or summarized) in Article 6 of Protocol II. The opening sentence of paragraph 2 of Article 6 lays down the general principle:

> "No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of indepe ndence and impartiality."

Constitutions, written and unwritten, usually provide for the 'indepen ence and impartiality' of the judiciary, as a matter of principle. In practice, however, especially in the field of political crimes, the judiciary are often subservient to the executive authority. Or, put rather differently, the judiciary will ha e to apply the law regardless of its fairness. The indepen ence and impartiality of the court is thus purely a matter of form, and the most that can be expected is a fair assessment of the available evidence and of applying the law to the facts. But even in applying the law to the facts the judiciary usually espouse the view of the executive in matters of international law, particularly in matters of recognition and entitlement to prisoner-of-war status.[1]

Protocol II, ho ever, does not envisage prisoner-of-war status, thereby facilitating the task of the judiciary.

According to Article 6 of Protocol II, the following basic principles must in particular be respected:

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1. See below, Chapter 4, Section 3, of this thesis.

"(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all the necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual responsiblity;

(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constite a criminal offence under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if after the commission of the offence, provision is made by the law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt."

In addition to these judicial guarantees, paragraph 3 provides that a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised. Further, paragraph 4 provides that the death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

Finally, while Protocol II does not provide for prisoner-

of-war status, paragraph 5 of Article 6 does require the authorities in power, at the end of hostilities, to 'endevour' to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they were interned or detained.

6.3. General Protection of the Civilian Population and Civilian Objects Against Effects of Military Operations

Until the last week of the Diplomatic Conference the whole work on the reaffirmation and development of humanitarian law applicable in armed conflict was based on the belief that, in principle, the protection due to the civilian population against the dangers of military operations should be the same in all situations and in all types of armed conflict. This was the attitude of the ICRC since at least 1965 when the Twentieth International Conference of the Red Cross held in Vienna in that year adopted resolution XXVIII which "solemly declares that all governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:

- that the rights of the Parties to a conflict to adopt means of injuring the enemy is not unlimited;
- that it is prohibited to launch attacks against the civilian population as such;
- that distinction must be made at all times between persons taking part in the hostilities and members of

the civilian population to the effect that the latter be spared as much as possible;

- that the general principles of the law of war apply to nuclear and similar weapons.[1]

This resolution was expressly affirmed by the General Assembly of the United Nations in resolution 2444(XXIII) of 19 December 1 68, which was adopted by a unanimous vote of 111 votes to none.[2] In the first preambular paragraph of this resolution, the General Assembly recognized the necessity "of applying basic humanitarian principles in all armed conflicts."

In 1969, at its session at Edinburgh, the respectable Institute of International Law adopted its famous resolution on "the distinction between military objectives and non-military objects in general and particularly the problems associated with weapons of mass destruction." The Institute noted that the rules embodied in that resolution "form part of the principles to be observed in armed conflicts by any de jure or de facto government, or by any other authority responsible for the conduct of hostilities."[3]

In 1970 the General Assembly of the United Nations matched the resolution of the Institute of International Law with its resolution 2675 (XXV) of 9 December, which was adopted unanimously by a vote of 109 votes to none, and affirmed "basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within

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1. Text in Schindler and Toman, The Laws of Armed Conflict, 1973, pp. 187 - 188.
2. Text, ibid., pp. 191-192. A roll-call vote did not take place.
3. Text, ibid., pp. 193-194. Also in Section 1 of Chapter 4 of this thesis.

the framework of progressive development of the international law of armed conflict."[1]

Thus, by 1970, there was a general consensus in governmental and non-governmental organizations that protection of the civilian population against the dangers of military operations should be the same in all types of armed conflict. The ICRC reflected this trend in its draft Protocols which served as a basis for discussion at t e Conference of Government Experts (1971 and 1972) and the Diplomatic Conference for reaffirmation and development of international humanitarian law applicable in armed conflict (1974 - 1977). Although the Diplomatic Conference had adopted a 'threshold' for Protocol II which was much higher than that proposed by the ICRC, the substantive rules affording protection to the civilian population were virtually the same in both Protocols until the Pakistani draft Protocol came to bear on it. Consequently, many important basic rules were deleted one after the other. Since this was t e first time that an international conference had attempted to regulate the conduct of military operations in non-international armed conflicts (civil war in brief), it will be useful to have a look at some of the more important rules which were deleted.

The first to be mentioned is the basic rule relating to methods and means of combat and which prohibits unecessary injury. This rule was contained in Article 20 of draft Protocol II, which stated that "in any armed conflict to which this Protocol applies, the right of the Parties to the conflict to

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1. Text, ibid., pp. 195-196. Also in Section 1 of Chapter 4 of this Thesis.

chose methods or means of combat is not unlimited. It is forbidden to employ weapons, projectiles, and material and methods of combat of a nature to cause superfluous injury or unnecessary suffering." This rule was adopted by consensus by Committee III on 4th June, 1976.[1] It was deleted in Plenary by 25 votes to 19, with 33 abstentions, and without discussion.[2] It is not clear therefore why the Article was deleted. Another basic rule was also deleted in Plenary, this was the basic rule of distinction which was contained in draft Article 24. It provided as follows:

> "1. In or er to ensure respect and protection for the civilian population and civilian objects, the Parties to t e conflict shall at all times distinguish between t e civilian population and combatants and between civilian objects and military objectives and shall direct their operations only against military objectives.
>
> 2. Constant care shall be taken when conducting military operations, to spare the civilian population, civilians and civilian objects. This rule shall, in particular, apply to the planning deciding or launching of an attack."

Paragraph 1 of this rule corresponds to Article 48 of Protocol I,[3] while paragraph 2 reiterates the basic principle

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1. See Cassese, Means of Warfare: The Traditional and New Law, in Cassese (ed.), The New Humanitarian Law of Armed Conflict, 1979, pp. 192-193.
2. CDDH/SR.51, para. 55.
3. See further, Section 1 of Chapter 4 of this thesis.

of Article 57 entitled "precautions in attacks."[1] Apart from the general objection to the phrase "Parties to the conflict" which, at any rate, was deleted systematically from draft Protocol II in Plenary, the main objection to draft Article 24 was stated by the representative of the United States of America, Mr. Aldrich. He said that Article 24 "implied that rebels were allowed to chose their objectives. He was therefore against the Article."[2] When nevertheless many delegations insisted on a roll-call vote, only 19 delegations voted against the rule, while 36 voted in favour and 36 abstained.[3] Having failed to obtain the necessary two-thirds majority, Article 24 was not adopted. However, it is important to note that in fact there was not really much opposition to the article and that the only stated objection to the Article was really ridiculous, for even if the Article implied that rebels were allowed to chose their objectives the Protocol does not make such a choice legal. At any rate, the insurgents do not lose anything by deleting the rule, nor gain anything by its retention. The loser is the civilian population whose legal protection was undermined.

However, deletion of the rule of distinction contained in draft Article 24 was only a prelude to the deletion of even more important rules, particularly the rules relating to the prohibition of indiscriminate attacks.[4] Indeed, since many delegations had anticipated that deletion of Article 24 would

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1. On the precautions in attack, see Section 9 of Chapter 5 of this thesis.
2. CDDH/SR. 52, para. 63.
3. CDDH/SR. 52, para. 78.
4. On the prohibition of indiscriminate attacks, see Section 8 of Chapter 5 of this thesis.

inevitably lead to the deletion of the rules prohibiting indiscriminate attacks, namely paragraphs 4, 5, and 6 of draft Article 26, many delegations wished to see the fate of those paragraphs decided first. The proposal to retain paragraphs 4, 5, and 6 of draft Article 26 was rejected by 30 votes to 25, with 34 abstentions.[1] No specific reason was given for this deletion, and it is unnecessary to speculate, for no reason whatsoever can justify the deletion of the rule of distinction, or, for that matter, the rules prohibiting indiscriminate attacks. It may be sufficient in this respect to note that such deletions would only benefit oppressive governments in terms of law, for their advocates may now legally argue that indiscriminate att cks do not violate any recognized rule applicable in civil war.

Deletion of the basic rule on methods and means of combat; the basic rule of distinction between civilians and combatants and between civilian objects and military objectives; and the rules prohibiting indiscriminate attacks made the deletion of the definition of military objectives (draft Article 26 bis) and the definition of a ivilian and the civilian population (draft Article 25) inevitable. These Articles were more than just definitions. Article 26 bis dealt with the "general protection of civilian objects." It stated that civilian objects shall not be made the object of attack, and that attacks shall be strictly limited to those objects which by their nature, location, purpose or use make an effective contribution to the armed action of the Parties to the conflict. This rule was

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1. CDDH/SR.52, para. 78.

deleted by consensus and without discussion.[1]

Similarly, draft Article 25 was deleted by consensus and without discussion. This Article defined a civilian as "anyone who is not a me ber of the armed forces or of an organized armed group", and defined the civilian population as comprising all persons who are civilians. While these definitions may seem superfluous, the Article contained a provision which was particularly important for the protection of the civilian population. It stated that "the presence within the civilian population of individual civilians who do not fall within the defin'tion of civilians does not deprive the population of its civilian character." In other words, the attack in such a case would constitute an attack against the civilian population as such.

After all these deletions one may legitimately ask, what is left of t e legal protection of the civilian population and civilian o jects against the dangers of military operations? The answer to this question seems to depend on the legal status of the rules whic have been deleted and on the interpretation of existing rules of Protocol II, some of which cannot be properly interpreted without invoking one rule or another of those which have been deleted. This is particularly true of Article 13 of Protocol II which states that:

> "1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in

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1. CDDH/SR.52, para. 77.

all circumstances.

2. The civilian population as such, as well as individual civilians shall not be made 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 of this Part unless and for such time as they take a direct part in hostilites."

The principle of"general protection", as distinguished from "special protection" which verges on imunity from attack[1], necessarily implies that civilians and civilian objects are not protected against unavoidable incidental losses caused by attacks directed at military objectives. The principle of distinction between civilians and combatants and between civilian objects and military objectives, with the consequence that attacks should be strictly limited to military objectives, is a part and parcel of the concept of general protection. It also necessarily invokes the concept of indiscriminate attacks, the concept of military objectives, as well as the precautions in attacks. According to Article 51 of Protocol I, rules regulating these problems are necessary to give effect to the principle of general protection. It cannot be said, therefore, that paragraphs 2 and 3 of Article 13 of Protocol II are by themselves sufficient to give effect to the principle of general protection. Moreover, these two paragraphs cannot properly be interpreted without the aid of some of the rules

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1. On the principle of general protection, see Section 2 of Chapter 6 of this thesis.

which have been deleted.

Thus paragraph 2 of Article 13 which states that the civilian population, as well as individual civilians shall not be made the object of attack, has traditionally been understood to mean that attacks which are directed exclusively at the civilian population or individual civilians are prohibited. The concept of military objectives is therefore indispensible for determining whether an attack was directed exclusively at the civilian population or individual civilians. It is also necessary for distinguishing acts of violence, the primary purpose of which is to spread terror among the civilian population, from those which may cause terror, but are primarily directed against military objectives.

Similarly, deletion of the definition of civilians makes it difficult to determine the scope of paragraph 3 of Article 13 of Protocol II, which states that civilians shall enjoy the protection of Part IV of the Protocol, "unless and for such a time as they take a direct part in hostilities." The term 'hostilities' was not defined, but a number of delegations expressed the view that the term included preparations for combat and return from combat.[1] This clearly indicates that the taking of a direct part in hostilities means the taking of a direct part in military operations. Consequently, according to paragraph 3, civilians forfeit their protection only during such time as they take a direct part in military operations. But it is not clear whether the term 'civilians' includes those referred to in Article 1 of the Protocol as "other organized

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1. Report to the Thire Commission of the Working Group, Committee III, Doc. CDDH/III/224, 24 February, 1975.

armed groups", as distinguished from "dissident armed forces." If the definition of civilians was retained, there would have been no doubt that such "other organized armed groups" were not included under the denomination 'civilians'.

It thus appears that even from a purely technical point of view the deletions were unwarranted. International lawyers will therefore be justified if they continue to read in the Protocol the provisions which have actually been deleted, if only to clarify the meaning of the rules which have been retained.

Before leaving Article 13 of Protocol II, it should be noted that its three paragraphs reproduce the first three paragraphs of Article 51, respectively, which are examined at length in Chapter Five of this thesis. In order to avoid duplication the reader is kindly referred to the relevant sections.[1]

With regard to the protection of civilian objects it has already been noted above that draft Article 26 bis which would have provided for general protection of civilian objects had been deleted. In Protocol I, civilian objects are defined negatively: "Civilian objects are all objects which are not military objectives", and military objectives are "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[2]

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1. See Sections 3, 4 and 5 of Chapter Five of this thesis.
2. Article 52 (2) of Protocol I.

With regard to objects indispensable to the survival of the civilian population, Article 14 of Protocol II says:

> "Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works."[1]

The meagre protection of these objects is probably clear from the phrase "for that purpose." This indicates that the acts which are prohibited against objects indispensable to the survival of the civilian population are those which are done for the purpose of starving the civilian population; acts which are not "done for that purpose", even though they might cause starvation, do not seem to be prohibited. The element of 'purpose' or 'intention', which is usually difficult to prove, renders the protection of such objects almost nominal.[2] Yet, in the simplified draft Protocol of the delegation of Pakistan, Article 14 was proposed deleted. It was retained by consensus due to a strongly worded attack by the representative of the Holy See in which he denounced the 'gentlemen's agreement' not to adopt or put to the vote articles on which there was no consensus, as a 'gentlemen's disagreement' or even a 'gentlemen's embarrassment', and denounced the simplified Protocol as being no more than "a legal ectoplasm."[3] "When the Conference

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1. Emphasis added.
2. For detail, see Section 6.2. of Chapter Five of this thesis.
3. CDDH/SR. 52, para. 79.

had decided to delete any reference to 'Parties to the Conflict in Protocol II", said the representative of the Holy See, "it had, as it were, abandoned attempts to draft a real legal instrument and instead had restricted itself to a statement of good intentions which in terms of humanitarian law came down to a 'legal ectoplasm', for the text will be devoid of any real humanitarian substance and of any mandatory character. Yet, its creators were daring to claim that it would serve to control... civil wars w ich, as everybody was aware, were the most cruel and pitiless of all conflicts."[1]

In eed, Article 14 of Protocol II itself is no more than a legal ectoplasm since it prohibits only acts which are intended to cause starvation, not acts which cause starvation. Consequently, it would always be possible to argue that the destruction of t e objects mentioned in Article 14 was intended to deprive the insurgents of food and water, and not to starve the civilian population.

However, it should e noted that the question of starvation of the civilian population is closely connected with the question of relief actions. Article 18, paragraph 2, of Protocol II provides in this respect, that:

> "If the civilian population is suffering undue hardshio owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be

1. CDDH/SR.52, para. 79 - 81.

undertaken subject to the consent of the High Contracting Party concerned."

This means that relief, even when it is exclusively humanitarian and impartial in nature, should not be given to the civilian population in the territories under the control of insurgents without the consent of the government against which a civil war is being fought. Governments thus arrogated to themselves not only the right to represent their peoples until they were overthrown, but also the power of life and death, of granting and depriving, and of determining whether the hardship of the civilian population was 'due' or 'undue'. This is really too much. One may understand a rule which would give a government the right to pronounce on the nature of the relief action undertaken by relief organizations or third states, but one cannot understand a rule that goes so far as to give even to tyrants the power of determining whether the civilian population should die or survive. There is not even an obligation to allow such relief *even when it is of an* exclusively humanitarian and impartial nature. Article 18, paragraph 2, *therefore, does* not amount even to 'legal ectoplasm'.

Relief action which is of an exclusively humanitarian and impartial nature cannot be regarded as an interference in the armed conflict and should not be made subject to the consent of the parties to the conflict. It should be determined by the needs of the civilian population. However, it is clear that the consent of the High Contracting Party on whose territory the armed conflict takes place is necessary although one delegation had expressed the view that the phrase "subject to the consent

of the High Contracting Party concerned", does not imply any discretionary power vested in such a Party to grant or withold permission for carrying out relief actions as defined in Article 18, paragraph 2.[1] The text does not support such an interpretation but it does support the view expressed by another delegation, that a Party refusing its consent could only do so for valid reasons, not for arbitary or capricious ones.[2]

Another category of special objects, the protection of which is very important for the protection of the civilian population,are works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations. These objects, according to Article 15 of Protocol II, "shall not be made the object of attack, even where these objects are military objectives, if such an attack may cause the release of dangerous forces and consequent severe losses among the civilian population."[3]

The last category of special objects protected by Protocol II includes cultural objects and places of worship. Article 16 provides that:

> "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, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual

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1. Belgium, explanation of vote , CDDH/SR.53, Annex.
2. Federal Republic of Germany, CDDH/SR.53, Annex.
3. See further, Section 6.4. of Chapter 5 of this thesis.

heritage of peoples, and to use them in support of the military effort."[1]

Finally, with regard to the protection of the civilian population, Protocol II prohibits the forced movement of civilians for reasons related to t e conflict. According to Article 17 of the Protocol, the displacement of the civilian population s all not be ordered for reasons related to the conflict "unless the security of the civilians involved or imperative military necessity so demand." In such a case, all possi le measures have to be taken in order that the civilian population may e received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. More importantly the Article insists that "civilians shall not be compelled to leave their own territory for reasons connected with the co flict." Th's usually happens in wars of secession, religious wars and colonial wars as happened in Palestine in 1948, where t e Arab population of Palestine were compelled to leave their own territory y the Zionist organizations.

It should be noted that Article 17 is modelled on Article 49 of the Fourth Geneva Convention of 1949 relative to the protection of civilians in time of war, which also allows the Occupying Power to undertake "total or partial evacuation of of a given area if the security of the population or imperative military reasons so demand." But the Article expressly requires that persons thus evacuated have to be transferred back to their homes as soon as hostilities in the area in question have ceased. It goes without saying that this also must be the case

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1. See further, Section 6.1. of Chapter 5 of this thesis.

in civil wars. Nevertheless, this writer is of the view that no exceptions to the prohibition of forcible movement (or relocation) should be allowed since such exceptions are always open to abuse.

CHAPTER THREE

WARS OF NATIONAL LIBERATION IN INTERNATIONAL HUMANITARIAN LAW

1. Introduction

In modern political and legal literature, wars of national liberation refer to armed conflicts in which peoples fight for their liberation and self-determination. The right of peoples to self-determination is recognized in the Charter of the United Nations, especially in Article 1, paragraph 2, and Article 55, 73, 76, and 80, and has been elaborated in many legally important instruments such as the Declaration on the Granting of Independence to Colonial Countries and peoples adopted by the United Nations General Assembly in Resolution 1514 (XV) on 14 December 1960,[1] 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,[2] as well as in a great number of General Assembly resolutions bearing on the right of self-determination in general and its application to concrete cases.[3] The right of self-determination has also been recognized as a fundamental human right of peoples in the Universal Declaration of Human rights adopted by the U.N. General Assembly on December 10, 1948,[4] and more expressly in Article 1 common to the International Covenants on Human Rights of 1966.[5]

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1. See text in Brownlie (ed.), Basic Documents in International Law, (second rev. ed., 1978), pp. 188-189.
2. Text in ibid., pp. 32-40, esp. pp. 38-39.
3. For a survey of "Measures to Promote and Protect the Right to Self-Determination" taken by the United Nations, see, United Nations Publication, 1980, (sales No. E. 79.XIV.6) entitled "United Nations Action in the Field of Human Rights", esp. pp. 23-44, and passim.
4. Text in Brownlie, op. cit. pp. 145-149. Article 21, para. 3 of the Declaration states: "The will of the people shall be the basis of the aughority of government...".
5. Text in Brownlie, ibid., pp. 152, 162.

But although the right of peoples to self-determination was recognized in so many international legal instruments the right of peoples fighting for their right of self-determination, and the right of liberation movements to be protected by humanitarian law in its entirety was the subject of a long controversy in the United Nations, in the Conference of Government Experts held in Geneva in 1971 and 1972, and in the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law applicable in Armed Conflicts, held in Geneva (1974-1977). This controversy is the focus of this chapter.

2. An Over View

The controversy over the legal status of wars of national liberation, (i.e. armed conflicts in which peoples are fighting for their right to self-determination, particularly, against colonial and alien and racist regimes), was between a group of states known in United Nations parlance as "the western and others group",[1] on the one hand, and the rest of the world, on the other hand.

To the group of 'Western states and others', wars of national liberation represented a species of armed conflicts not of an international character and therefore must at best

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1. The others being such regional atypical states as Israel and South Africa, according to Abi-Saab, 165 Recueil des Cours of the Hague Academy of International Law, 1979 - IV, p.385. See also, Keith Suter, An International Law of Guerrilla Warfare, 1984. passum.

be governed by Article 3 common to the Geneva Conventions of 1949, and by Additional Protocol II. To African, Asian, Latin American, and East European, as well as some western states, wars of national liberation were of an international character and therefore the peoples involved in such a war, and members of liberation movements must be protected by humanitarian law in its entirety as in the case of an inter-state armed conflict.

From a purely technical legal point of view, the controversy, may be said to have centred on the interpretation of one word - the word 'power' in paragraph 3 of Article 2, common to the four Geneva Conventions of 1949. The text of Article 2, reads as follows:

> "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a Party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. <u>They shall furthermore be bound by the Convention in relation to the said Power, if the</u>

latter accepts and applies the provisions thereof."
(Emphasis added)

In the 'Western-and-others' group there were two views regarding the term 'Power' in Article 2(3) common to the four Geneva Conventions. One view held that the term 'Power' meant only 'states', while the other view held that, in addition to states the term also included state-like entities.[1] Different arguments were advanced to support this thesis, most of which, as will be shown, were neither convincing nor were even relevant to the point under discussion.[2] Indeed, this group of states made no effort to prove that the term 'Power' meant only states, and the main argument they advanced was that the requirements of the Geneva Conventions could be fulfilled only by states according to one view.[3] To this the proponents of the international character of wars of national liberation replied, with justice, that practically, liberation movements are in the same position of a state whose territory is under occupation or of resistance movements in occupied territories, to which the Geneva Conventions of 1949 are applicable.

To be sure, the question before the Conference was not whether the Geneva Conventions could or could not be applied to entities other than states; the question was whether wars of national liberation were armed conflicts of international character in the light of general international law.

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1. It should be noted that only Professor Cassese of the delegation of Italy, spoke of Article 2(3) explicitly.
2. See below, Section 4.2.1. of this Chapter.
3. Draft Report of Committee I, First Session, (CDDH/I/81.

To cut it short, the controversy over the legal status of wars of national liberation was concluded by the adoption of Article 1 of Protocol I. Additional to the Geneva Conventions. The full text of this Article, entitled "General Principles and Scope of Application", reads as follows:

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, shall apply in the situations referred to in Article 2 *common to those Conventions*.
4. The situations referred to in the preceeding paragraph include 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, 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."

The first paragraph of this Article is a restatement of the principle enshrined in Article 1 common to the Geneva Conventions of 1949. The second paragraph is a useful codification or restatement of a principle already expressed in the preamble to the Hague Convention of 1907 (Convention IV) respecting the laws and customs of war on land,[1] and is generally known as De Marten's clause. In terms of the history of Article 1 of Protocol I, it represented the initial attitude of the main group of Western states towards wars of national liberation. The third paragraph prescribes the scope of application of Protocol I and the link between the Protocol and the Geneva Conventions. Treaty relations upon entry into force of the Protocol are governed by Article 96 of the Protocol, which also makes explicit what has always been implicit in Article 1, paragraph 4, of Protocol I, regarding the manner in which a liberation movement is required to express its will to be bound by the Geneva Conventions and their Additional Protocol I.

Since Article 96 of Protocol I is indissolubly linked with paragraphs 3 and 4 of Article 1 of Protocol I, it will be useful here to reproduce it in full. Article 96 is entitled "Treaty relations upon entry into force of this Protocol." Its text reads as follows:

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound

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1. For the text of the preamble, see "Documents on the Law of War", edited by Adam Roberts and Richard Guelf, 1982, p.45.

by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.

3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

   (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate affect;

   (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

   (c) The Conventions and this Protocol are equally binding upon all Parties to the conflict.

It is probably obvious that paragraph 3 of Article 96 of Protocol I (which was not among the original ICRC proposals) is merely a technical clarifiction of paragraph 4 of Article 1 of Protocol I, as well as of Article 2,

paragraph 3, common to the Geneva Conventions. It is also a technical clarification of paragraph 2 of Article 96 of Protocol I with regard to wars of national liberation.

Another purpose of Article 96(3) of Protocol I, was to dispel the fear voiced by some Western delegations that the characterization of wars of national liberation as international armed conflicts would introduce a 'just war' concept into humanitarian law. In other words, they feared that the intention of the proponents of wars of national liberation was to 'free' liberation movements from any humanitarian law obligations towards their enemies while saddling their enemies (the colonial and alien and racist regimes) in all the humanitarian law obligations without giving them any corresponding rights. Such, at any rate, was a misguided conception; proponents of the international character of wars of national liberation have not even hinted that the opponents of liberation movements are any less entitled to legal protection, what they have hinted at is that there must be distinction between the aggressor and the victim of aggression. In other words, what they questioned is the aggressor's claim to a 'legitimate' military necessity.

This latter point, however, was not pursued with the vigour it deserved, and the result was that "the Conventions and this Protocol are equally binding upon all Parties to the conflict", as stated in sub-paragraph 3(c) of Article 96 of Protocol I. This is indeed a prime example of an injustice in equality before the law. For the aggressor, or those who continue to deny peoples their right to self-determination

will incur no responsiblity beyond those breaches of humanitarian law which, as a rule, have always been sent to oblivion, during, and at the end, of every war of aggression, from the Second World War till the present time.

The rule that humanitarian law must apply equally to the aggressor as well as to the victim, in our view, must be complemented by making the aggressor, and especially those who deny, or continue to deny the peoples their right to self-determination, responsible for all the cost of the war. Unless, and until such a rule is put into practice, there will be no determent to aggression, and the prohibition of the use of force in international relations and "in any other manner inconsistent with the purposes of the United Nations", will continue to be the daydream of humankind.

Accordingly, while the proponents of the international character of wars of national liberation may congratulate themselves on making the Geneva Conventions and the Protocol equally binding on all Parties to the conflict, they can hardly be considered to have stood between the greedy dog and its bone. This being said, we revert now to the less ambitious battle over the international character of wars of national liberation in humanitarian law.

3. A Legal Framework

The pupose of this section is to introduce and to put in perspective the different questions relating to wars of national liberation in humanitarian law and to serve as a

background to the rest of this chapter. The length of the two following sub-sections is explicable by the fact that the different questions related to wars of national liberation are closely interrelated. A general view is therefore thought to be desirable although technically might not be necessary,since all the questions raised here will be dealt with in detail later on. However, it is always useful to have a general view before going into details.

3.1. The Basic Questions Explained

Humanitarian law issues relating to wars of national liberation can be reduced to four basic questions:[1]

- Which status ?
- For what conflicts ?
- Between which parties ?
- For what purpose ?

This chapter is concerned with the first three of these questions. The fourth question (i.e. for what purpose ?) is a question that in fact pervades any discussion of humanitarian law as it refers to the policy (or policies) underlying the rules of humanitarian law. In a more general sense, the purpose of humanitarian law is to protect victims of armed conflict, and it is this sense that writers generally speak of the purpose of humanitarian law and enquire about the success or failure of the law to acheive this objective.

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1. See Abi-Saab, 165 Recueil Des Cours (1979-IV), pp. 364-365.

1. Which Status ? This is the fundemental issue of determining whether wars of national liberation constituted armed conflicts of international character, or, armed conflicts of non-international character, for purposes of humanitarian law. Article 1, paragraph 4, quoted above, clearly characterizes wars of national liberation as armed conflicts of international character. But unless one takes Article 1, paragraph 4, as given, it would be necessary to examine its history in order to assert whether it is declaratory of existing international law, or whether it is merely a new rule that ultimately depends for its operation on such formalities as accession and ratification by the Party to the conflict against whom a war of national liberation is being waged.

2. For What Conflicts ? This is the question of the definition of wars of national liberation for purposes of humanitarian law. Normally, one would have started with this question. But the present formula of Article 1, paragraph 4, is a compromise formula developed during the debate on the legal status of wars of national liberation. Whether it differs in substance from other formulæ used in U.N. General Assembly resolutions is a matter of opinion, as will be explained later. However, the fact remains that Article 1, paragraph 4, is still open to different interpretations. On the wider interpretation, it may cover all armed conflicts fought for self-determination. But on the narrower interpretation, it covers only armed conflicts in which peoples are fighting against "colonial domination and alien occupation and racist regimes." It may be summarily stated that the

narrower interpretation draws much support from the drafting history of Article 1, paragraph 4, of Protocol I, and therefore, is likely to prevail. But it should be pointed out that the wider interpretation had also its supporters, and indeed, was the subject of a proposal submitted to the Diplomatic Conference by more than fifteen states.

3. Between Which Parties ? This is the question of the identification of liberation movements and of their locus standi in Humanitarian Law. In other words, this is the question of the representation of a people fighting for its liberation and self-determination. During the work of the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts, held in Geneva in the years 1974 to 1977, the question of the locus standi of liberation movements came up at three different stages of the work of the Conference. At the begining, and even before the Conference had elected the presidents and rapporteurs of its various committees, the question before the Conference was whether liberation movements should be invited to take part in the work of the Conference, and if so, which liberation movements were to be invited, and how far their participation should go?

With regard to these matters it may be remarked in passing that the Diplomatic Conference decided by consensus, without vote, to invite the liberation movements recognized by the regional intergovernmental organizations, to participate fully in the deliberations of the Conference and its main committees. It was understood however, that only delegations representing states would be entitled to vote.

Paradoxically, recognition by the regional intergovernmental organization is not among the conditions which a liberation movement has to fulfil in order to make a declaration under Article 2(3) common to the Geneva Coventions of 1949, or Article 96(3) of the Additional Protocol I, of 1977, as will be shown later.

It may be noted here that although the problem of invitation and participation was procedural in appearance, it was in fact substantive, or, as Baxter put it "a procedural harbinger of what was to follow on the substantive side of the adoption" of what he calls "new humanitarian law."[1] It will be shown in due course that the so-called "new humanitarian law" of wars of national liberation was not new at all, except, perhaps, with regard to the 'Republic' of South Africa. Recognition of the international character of wars of national liberation in paragraph 4 of Article 1 of Protocol I (which is the substantive side to which Baxter refers), is in complete harmony with the common sense of international law - that common sense which has been arbitrarily defied at least since 1949. The international character of the armed conflicts in which the liberation movements which were, or are recognized by regional intergovernmental organizations, was already a foregone conclusion since 1968 and definately so since 1973 when the General Assembly of the United Nations adopted resolution 3103 (XXVIII) of 12 December, 1973, which 'solemnly' proclaimed "Basic Humanitarian Principles in all Armed

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1. R.R.Baxter, Humanitarian Law or Humanitarian Politics ? The Harvard International Law Journal, Vol. 16, 1975, p.11.

Conflicts and Principles of the Legal Status of the Combatants struggling against Colonial and Alien Domination and Racist Regimes." What in fact, the question of invitation and participation was a harbinger of, was the watering down of the concept of the struggle of peoples for self-determination, from one embracing the principle of self-determination as elaborated in the Declaration on Principles of International Law (U.N. General Assembly Resolution 2625), down to the situations where peoples are fighting against "colonial and alien domination and racist regimes", and further down to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes."

How and why this down-the-scale movement had happened will be explained later. Suffice it here to note that, in addition to Guinea-Bissau which was admitted in the capacity of a state, fourteen other liberation movements were invited and had in fact participated in the work of the Diplomatic Conference.

The fourteen liberation movements which participated in the work of the Diplomatic Conference were the following:

1. The Palestine Liberation Organization (PLO)
2. The Mozambique Liberation Front (FRELIMO)
3. The Angolan People's Liberation Movement (MPLA)
4. The Angolan National Liberation Front (FNLA)
5. The African National Congress (South Africa) (ANC)
6. The Panafricanist Congress (South Africa) (PAC)
7. The Zimbabwe African National Union (ZANU)
8. The Zimbabwe African People's Union (ZAPU)

9. The South-West African People's Organization (SWAPO)

10. The Somali Coast Liberation Front (FLCS)

11. The Djibouti Liberation Movement (MLD)

12. The Seychelles People's Unity Party (SPUP)

13. The Sao Tome and Principe Liberation Movement (MLSTP)

14. The Comoro National Liberation Movement (MOLINACO).[1]

When the Final Act of the Diplomatic Conference was opened for signature, to wit, on the 10th of June, 1977, only the representatives of the following national liberation movements signed the Final Act:

Palestine Liberation Organization (PLO)

Panafricanist Congress (South Africa) (PAC)

South West Africa People's Organization (SWAPO).[2]

The other liberation movements had by then either reached their immediate goal of self-government or independence, or were in their way of exercising 'peacefully' their political right of self-determination and therefore did not feel the need to sign the Final Act as liberation movements.[3]

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1. Cf. the list given by Frits Kalshoven, in Netherlands Year Book of International Law, 1974, p. 28, n. 50, and the list given by R.R.Baxter, Humanitarian Law or Humanitarian Politics ? Harvard International Law Journal, Vol. 16, Number 1, Winter 1975, p. 9-10. Baxter's list does not include the liberation movements of the Somali Coast Djibouti, Sao Tome and Principe, and Comoro, and Kalshoven's does not include the Zimbabwe African People's Union (ZAPU). For the list of countries which became self-governing or independent during the period 1973 - 1977, see the following foot note.3.
2. CDDH/SR.59, para. 5.
3. The following countries became self-governing or independent during the period 1973-1977: Angola, the Bahamas, Cape Verde, Comoros, Djibouti, Grenada, Guinea-Bissau, Mozambique, Niue, Papua New Guinea,Sao Tome and Principe, Seychelles, Suriname. See "United Nations Action in the Field of Human Rights, United Nations Publication, (Sale No. E. 79. XIV. 6), New York, 1980, p.29.

It may be interesting to note that, just as the Conference opened with the problem of the locus standi of liberation movements in humanitarian law, it also ended with a controversy over whether liberation movements were entitled to sign the Final Act. In between, there was of course the problem of the legal status of wars of national liberation - which is a substantive matter, and the problem of the expression of the will to be bound by the Geneva Conventions of 1949 and Additional Protocol I, by liberation movements. As noted above, this latter problem is now governed by Article 96(3) of Protocol I, and of course, by Article 2 (3) common to the four Geneva Conventions of 1949.

Having now broached the main issues involved, a question of approach seems to impose itself. If as available legal literature seems to suggest, that Israel and South Africa are the last vestiges of "colonial domination and alien occupation and racist regimes", why not undertake a case study of these political entities (South Africa and Israel) and of the struggle against them, instead of a discussion of the theory of wars of national liberation in humanitarian law ?

As a matter of fact the two approaches do not exclude each other; they overlap, and the choice between the two approaches is one of emphasis than of substance. For a case study would still raise theoretical issues, and theoretical studies would still need some illustrations.

But there are more fundamental reasons why we must concentrate on the theory of wars of national liberation in humanitarian law. First, as noted above, Article 1, paragraph

4, of Protocol I, is open to different interpretations and must not be surrendered to the narrower interpretations, whatever might be the odds against the wider interpretation in present circumstances of world politics. Secondly, whatever conception of wars of national liberation prevails in the future, it will be based on Article 2(3) of the Geneva Conventions of 1949 and Article 1(4) of Additional Protocol I. In brief, the international character of armed conflicts in which peoples fight for their right of self-determination has been a long awaiteo achievment and must not be let to wither away with transient situations as now exists in Palestine, South Africa, and Namibia Article 1, paragraph 4 of Protocol I, is an abstract rule of general application and must be treated as such.

Indeed, if the international lawyer is to be more than just an advocate of narrow national interests as perceived by opportunistic national policy-makers, and if he were to be more than just a positivist trailing behind what short-sighted policy-makers say about the rules of international law, he must realise that national interests are best served by upholding the right of peoples to self-determination and by the enjoyment of human rights by everyone everywhere.

To uphold a concept of wars of national liberation that coincides with the right of peoples to self-determination in the widest possible sense is therefore tantamount to upholding an international legal order that allows all peoples all over the world to prosper together politically, economically, socially. Those who think that national

interests are really served by maintaining political spheres of influence and economic empires, or think that the greatness of the nation is measured by the strength of its armed forces and its ability to defeat others are strongly advised to re-think their policies and attitudes. It is not in vain that the Charter of the United Nations provides in Article 1, that the purposes of the United Nations are;

> "1. To maintain international peace and security,...
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.
>
> 4. To be a centre for harmonizing the actions of nations in the attainment of common ends."

This is the sort of international legal order envisaged by the Charter of the United Nations. It is an international legal order based on respect for the principle of equal rights and self-determination of peoples, and respect for human rights and for fundemental freedoms for all without distinction as to race, sex, language or religion. Accordingly, for the law of armed conflict to be in harmony

with the Charter of the United Nations, it must also be based on the respect for the principle of equal rights and self-determination of peoples and respect for human rights. Actually, Article 1, paragraph 4, of Protocol I, by and large, and notwithstanding its drafting history, may still respond to the view advocated here, especially if the terms "colonial domination and alien occupation and racist regimes" are interpreted in the light of the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations and elaborated in the "Declaration on Principles of International Law concerning Friendly Relations and co-operation among States in accordance with the Charter of the United Nations", adopted by the General Assembly of the United Nations in Resolution 2625 (XXV) of 24th October, 1970. For purposes of our discussion, it would seem sufficient to introduce this declaration and reproduce the portions relative to the principle of equal rights and self-determination of peoples.

It is worth recalling here that this 'Declaration' is referred to in Article 1, paragraph 4, of Protocol I, and therefore, it constitutes an indispensable framework for any discussion of the problem of wars of national liberation in humanitarian law.

3.2. The Principle of Equal Rights and Self-Determination of Peoples: A Statement of the Principle

A comprehensive 'authoritative'[1] statement of the principle of equal rights and self-determination of peoples, beside the provisions of the United Nations Charter, is embodied in the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." This Declaration was painstakingly elaborated by a special committee established by the General Assembly of the United Nations in 1963 - "Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." The Committee was composed of the following twenty seven Member States: Argentina, Australia, Burma, Cameroon, Canada, Czechoslovakia, Dahomey, France, Ghana, Guetemala, India, Italy, Japan, Lebanon, Madagascar, Mexico, Netherlands, Nigeria, Poland, Romania, Sweden, Union of Soviet Socialist Republics, United Arab Republic (Egypt), United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela and Yugoslavia.[2]

The special Committee was instructed by the General Assembly to consider the "progressive development and codification" of the following seven principles of the

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1. According to Schwarzenberger, International Law, Vol. 1, 3rd ed., (1957), p. 531: "any judicial interpretation of a treaty is authoritative. Used in the narrower meaning, authoritative interpretation is the interpretation of the treaty by the parties themselves."
2. See overleaf.

Charter of the United Nations:

(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;

(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;

(d) The duty of States to co-operate with one another in accordance with the Charter;

(e) The principle of equal rights and self-determination of peoples;

(f) The principle of sovereign equality of States;

(g) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

It is probably worth recalling that all these principles have already been expressly laid down in Chapter One of the Charter of the United Nations (Articles 1 and 2). But as they involve most of the fundamental areas of

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2. (From previous page)
Chris N. Okeke, Controversial Subjects of International Law, Rotterdam University Press, 1974, p. 111, n. 4.

international relations, it is hardly suprising that the Committee had experienced many difficulties in reaching agreed formulations. The difficulties were all the greater as the Committee agreed to work in general on the basis of unanimity.[1]

The decision to work on the basis of unanimity or consensus reflects both the degree of seriousness with which the Committee viewed the nature of the task entrusted to it, and the degree of forbearance the delegations were required to show in a spirit of *co-operation and determin*-ation to bring the Committee's mission into a conclusion, acceptable, not only to the members of the Committee, but also to all other members of the United Nations. The consensus or unanimity procedure has of course its inherent points of weakness and of strength. In bad faith, it can obviously be overdone and turned into a nightmare of vetoes, and thus, may either lead to the paralysis of the organ functioning on the basis of unanimity, or, it may produce the lowest common denominator.

But there are times when working by consensus is particularly useful. As Robert Resenstock remarked:

> "The decision to work on the basis of consensus was based on the view that any other approach would produce a far less useful document, which would record the level and degree of disagreement rather than set forth a body of norms to which all the

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1. See Robert Rosenstock, The Declaration of Principles of International Law Concerning Friendly Relations: A Survey, A.J.I.L., Vol. 65, 1971, pp. 713-735, at pp. 713-14.

> states in the Committee could adhere and which could be regarded as an authoritative statement of key principles of the Charter. This agreement was strained nearly to the breaking point on several occasions, and at no time were the General Assembly Rules of Procedure suspended. Any delegation had at all times the right to insist on their application and consequently on having decisions taken by vote. It is the writer's view that the forbearance shown by the delegations in adhering to the consensus approach was well rewarded."[1]

In the light of these remarks, it may be assumed that the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations individually and collectively, have been adopted unanimously. In other words, the Declaration was adopted by a strong and 'active' (not passive) unanimity since every member-state of the Committee could exercise its right to 'veto' any formulation unacceptable to it. Inevitably, this is bound to result in general formulations. But it is true of almost every rule of international law that touches on matters which states consider to be vital to their interests, or restrict their freedom of action. The generality of the language used in the Declaration, therefore, "does not deprive this instrument of its significance as the most important single statement representing what the Members of the United Nations agree to be the law of the Charter on

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1. Robert Rosenstock, ibid., p. 714, n. 2.

these seven principles."[1]

Similar views on the legal significance of the Declaration have been expressed by other writers. Professor Brownlie states:

> "The legal significance ot the Declaration lies in the fact that it provides evidence of the consensus among Member States of the United Nations on the meaning and elaboration of the principles of the Charter. Though it is a document of the first importance, it is not, of course, an amendment of the Charter. Moreover, it is not to be construed 'as prejudicing in any manner the provisions of the Charter."[2]

Subrata Roy Choudhury (Senior Advocate of the Supreme Court of India, New Delhi, and of the High Court at Calcutta), is of the view that the Declaration here under discussion "is to be treated as a subsequent agreement between the parties providing an authoritative interpretation of the rights and obligations under the Charter and the application of its provisions."[3]

The delegation of the United States of America expressed the following view during the work of the Special Committee:

> "The significance of this gradual accumulation of areas of agreement can best be understood in light of the nature of the operation in which we are

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1. Ibid., p. 714.
2. Brownlie, Basic Documents in International Law, 1978, p.32.
3. Subrata Roy Choudhury, The Status and Norms of Self-determination in Contemporary International Law, in Netherlands International Law Review, Vol. 24, 1977, pp. 72-91, at p.73.

involved. For some years the Assembly has been engaged in formulating legal texts which will be authoritative interpretation of broad principles of international law expressed in the Charter."[1]

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations was unanimously adopted and 'solemly' proclaimed by the General Assembly of the United Nations in Resolution 2625 (XXV), of October 24, 1970. The Section of the Declaration elaborating the principle of equal rights and self-determination of peoples provides as follows:

1. "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right *in accordance with the provisions of the Charter*.

2. "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

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1. Cited in Robert Rosenstock, op. cit., p. 714.

(a) to promote friendly relations and co-operation among States; and

(b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that the subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundemental human rights, and is contrary to the Charter.

3. "Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and freedoms in accordance with the Charter.

4. "The establishment of a sovereign and independent State, the free association or intergration with an independent State or the emergence in any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

5. "Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their action against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

6. "The territory of a colony or other non-self-governing

territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination, and particularly its purposes and principles.

7. "nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

8. "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."[1]

* * *

In the general part of the Declaration, the General Assembly declares that, "in their interpretation and application", the principles embodied in the Declaration "are interrelated and each principle should be construed in the context of the other principles." The General Part contains also the following clause:

"Nothing in this Declaration shall be construed

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1. Numericals are not in the original, they have been added here to facilitate the reference to them.

as prejudicing in any manner the provisions of the Charter of the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this declaration."

This is a very important 'saving' clause; it means that the Declaration is neither an amendment nor a final interpretation of the principles which it elaborates.

Finally the General Assembly declared that:

"The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles."

4. The Legal Status of Wars of National Liberation in International Humanitarian Law

In its advisory opinion on Namibia in 1970, the International Court of Justice stated that:

"The Court must take into consideration the changes which have occured in the supervening period, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system

prevailing at time of interpretation."[1]

It is immaterial therefore what the law-makers thought in 1949 of the scope of application of the Geneva Conventions and of the concept of armed conflicts of international character or that of non-international character. What matters is that common Articles 2 and 3 of the Geneva Conventions must be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation. When so interpreted, it will appear that even in 1949 the prevailing legal system could not be invoked in support of the view that all wars of national liberation, however defined, were armed conflicts of non-international character.

In other words, the thesis advanced here is that Article 1, paragraph 4, of Protocol I, which states that armed conflicts of international character within the meaning of Article 2 common to the Geneva Conventions of 1949 "include armed conflicts in which peoples are fighting against colonial and alien occupation and against racist regimes 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 Relation and Co-operation among States in accordance with the Charter of the United Nations", is partly reaffirmation, and partly a development of international law, and that it is in conformity with present international law and therefore is already binding on the parties to the Geneva Conventions, notwithstanding the formalities of

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1. "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports, 1971, para. 53, p. 31.

signature, accession and ratification.

This thesis may be substantiated even without the aid of the history of Article 1, paragraph 4, but since all possible objections to the international character of wars of national liberation had been raised at the first session of the Geneva Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law applicable in Armed Conflicts in 1974, it will be useful to review the debate which took place at that Conference.

4.1. The Diplomatic Conference: ICRC Proposal and Amendments

Between 1968 and 1973 the General Assembly of the United Nations adopted a great number of resolutions bearing on the legal status of wars of national liberation in international humanitarian law, some of which were of general nature while others related to specific situations in Southern Africa and the Middle East. The most important of these resolutions was Resolution 3103 (XXVIII) of 12 December, 1973, in which the General Assembly solemnly proclaimed the following "basic principles of the legal status of combatants struggling against colonial and alien domination and racist regimes" without prejudice to their elaboration in future within the framework of the development of international law applying to the protection of human rights in armed conflicts:

> "1. The struggle of peoples under colonial, alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of

international law;

2. Any attempt to supress the struggle against colonial and alien domination and racist regimes is incompatible with the Charter of the United Nations, the Declaration on Principles of International Law concerning friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples and constitutes a threat to international peace and security;

3. The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Convention and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes;

4. The combatants struggling against colonial and alien domination and racist regimes captured prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August, 1949;

5. The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a

criminal act and the mecenaries should accordingly be punished as criminals;

6. The violation of the legal status of the combatants struggling against colonial and alien domination and racist regimes in the course of armed conflicts entails full responsibility in accordance with the norms of international law."

Resolution 3103 was adopted by 83 votes in favour, 13 against, (namely, Australia, Belgium, Brazil, France, Fedral Republic of Germany, Israel, Luxemburg, Portugal, South Africa, United Kingdom, U.S.A., Uruguay), and 19 abstentions.

Thus the majority of states considered that armed conflicts in which peoples are fighting against colonial and alien domination and racist regimes were of an international character, in the sense of the Geneva Conventions.

Similarly, at the Confernce of Government Experts which the ICRC convened and organized in 1971 and 1972, with a view "to obtain expert opinion on the reaffirmation and development of international humanitarian law applicable in armed conflicts"[1], most of the experts who spoke on the subject, according to the ICRC Reports, considered that wars of national liberation were international armed conflicts.[2]

However, in spite of all the indications as to the great importance which a very large majority of states attached to the issues of wars of national liberation, the Draft Protocols submitted to the Diplomatic Conference to serve as basis for

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1. Rule 1 of the Conference's Rules of Procedure, text in ICRC Report, 1971, p. 15.
2. ICRC Report on the Work of the Conference of Government Experts, 1971, pp. 52-56, at 54.

discussion practically evaded the issue. Article 1 of Draft Protocol I proposed by the ICRC simply stated that:

> "The present Protocol, which supplememnts the Geneva Conventions of August 12, 1949, for the protection of War Victims, shall apply in the situations referred to in Article 2 common to these Conventions."[1]

Actually, in the study prepared by the ICRC and submitted to the Conference of Government Experts, the ICRC was of the view that the armed conflicts in southern Africa (i.e., those waged by the peoples of Angola, Mozambique and Guinea-Bissau, against Portugal, and the struggle of the peoples of Namibia and South Africa against the racist regime of South Africa, and the struggle of the people of Zimbabwe (formerly Rhodesia) against the racist White Minority which unilaterally declared independence from Britain in 1965 but was never recognized by any state, were armed conflicts of non-international character.[2]

In the ICRC Draft Protocols the issue of wars of national

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1. ICRC Draft Protocols - Commentary, 1973, p.6. It should be noted that the ICRC Commentary on this Article, when judged by the ICRC Report mentioned in the previous note, appears to be a complete distortion of facts. For example, in the Commentary on draft Article 1, the ICRC says that only "several experts" considered that wars of national liberation were international armed conflicts but the"majority" did not concur, ibid., p.6, while in the ICRC Report, 1971, para. 321, p.54, the Report expressly states that "Most of the Experts of Commission II who spoke on the subject considered that wars of liberation were international armed conflicts." Similarly, in the study prepared by the ICRC for the Conference of Government Experts, the ICRC says that "very many experts" consulted by the ICRC in 1969 and 1970 expressed the view that wars of national liberation were of international character, and that only "a few experts considered that the theory that wars of liberation against colonial governments were international conflicts was based on fictitious grounds." See ICRC, Doc. CE/5b, Geneva, January, 1971, p.28.
2. See ICRC, Doc. CE/5b, Geneva, January, 1971, p.26.

liberation was relegated to a 'Note' to draft Article 42 which was erroneously entitled "New Category of Prisoners of War" stating that if, as many governments wished, the Diplomatic Conference should decide to mention in the present Protocol members of movements of armed struggle for self-determination, a solution would be to include in this Article a third paragraph to the effect t at members of organized liberation movements who comply with the conditions of being under a responsible command, distinguish themselves from the civilian population in military operations, and conduct their military operations in accordance wit the Geneva Conventions and Protocol I, "shall be treated as prisoners of war as long as they are detained."[1]

This was obviously a far cry from resolution 3103 (XXVIII) of 12 December, 1973, which expressly states in operative paragraph 3 t at "The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of t e 1949 Geneva Conventions and the legal status envisaged to apply to combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien and racist regimes."

It is unnecessary to dwell any further on the ICRC's approach to wars of national liberation.[2] Suffice it to mention

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1. Text in ICRC Draft Protocols - Commentary, Geneva, 1973, p.47. Questions of international law relating to combatants and prisoner-of-war status are discussed at length in Chapter 4 of this thesis.
2. For a criticism of the ICRC's approach to wars of national liberation, see David P. Forsyth, Humanitarian Politics, 1977, pp. 124 - 126.

that no organization has been so heavily involved in the aid of victims of non-interstate armed conflicts as the ICRC, yet probably no organization has argued against the very interests it wishes to serve as the ICRC has often done with respect to non-interstate armed conflicts.

However, even before Committee I of the Diplomatic Conference started its substantive discussion on the field of application of Protocol I, four amendments were submitted, three of which with a view to making explicit the international character of wars of national liberation in the sense of the Geneva Conventions. In the course of discussion more amendments were submitted. In the following, all these amendments will be reviewed in a chronological order.

The first amendment was submitted by Algeria, Bulgaria, Czecholovakia, German Democratic Republic, Hungary, Morroco, Poland, Union of Soviet Socialist Republics, and United Republic of Tanzania. It purported to add a second paragraph to Draft Article 1 of Protocol I, stating that:

> "The international armed conflicts referred to in Article 2 common to the Conventions include armed conflicts where peoples fight against colonial and alien domination and against racist regimes."[1]

This amendment was dated 7 March, 1974, and was classified as amendment CDDH/I/5 and Add.1 and 2.[2] It is

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1. Text in Levie, Protection of War Victims, Vol. I, 1979, p.1; also Abi-Saab, Wars of National Liberation, Collected Courses of the Hague Academy of International Law (Recueil des Cours), Vol. 165, (1979-IV), p. 375.
2. It is important to remember the classification numbers of the different amendments because delegates usually refer to amendments by their classification numbers.

probably obvious that the language of this amendment was taken from resolution 3103 (XXVIII) of 12 December, 1973, adopted by the General Assembly of the United Nations by 83 votes in favour, 13 against, and 19 abstentions.

The second and more important amendment was basically a non-aligned initiative. It was submitted by the following 15 Powers who were later joined by a substantial number of additional co-sponsers: Algeria, Egypt, Australia, Democratic Yemen, Guinea-Bissau, Ivory Coast, Kuwait, Libya, Madagascar, Nigeria, Norway, Pakistan, Senegal, Sudan, Syria, Tunisia, United Arab Emirates, Cameroon, Yugoslavia, Zaire. The amendment purported to add a second paragraph to draft Article 1 of Protocol I reading as follows:

> "The situation referred to in the preceding paragraph include armed struggles waged by peoples in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and defined by the Declaration on principles of International Law concerning Friendly Relation *and Co-operation among* States in accordance with the Charter of the United Nations."[1]

This amendment was dated 8 March, 1974, and was classified as amendment CDDH/I/11 and Add.1 to 3. It was the best proposal ever made at a law-making conference, but apparently was ahead of its time. Many governments were not yet prepared to go co-extensively with the right of peoples to self-determination and thus consider as legitimate combatants, not rebels, those

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1. Text in Levie, Protection of War Victims, Vol. I, 1979, p.1; and Abi-Saab, op. cit., p. 375.

who fight for their people's right of self-determination as enshrined in the Charter of the United Nations and defined in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The third amendment - which was not really an amendment, was submitted by Argentina, Austria, Belgium, Federal Republic of Germany, Italy, Netherlands, Pakistan, United Kingdom of Great Britain and Northern Ireland. It proposed to replace draft Article 1 proposed by the ICRC by the following:

> "1. The High Contracting Parties undertake to respect and to ensure respect for the present Protocol in all circumstances.
>
> "2. The present Protocol shall apply in situations referred to in Article 2 common to the Geneva Conventions of August 12, 1949, for the protection of war victims.
>
> "3. In cases not included in this present Protocol or in other instruments of conventional law, civilians and combatants remain under the protection and the authority of the principles of international law, as they result from established custom, from the principles of humanity and the dictates of public conscience."[1]

This amendment was submitted on the 8th of March, 1974, and was classified as document CDDH/I/12 and Corr. 1. Substantively however, it could hardly be considered an amendment to the ICRC proposal; the first paragraph simply

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1. Quoted from Levie, ibid., p. 1-2.

reproduced Article 1 common to the four Geneva Conventions, the second paragraph reproduced the ICRC proposal but failed to point out that the Protocol supplements the Geneva Conventions, and the third paragraph simply reaffirms the famous de Marten's clause which is already a rule of customary law and may even be considered a rule of jus cogens. At any rate, paragraph 2 of the amendment, like the ICRC proposal, only begs the question. Clarification of the scope of application of the Geneva Conventions and of Protocol I was the very issue confronting the conference - an issue on which even the sponsors of this amendment were not in agreement. Pakistan and Argentina held different views from those of the rest of the sponsors of the same amendment on this issue. However, the sponsors of the other amendments were not against amendment CDDH/I/12, but they wanted in addition a clear statement that international armed conflicts in the sense of the Geneva Conventions include armed conflicts in which peoples fight for their right of self-determination, a statement which the majority of Western states at that stage were unwilling to make or accept.

The fourth amendment was submitted by Romania. It purported to add the following at the end of the ICRC proposal:

> "... and in armed conflicts in which the people of a colony, a non-self-governing territory or a territory under foreign occupation are engaged in the exercise of the right of self-determination and the right to self-defence against aggression, with a view to ensuring more effective protection for the victims of aggression and oppression."[1]

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1. Text in Levie, op. cit., p. 2.

This amendment was submitted on 11 March, 1974, and was classified as document CDDH/I/13.

The stage was thus set for what Professor Abi-Saab described as "the great debate on wars of national liberation."[1] But as the same writer observed, however convincing the arguments and counterarguments which constituted the great debate on wars of national liberation in the Diplomatic Conference, they were not sufficient by themselves in parliamentary or conference diplomacy to determine the outcome of the issue; an outcome which was ultimately to be decided by a vote on different possible solutions which were put forward and backed by competing coalitions, each trying to secure for its proposal the largest possible acceptance.[2]

That 'great debate' on wars of national liberation began at the second meeting of Committee I of the Diplomatic Conference. During that meeting the majority of Western states supported amendment CDDH/I/12 and attacked the other three amendments which purported to make explicit the international character of wars of national liberation. Such an all out attack was bound to back fire.[3] Consequently, supporters and most of the sponsors of the other three amendments papered over their differences on the scope of the concept of wars of national

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1. Abi-Saab, op. cit., p. 384
2. Loc. cit.
3. Indeed, at the third meeting of Committee I the representative of the Soviet Union remarked that "The three proposed amendments before the Committee were not contradictory and, though his delegation favoured the text of which it was a co-sponsor (CDDH/I/5 and Add. 1) as being more precise and in conformity with United Nations General Assembly resolution 3103 (XXVIII), his delegation would consider the possibility of merging the text with two others (CDDH/I/11 and Add. 1 and CDDH/I/13). CDDH/I/SR.3, para. 2.

liberation and submitted at the fourth meeting of Committee I an amendment sponsered by 51 states from Africa, Asia, and Eastern Europe. This was amendment CDDH/I/41 and Add. 1 to 7, dated 14 March, 1974. It proposed to add a second paragraph to the ICRC proposal reading as follows:

> "The situations referred to in the preceding paragraph include armed conflicts where peoples fight against colonial and alien domination and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and defined in the Declaration on Principles of International Law concerning friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."[1]

This was immediately followed by an alternative proposal submitted by Turkey (amendment CDDH/I/42). The Turkish proposal purported to add a second paragraph to the original ICRC proposal reading as follows:

> "The present Protocol shall also apply to armed conflicts waged by the national liberation movements recognized by the regional intergovernmental organizations concerned against colonial and foreign domination and racist regimes in the exercise of the principle of the self-determination of peoples as set out in the Charter of the United Nations."[2]

At its sixth meeting, Committee I deided to refer the proposals in documents CDDH/I/11, 12, 41, and 42 to a Working

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1. Levie, op. cit., p. 22.
2. Loc. cit.

Group whose task was to explore the possibility of submitting a single amendment to draft Article 1 of Protocol I.[1] The Working Group consisted of the delegations who had sponsored those amendments and other delegations wishing to take part. The Working Group met on 19 and 20 March, 1974, but according to the Draft Report of Committee I:

> "It was not possible, however, to reach agreement nor was it possible to determine whether the differences between the various proposals were a matter of form or of substance."[2]

When the Draft Report was examined in Committee I, the delegation of the Soviet Union remarked that the differences referred to in this sentence were "undeniably a matter of substance."[3] Afterwards, however, on the suggestion of the Chairman, the Committee deciced to delete the words "nor was it possible to determine whether the differences between the various proposals were a matter of form or substance."[4]

It was certainly of primary importance to let the discussion go to its fullest possible length, especially as the discussion on the Draft Report took place after Committee I had adopted Article 1 of Protocol I. In particular, the discussion would have shed some light on the material scope of Article 1, paragraph 4, of Protocol I, but the wisdom of the Chairman has deprived us of what might have constituted crucial evidence in

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1. Amendments CDDH/I/5 and 13 were withdrawn by their sponsors who joined in sponsoring amendment CDDH/I/41. See Draft Report of Committee I, first session, para. 9, in Levie, Vol. I, p. 51.
2. Levie, Vol. I para. 11, p. 51.
3. Ibid., para. 27, p. 54.
4. Ibid., para. 28, p. 54.

this respect.

Reverting now to Committee I, it may be noted that after the Working Group had failed to reach agreement on a single amendment to draft Article I, two initiatives were made with a view to breaking the deadlock. One was completely ignored and not even discussed despite requests made by some states for a discussion,[1] the other was successful.

The initiative which was ignored was procedural in character. It was proposed by the delegations of Canada and NewZealand in the form of a draft resolution to be adopted by the Conference and by which it decides to set up an inter-sessional Working Group to study the problem of armed conflicts in which peoples fight for their right of self-determination and to report to the second session of the Diplomatic Conference. It is unnecessary to comment on this initiative since the Conference had decided to continue the discussion of draft Protocol I and the various amendments submitted by the various groups of states.[2]

The initiative which was successful and finally became Article 1 of the present Protocol I was made by a group of Latin American countries, namely, Argentina, Honduras, Mexico, Panama, and Peru. They submitted amendment CDDH/I/71 which in their view represented a compromise between amendment CDDH/I/12 and amendment CDDH/I/41.[3] The provisions of paragraphs 1, 3 and

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1. E.g. by the delegations of the U.S.A., CDDH/I/SR.13, para. 12, and Colombia, CDDH/I/SR.13, para. 14.
2. For the text of the Canada/New Zealand draft resolution, see Levie, Protection of War Victims, Vol. I, 1979, p. 37. For the speech of the delegation of Canada introducing the draft resolution, see ibid., p. 37-38, or CDDH/I/SR.13, para. 1 - 5.
3. See the speech of the delegation of Argentina on behalf of the sponsors of amendment CDDH/I/71, CDDH/I/SR.13, para. 16.

4 of amendment CDDH/I/71 were virtually those of amendment CDDH/I/12, but the ICRC text was preferred to the corresponding provision of amendment CDDH/I/12. Paragraph 2 of amendment CDDH/I/71 was a modified version of amendment CDDH/I/41. The modification concerned the terms *'colonial and alien domination'* which Latin American countries proposed to replace by 'colonial domination and alien occupation', but as a compromise the words 'colonial and alien occupation' had initially been used in the Latin American amendment.[1] Subsequently, however, the Indian delegation, speaking on behalf of the sponsors of amendment CDDH/I/41 proposed to replace the words 'colonial and alien occupation' by the words 'colonial domination and alien occupation', thus reverting to the original Latin American proposal.[2] The Syrian delegation, speaking on behalf of the Arab group said that the group preferred the wording of amendment CDDH/I/41, but the group, in a spirit of reconciliation was ready to support the Latin American amendment CDDH/I/-71.[3] Thus the terms 'colonial domination and alien occupation' finally replaced the terms 'colonial and alien domination' which were used in amendment CDDH/I/41. In other respects amendment CDDH/I/41 remained the same and constituted paragraph 2 of the Latin American amendment as thus modified.

To the Western sponsors and supporters of amendment CDDH/I/12 the Latin American amendment CDDH/I/71 did not constitute a compromise; it was merely a combination of amendment CDDH/I/12 and amendment CDD/I/41. The sponsors of

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1. Loc. cit.
2. CDDH/I/SR.13, para. 18.
3. CDDH/I/SR.13, para. 19.

amendment CDDH/I/12, according to the Belgian delegation, "did not in any way envisage the situations described in amendments CDDH/I/11 and CDDH/I/41. Paragraph 2 of amendment CDDH/I/71 contained a provision which was wholly alien to the spirit of amendment CDDH/I/12 and it was in no sense a compromise."[1]

Actually, neither the spirit nor the letter of amendment CDDH/I/12 were averse to amendment CDDH/I/41 or to any of the other amendments as evidenced by the attitudes of the vast majority of delegations in 1974, and even by the attitudes of Western states in 1977. True, all of the Western delegations (except Norway) had voted against the Latin American amendment or abstained in 1974. But by 1977 the opposition to the international character of wars of national liberation had abated and many Western delegations including the Belgian delegation itself had voted in favour of the Latin American amendment as adopted in Committee I in 1974. In Plenary, in 1977, the Latin American amendment as it presently stands in Article 1 of Protocol I was adopted by an impressive majority of 87 votes in favour, one against (Israel), and 11 abstentions.[2] The following delegations abstained; Monaco, United Kingdom, Federal Republic of Germany, Canada, Spain, United States of America, France, Guatemala, Ireland, Italy, and Japan. Indeed, if it were not for the insistance of the delegation of Israel to put Article 1 of Protocol I to the vote, the Article would have been adopted by consensus, as the delegation of the United States had requested.

It should be noted, however, that in the explanation of

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1. CDDH/I/SR.13, para. 26.
2. CDDH/SR.36, para. 58.

votes which followed the adoption of Article 1 of Protocol I, none of the delegations which had abstained said that it was against the classification of armed conflicts in which peoples fight in the exercise of their right to self-determination as international armed conflicts. They said that they had abstained because, in their view, the terms used in paragraph 4 of Article 1 were political rather than legal. For example, the delegation of the United Kingdom said that it had abstained in the vote on Article 1 as a whole and would have abstained on paragraph 4 if a seperate vote had been taken "because it had seen legal difficulty in the language used, which seemed to be cast in political rather than legal terms."[1]

This, however, seems unconvincing, for in the last analysis it is the right of peoples to self-determination which is the criterion of whether a none-interstate armed conflict is of international or non-international character.

4.2. The Debate on the Legal Status of Wars of National Liberation at the First Session of the Diplomatic Conference of Geneva, 1974.

The importance of the debate on the legal staus of wars of national liberation for the present and future of international humanitarian law can hardly be exaggerated, and it is perhaps unfortunate that the debate cannot be summarized

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1. CDDH/SR.36, para. 83. In the same vein were also the explanations of votes made by the delegations of France, CDDH/I/SR. 36, para. 91; Canada, CDDH/I/SR.36, para. 93; Federal Republic of Germany, CDDH/I/SR.36, Annex; Spain, CDDH/I/SR.36, Annex; and Guatemala, CDDH/I/SR.36, Annex.

without causing great damage to its substance. The Rapporteur of Committee I of the Diplomatic Conference seems to have pleased no one when he tried to sumarize the debate in paragraph 10 of his report stating that:

> "The majority of delegations were in favour of Article 1 mentioning that the international armed conflicts referred to in Article 2 common to the four Geneva Conventions include those armed conflicts in which peoples, in the exercise of their right to self-determination, fight against colonial and foreign domination and against racist regimes. Other delegations considered that the four Conventions and Protocol I could not be applicable to entities other than States."[1]

During the discussion of this paragraph of the report by Committee I, several amendments were put forward. Thus, the delegations of Austria, Belgium, Canada, Federal Republic of Germany, Netherlands, United Kingdom, and the United States of America, proposed to relace the last sentence of the above quoted paragraph by the following:

> "Other delegations considered, however, that such a procedure was unacceptable in that, in their view, it involved the introduction into Protocol I of criteria of political motivation. Some of these delegations made it clear that they accepted that the four Geneva Conventions and Protocol I could apply to armed conflicts other than between States, but only in so far as the Parties to the conflict accepted the provisions thereof and were

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1. Draft Report of Committee I, First Session, Doc. CDDH/I/81, para. 10.

willing and able to apply them."[1]

The representative of Uganda considered this amendment, especially the last sentence, to be completely inappropriate. The Committee, he said, had not sought to determine whether Article 2 would be applicable only to States, but had tried to determine whether wars of national liberation were international conflicts.[2]

On the other hand, the delegation of Australia suggested the addition of the following sentence at the end of paragraph 10:

> "Yet other delegations, while accepting the principle that Protocol I should apply to armed conflicts of self-determination considered that this should be expressed without qualification."[3]

The delegation of Norway said it had no objection to these amendments, but if these amendments were adopted, then a sentence should be added at the end of the Australian amendment (that is at the end of paragraph 10) reading as follows:

> "It was emphasized that this would merely be a restatement of positive international law, and that it would not involve any subjective or political motivation as criteria for the application of international humanitarian law."[4]

In the end, however, none of these amendments were adopted. Instead, the Committee decided to replace the last sentence of paragraph 10 of the Report by: "Other delegations

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1. Amendment CDDH/I/81, as reproduced in Levie, Vol. I, p. 52.
2. CDDH/I/SR.15, para. 19.
3. CDDH/I/SR.15, para. 20.
4. CDDH/I/SR.15, para. 21.

did not share this view. The various opinions expressed on the subject appear in the summary records of the second to the fourteenth meetings of the Committee."[1] It is necessary therefore to revert to the summary records of those meetings for the various opinions expressed on the subject.[2]

The substantive debate on the legal status of wars of national liberation was opened by the Egyptian delegate, Professor Abi-Saab, introducing the 15-Power amendment CDDH/I/11 and Add. 1. He said that wars of national liberation had formed a very important category of armed struggle in the post-1945 period and a number of them were still continuing. Contemporary international law recognized such wars as international armed conflicts. United Nations General Assembly resolution 3103 (XXVIII) of 12 December, 1973, was the latest in a stream of resolutions of important international bodies proclaiming that

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1. CDDH/I/SR.15, para. 24.
2. A compilation of the summary records of these meetings may be found in Levie, Protection of War Victims, Vol. I, 1979, pp. 1-52.
   In legal literature, the Western thesis that wars of national liberation were armed conflicts of non-international character was advocated by Professor R.R.Baxter, "The Geneva Conventions of 1949 and Wars of National Liberation", published in Rivista Di Dirrito Internazionale, Vol. LVII, 1974, pp. 193-203. After the first session of the Diplomatic Conference Professor Baxter modified much of his views. See R.R.Baxter, Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law, In the Harvard International Law Journal, Vol. 16, No. I, Winter 1975, pp. 1-26, especially pp. 11-17.
   For a critical review of the various arguments put forward by Western delegations at the first session of the Diplomatic Conference, see Abi-Saab, Wars of National Liberation in Geneva Conventions and Protocols, in Recueil des Cours of the Hague Academy of International Law, Vol. 165 (1979-IV), pp. 374-384; See also, Charles Lysaght, The Attitude of Western Countries, in Cassese(ed). The New Humanitarian Law of Armed Conflict, 1979, pp. 349-356; and Jean J.A.Salmon, Les Guerres De Liberation Nationale, in Cassese, ibid., pp. 68-82.

principle. The General Assembly had, indeed gone further by recommending sanctions against colonial, alien and racist regimes and the provision of assistance to specific liberation movements, and the Security Council in one case had ordered mandatory sanctions. It would be difficult to explain all such international action if wars of liberation were to be considered merely as armed conflicts of non-international character. Existing practice provided abundant proof of the international nature of such conflicts.

Noting that, for some, the very words 'liberation movement' and 'wars of national liberation' are objectionable, not to say frightening, the Egyptian delegate went on to say:

> "We have not used in our draft amendment of Article I the words 'wars of national liberation'... We have tried use generally acceptable legal concepts as a frame of reference to allay any legitimate worries that some may have. We refer them to one of the basic principles of contemporary international law, that of self-determination, and again we refer to it as it is recognized and consecrated in two legal istruments of the highest significance and which enjoy the widest acceptance, namely the Charter of the United Nations and the authentic interpretation of its major legal principles by the General Assembly in the Declaration on Friendly Relations... We are thus not asking the participants in the Conference to accept something new. We are just proposing to them to state explicitly in the field of humanitarian law what they have already accepted as existing and binding law within the framework of the

United Nations and General International Law."[1]

Along the same lines also was the speech of the representative of Yugoslavia, Mr Obradovic, who said that Article 1 of Protocol I should be drafted clearly so as to avoid any misinterpretation and to ensure that it conformed to contemporary international law. It was with that in mind that his delegation had co-sponsored the amendment introduced by the Egyptian representative (CDDH/I/11 and Add. 1). The amendment, he said, contained nothing new; all it did was to make explicit a rule which had developed gradually over the past quarter of a century and had now been generally accepted. In acordance with substantive international law, he added, any armed struggle carried on to achieve the right of peoples to self-determination was an international armed conflict within the meaning of Article 2 common to the Geneva Conventions of 1949. That principle, he said, had been affirmed in numerous United Nations General Assembly resolutions of which the most recent was resolution 3103 (XXVIII) of 12 December, 1973.[2]

In brief, as the delegation of Norway put it, "the sponsors of amendment CDDH/I/11 and Add. 1 were simply asking for the Geneva Conventions to be interpreted within the framework of the existing international legal system. That was the only framework which to some extent could claim to be objective."[3]

This was also the view of delegations from Eastern Europe sponsoring amendments CDDH/I/5 and CDDH/I/13. Mr. Cristescu of

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1. CDDH/I/SR.2, para. 8 - 11, quotation from para. 10.
2. CDDH/I/SR.2, para. 16 - 29, esp. para. 16 and 17.
3. CDDH/I/SR.3, para. 34.

Romania, introducing his delegation's amendment (CDDH/I/13), said that some of the reasons for its submission had already been explained by the Egyptian representative in introducing his own group's amendment (CDDH/I/11 and Add. 1). Among the international instruments which justified his delegation's amendment, said Mr. Cristescu, were Article 1 of the Charter of the United Nations, the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December, 1960), 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 (General Assembly resolution 2625 (XXV) of 24 October, 1970).[1] But the delegation of Romania injudiciously introduced into the discussion the rather controversial notion of aggression when he remarked that international law considered aggression as an international crime, and that humanitarian law came within the general framework of international law and should conform to its principles, hence the reference in the Romanian amendment to the right of peoples in colonies and non-self-governing territories to defend themselves against aggression.[2]

The representative of the German Democratic Republic, introducing amendment CDDH/I/5, also invoked the notion of aggression. He said that it was increasingly recognized that forcible maintenance of a colonial regime was an international crime, equivalent to permanent aggression. In international

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1. CDDH/I/SR.2, para. 13.
2. CDDH/I/SR.2, para. 15.

practice, a people under colonial oppression had the same right of self-defence as a state under armed attack.[1] But like the representative of Romania, the representative of the German Democratic Republic did not explain the relevance of the notion of aggression to the applicability of international humanitarian law. It is possible however, that the communist delegations had invoked the notion of aggression in preference to self-determination which is not mentioned in amendment CDDH/I/5 or amendment CDDH/I/13. Indeed, the delegation of Romania went so far as to state that a general reference to the right of self-determination would not be appropriate in the context of Article 1 of Protocol I because, in its view, United Nations jurisprudence in that field covered only one aspect of the right of peoples to self-determination.[2] Such a statement, at any rate, is belied by the very definition of the right of peoples to self-determination as laid down in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The reality is that East European delegations (except Yugoslavia) were reluctant to make unqualified reference to the right of peoples to self-determination. That was probably why they adhered to the language of resolution 3103 (XXVIII) of 12 December, 1973.

Apart from these differences between the sponsors of amendment CDDH/I/11 and the sponsors of amendments CDDH/I/5 and CDDH/I/13, all the sponsors of these amendments claimed that their proposals contained nothing new. Thus, the delegation of

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1. CDDH/I/sr.2, para. 36.
2. CDDH/I/SR.2, para. 54.

the German Democratic Republic stated that:

> "The new paragraph which sponsors of amendment CDDH/I/5 and Add. 1 were proposing to add to Article 1 of draft Protocol I embodied the principles of resolution 3103 (XXVIII) and was designed to codify international law already in force."[1]

To the same effect was the following statement made by the delegation of the Soviet Union with reference to amendment CDDH/I/5 of which it was a co-sponsor:

> "The right of peoples to govern themselves was recognized in international law, and their struggles to that end were international armed conflicts covered by the Geneva Conventions and other agreements in the field of humanitarian law. Consequently, the sole object of the propsal was to embody in humanitarian law a rule which was already in existence and which took into account the realities of the times."[2]

The position of the proponents of the international character of wars of national liberation may thus be summarized as follows: first, that Article 2 of the Geneva Conventions should be interpreted within the framework of general international law; second, that in accordance with general international law armed conflicts in which peoples fight in the exercise of their right to self-determination - mutatis mutandis - are of international character within the meaning of Article 2 of the Geneva Conventions; and third, that the international charater of such armed conflicts has been evidenced in

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1. CDDH/I/SR.2, para. 38.
2. CDDH/I/SR.3, para. 1.

international practice, particularily in resolution 3103 (XXVIII) of 12 December, 1973, adopted by the UN. General Assembly.

By contrast, at least until 1974, Western delegations (except Norway and Australia who were co-sponsors of amendment CDDH/I/11), advocated the view that wars of national liberation are armed conflicts of non-international character. The arguments they advanced in support of this view and the objections they raised against amendments CDDH/I/5, 11 and 13, and the counter-arguments made in reply will be reviewed in the remainder of this section. In this review, it is proposed to follow the example of Professor Abi-Saab in his lectures at the Hague Academy of International Law and to classify these arguments into three categories: objections on grounds of legal feasibility, objections on grounds of opportunity (legislative policy), and objections on grounds of practicability.[1] This categorization is preferrable to that of Dan Ciobanu who classified the various arguments put forward by Western delegations into arguments pertaining to the advisability, arguments pertaining to the admissability, and arguments pertaining to the feasibility of assimilating wars of national liberation to international armed conflicts.[2]

It should be noted that from the point of view of the supporters of the international character of wars of national

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1. Abi-Saab, Wars of National Liberation in the Geneva Conventions and Protocols, 165 Recueil des Cours of the Hague Academy of International Law, 1979-IV, pp. 376-384.
2. Dan Ciobanu, The Attitudes of Socialist Countries, in Cassese (ed.), The New Humanitarian Law of Armed Conflict, 1979, pp. 406-409. Ciabanu did not discuss the various arguments advanced by Western delegations; he only summarized them.

liberation the question was not one of assimilation but of codification. To speak of assimilation is to equate the term 'international' with the term 'inter-state' and thus assume what ought to be proved. Moreover, Dan Ciabanu's classification seems too subjective to contribute to our understanding of the discussion.

However, it should be noted that Western delegations did not present their arguments schematically, and that any classification is the work of writers. This being said, we turn now to the actual debate which took place at the first session of the Diplomatic Conference of 1974.

4.2.1. Objections on the Grounds of Legal Feasibility:

The first argument to be mentioned in this series of objections relates to the relevance of the work of the United Nations in legal matters to the work of the Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts. Thus, to the speech made by the Egyptian delegation introducing amendment CDDH/I/11, the French delegate, Mr. Girard put forward the following objection:

> "... two completly different concepts were emerging from the discussion. The first was the concept upon which the Egyptian representative had based his statement and the second was the concept to which his Government subscribed, namely, that the United Nations and the ICRC pursued their activities on different levels. The United Nations is the political body whose role was to find political solutions to specific problems of the moment

whereas humanitarian law must provide protection for all war victims at all times ... "[1]

Apparently, the French delegate had meant to say that the United Nations has nothing to do with law-making because the United Nations is a political body. If so, the French argument would be as absurd and nonsensical as "arguing that legislation by parliament has no legal significance because parliament is a political body."[2]

Nor the artificial dichtomy between the United Nations as a political body and the Diplomatic Conference as a humanitarian and a legal one is convincing; it suffices here to meditate the import of the adjective "Diplomatic".[3]

Moreover, nobody can reasonably deny today that the United Nations has become the principal instrumentality for the codification and development of international law, whether through the work of the International Law Commission or other United Nations bodies. It is therefore unconvincing to argue that codification and development of international law was irrelevant to the work of a Diplomatic Conference held under the auspices of the ICRC because it was done in the United Nations.

The relevance of the work of the United Nations to the work of the Diplomatic Conference was contested in other forms. Thus, it was said that self-determination was mentioned in the Charter of the United Nations "as a principle, not as a right;"[4] that terms like 'self-determination' and 'peoples' were all too

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1. CDDH/ISR.2, para. 49.
2. Abi-Saab, op. cit., p. 378.
3. Loc. cit.
4. Draper (UK), CDDH/I/SR.2, para. 46.

vague and elastic and could not be used as a basis for law making;[1] that the General Assembly of the United Nations has no legislative powers and that at most it was competent to "prepare legislation and invite States to work out treaties;"[2] that United Nations resolutions, even when adopted unanimously were not a component of positive international law;[3] that no resolution of the United Nations (incuding the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations) could amend the Charter, which would remain inviolate until amended in the proper manner.[4]

It seems doubtful whether all these arguments were relevant to a discussion of the international character of wars of national liberation. Nevertheless, these arguments were not left unanswered.

The argument that "self-determination was mentioned in the Charter as a Principle, not as a right, was rightly answered by categorically stating that it did not matter whether the "right of peoples to self-determination was called a 'right or a 'principle'; what counted was that it was part of contemporary international law."[5]

With regard to the criticism that terms like 'self-determination' and 'peoples' were too vague and elastic to serve as a basis for law-making, it should be noted first of all that almost all concepts of international law have a more

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1. Draper (UK), CDDH/I/SR.2, para. 46; de Breucker (Belgium), CDDH/ISR.2, para. 35; Lysaght (Ireland), CDDH/I/SR.5, para.10.
2. De la Pradelle (Monaco), CDDH/I/SR.4, para. 20.
3. Loc. cit.
4. Draper (UK), CDDH/I/SR.2, para. 46.
5. Abi-Saab (Egypt), CDDH/SR.5, para. 4.

or less large margin of vagueness around them and that vagueness and alasticity has never prevented them being used as a basis for law-making. In the case at hand, it was argued in reply that:

> "It was true that the concept of 'peoples' still had to be more precisely defined in legal terms; although that task was difficult, it was not impossible ... the Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV) provided an adequate basis for determining, in a given situation, whether the right of peoples to self-determination was applicable ..."[1]

Amendment CDDH/I/11 doubtless still contained some imprecision, but no more than other texts of the same nature: unfortunately, international law always allowed for a wide margin of interpretation, which could always be used in bad faith. That was an unavoidable deficiency which must be mitigated, as far as possible, by satisfactory guarantees of implementation and by reducing the margin of divergent interpretation as far as possible which was exactly the purpose of the amendment.[2]

The alleged vagueness of the concept of 'people' had also been used in a tactical move to dissuade delegations from supporting amendment CDDH/I/11. "The amendment in document CDDH/I/11 spoke of 'peoples", said the Belgian representative,

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1. Ibid., para. 4.
2. Ibid., para. 6.

"but what were 'peoples' in international law ? It would be impossible to speak of an international armed conflict every time an ethnic community wished to sever itself from a State."[1]

Such a tactic, however, did not work. The representative of Nigeria, for example responded by saying that he could assure the Belgian representative that some of the points he had made had not entered the sponsor's minds at all when they were drafting their amendment (CDDH/I/11). His delegation had sponsored the amendment in the belief that it was based on generally accepted principles of international law. He (the representative of Nigeria) understood the right to self-determination not as encouraging secessional and divisive subversion in multi-ethnic nations, but as applying to a struggle against colonial and alien domination, foreign occupation and racist regimes.[2]

Speaking on the same point the representative of Egypt said:

> "Delegations which were afraid that the principle (of self-determination) would apply to all states where there was a variety of races, languages or religions need not be alarmed: according to the Declaration[3], it applied only in cases where such grounds were used as a basis for systematic discrimination."[4]

The arguments that the General Assembly of the United Nations has no legislative powers; that General Assembly

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1. De Breucker (Belgium), CDDH/I/SR.2, para. 35.
2. Clark (Nigeria), CDDH/I/SR.2, para. 41.
3. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.
4. Abi-Saab (Egypt), CDDH/I/SR.5, para. 5.

resolutions, even when adopted unanimously were not a component of positive international law; and that no resolution of the United Nations could amend the Charter are at best only indirectly relevant to the discussion, for the question at hand is not a question of law-making but a question of law-determination, and states are free to express their views on the rules of international law at any forum and in whatever form.

It is uncontestable that states are the primary law-determining agency,[1] and that "the teachings of the most highly qualified publicists of the various nations" are but "subsidiary means for the determination of rules of law."[2] Moreover, according to Article 31 of the Vienna Convention on the Law of Treaties, there shall be taken into account, together with the context of a treaty:

a) any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions;

b) any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation;

c) any relevant rules of international law applicable in the relations between the Parties.[3]

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in

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1. On the "law making processes and law-determining agencies," see generally, Schwarzenberger, International Law, Third edition, 1957, pp. 25 et seq.
2. Article 38 of the Statute of the International Court of Justice, text in Brownlie (ed), Basic Documents in International Law, second edition, 1978, pp. 267 et seq.
3. Article 31 (3) of the Vienna Convention, text in Brownlie, ibid., pp. 233 et seq.

accordance with the Charter of the United Nations is a subsequent agreement between the members of the United Nations on the interpretation of the principles of international law elaborated in the Declaration. Moreover, the Declaration expressly states that "Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter ..." In other words, no question of amending the Charter is involved. Those who claim otherwise must be captives of their own conceptions (or misconceptions) of the law of the Charter.

The argument that United Nations resolutions, even when adopted unanimously, were not a component of positive international law (whatever this was supposed to mean), is untenable. The components of positive international law are the rules of international law. The question whether a rule of international law exists on a certain matter is a question of evidence. No one can reasonably deny that United Nations resolutions provide an important source of evidence on rules of international law, whether with regard to the existence of the rule itself or with regard to its meaning.

The last objection on grounds of legal feasibility to be examined in this subsection was made by the Italian representative, Professor Cassese.

> "His delegation could not share the view that wars of national liberation were already covered by Article 2 of the 1949 Geneva Conventions in that those movements were 'Powers' under the Third paragraph of that article and as such entitled to accept and apply the Geneva Conventions. In his delegation's opinion, the word 'Powers' used in the third paragraph of Article 2 of

the Geneva Conventions could only mean States and not authorities other than States."[1]

Professor Cassese alledged that this interpretation was born out not only by the letter and spirit of the Conventions but also by the circumstance that many of the provisions of the Geneva Conventions called for a complicated machinery which was, generally speaking, available only to States.[2]

It may be noted that Professor Cassese was the only Western delegate to articulate the argument in the manner quoted above. Other Western delegates who apparently shared the same view contended that the requirements of the Conventions could only be fulfilled by states, according to some delegates,[3] or by other equally responsible bodies, according to others.[4] We shall revert to these arguments in the discussion of the variety of objections on grounds of practicability. Here, it is propsed to concentrate on the argument that the term 'Powers' in Article 2, paragraph 3, common to the Geneva Conventions could only mean states and not authorities other than states.

For a start it is undeniable that the term 'Powers' in diplomatic language normally refers to 'States' and therefore, strictly speaking, there is a presumption that the term 'Powers' in Article 2, paragraph 3, common to the Geneva Conventions, could only mean States. This presumption, however, is rebuttable, and there is strong evidence to rebut it.

First, the Geneva Conventions, being humanitarian

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1. CDDH/I/SR.3, para. 38.
2. Loc. cit.
3. E.g. Draper (UK), CDDH/I/SR.4, para. 25; De Breucker (Belgium), CDDH/I/SR.2, para. 32.
4. E.g. Prough (U.S.A.), CDDH/I/SR.2, para. 51.

Conventions (or so they are supposed to be), commend the widest possible application of their provisions. Indeed, even in armed conflicts of non-international character, the parties are urged to apply in addition to Article 3 common to the Geneva Conventions, and by virtue of that Article, all or part of the Geneva Conventions by means of special agreements. Moreover, it is particularly revealing of the purpose and object of the Geneva Conventions that their provisions constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection and relief of the victims of armed conflict.[1] It is the consent of the Parties to the conflict (or the lack of it), not the provisions of the Conventions, which constitutes the real obstacle in the way of the application of the Conventions. It is too formalistic therefore to invoke some of the provisions of the Conventions in order to restrict their field of application.

Second, the claim that the term 'Powers' could only mean 'States' seems to be too formalistic even by classical standards. According to classical criteria even a purely 'civil war' becomes of international character and the law of armed conflict becomes applicable in its entirety upon recognition of the insurgents as belligerents by third states or by the established gövernment against which the civil war is being waged. It is also generally held that recognition of belligerency does not imply the reocgnition of the insurgents as a

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1. See Articles 9/9/9/10, of the four Geneva Conventions respectively.

state. In other words, the Conventions in this case would apply to the insurgents in their capacity as a belligerent power, a belligerent community, or a de facto government of the part of national territory under their control, but not as a state.[1] Indeed, Professor Cassese himself admits that "in the event that the insurgents are recognized as a belligerent Power either by the lawful Government or by third States, ... the internal conflict turns into an international war and the rules regulating warfare become applicable."[2] It is difficult to see how the Geneva Conventions would apply in this case if the term 'Powers' meant only 'states' and that only states were entitled under the Geneva Conventions to accept and apply the Conventions by virtue of Article 2, paragraph 3 of the Conventions.

Thirdly, according to paragraph 3 of Article 4 of the Third Geneva Convention, the Convention applies, inter alia, to

> "Members of the regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

The ICRC Commentary seems to insist that this provision must be interpreted, in the first place, in the light of the actual case which motivated its drafting - that of the forces of General de Gaulle which were (during the Second World War) under the authority of the French National Liberation Committee.[3] Such insistance however does not seem necessary, since the

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1. See also Abi-Saab, 165, Recueil des Cours, 1979, pp. 400-401; D. Schindler, 163 Recueil des Cours, 1979, pp. 135-136.
2. Cassese, The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflict, in Cassese (ed), Current Problems of International Law, 1975, p. 287.
3. Pictet (ed.), Commentary on the Third Geneva Convention, Geneva, 1960, p. 62.

forces of General de Gaulle were 'co-belligerents', and, according to the ICRC Commentary itself, "the authors of the Convention deliberately dropped the requirement that such armed forces should be fighting in conjunction with a State recognized as a regular belligerent."[1] In other words, the government or authority which is not recognized by the adversary, may itself be a Party to the conflict, notwithstanding the fact that the adversary does not recognize this 'authority' as a Party to the conflict.

It may be noted that the ICRC Commentary does not say explicitly what the term 'authority' means in the context of the Geneva Conventions, but the following quotation from the Commentary suggests that the 'authority' in question is neither a state nor a government nor even a Party to the conflict in the eyes of its adversary. The ICRC Commentary in this regard says:

> "The distinguishing feature of such armed forces (referred to in Article 4, paragraph 3, of the Third Geneva Convention) is simply the fact that in the view of their adversary, they are not operating ... under the direct authority of a Party to the conflict in accordance with Article 2 of the Convention."[2]

As in the view of the authors of the ICRC Commentary, a Party to the conflict in accordance with Article 2 of the Conventions means a 'state', this quotation may be read as saying that the distinguishing feature of the 'authority' referred to in Article 4, paragraph 3, of the Third Geneva

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1. Ibid., p. 64.
2. Ibid., p. 63.

Convention, is simply the fact that in the eyes of its adversary, it is not operating under the direct authority of a State Party to the conflict. Indeed, this was the actual case of the "Free French National Committee" or the "Free French Movemnet" of General de Gaulle; it was not recognized as a State or a government even by its allies,[1] moreover, it was not recognized by Germany as a Party to the conflict since France had concluded an armistice agreement with Germany, dated 22 June, 1940, of which Article 10, paragraph 3, went so far as to stipulate that French nationals who continued to bear arms against Germany would not be entitled to the protection of the laws of war.[2]

In a word, the 'authority' referred to in paragraph 3 of Article 4 of the Third Geneva Convention is simply a liberation movement.

This 'authority', which is neither a state nor a government nor even recognized by the adversary as a state, a government, or a Party to the conflict, inorder to benefit from the Geneva Conventions, should, according to the ICRC Commentary, "either consider itself as representing one of the High Contracting Parties, or declare that it accepts the obligations stipulated in the Convention and wishes to apply them."[3]

Accession to the Geneva Conventions by means of an ad hoc declaration of acceptance is a procedure open to non-contracting 'Powers' by virtue of paragraph 3 of Article 2 common to the

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1. Britain, for example, recognized the French National Committee of General de Gaulle as "representing all Free Frenchmen wherever they may be, who rally to the Free French Movement in support of the Allied Cause." Whiteman, Digest of International Law, Vol. 2, p. 471.
2. Pictet (ed.), Commentary on the Third Geneva Convention, Geneva, 1960, p. 62.
3. Ibid.,p. 63.

Geneva Conventions. Accordingly, unless it is submitted that the term 'Powers' refers to 'states' as well as to entities or authorities other than states, it would be difficult for such authorities as mentioned in Article 4, paragraph 3, of the Third Geneva Convention to be bound by the Conventions. Indeed, it does not need much ingenuity to prove that this is actually the case; the Third Geneva Convention speaks throughout of the 'Detaining Power' and of the 'Power on which the prisoner depends", and unless these terms refer to entities other than states, it would be impossible to operate paragraph 3 of Article 4 of the Third Geneva Convention, or to bind such authorities by the provisions of the Conventions as a whole.

Fourth, in legal literature[1], as well as in the practice of the United Nations, the term 'authorities' has normally been used to distinguish entities not representing states from 'governments' representing states. For example, the Security Council, in resolution No. 50, of the 29 May, 1948, which called for a cessation of all military activities for four weeks and for the protection of the Holy Places in Palestine, no less than five times used the descriptive formula 'Governments and Authorities.' The same resolution invited "the States Members of the Arab League and the Jewish and Arab authorities" to communicate to the Security Council their acceptance of this resolution. In a previous resolution (Resolution No. 46, of 17 April, 1948, the Security Council called upon "all persons and organizations in Palestine and especially upon the Arab Higher

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1. See for example, Oppenheimer, Governments and Authorities in Exile", 36 A.J.I.L., 1942, pp. 568-574; Whiteman, Digest of International Law, Vol. 2, p. 467 et seq.

Committee and the Jewish Agency ...". It is these 'organizations' which were described as 'authorities' whereas the participating'states' were referred to as 'States' or 'Governments'. Pratice, with regard to the usuage of terminology was thus settled long before the Geneva Conventions were adopted. This clearly supports what has been said above; that the term 'authority' in paragraph 3 of Article 4 of the Third Geneva Convention referred to entities other than 'Governments' representing states, and that these authorities were 'Powers' within the meaning of paragraph 3 of Article 2 common to the Geneva Conventions.

Fifth, it is really a naive formalistic logic which assumes that wars of national liberation would automatically fall into the category of armed conflicts of non-international character once the term 'Powers' in Article 2, paragraph 3, of the Geneva Conventions were construed to mean only states, and not entities other than states. For such an interpretation might well lead to the absurd conclusion that at least some wars of national liberation would be put outside the pale of the Geneva Conventions altogether. This, for instance would be the case of the peoples of mandated, trust, and non-self-governing territories which had not yet exercised their right of self-determination.

Armed conflicts of non-international character are described in Article 3 common to the Geneva Conventions as armed conflict "occuring in the territory of one of the High Contracting Parties." This decription, to say the least, can not be extended to mandated territories, since the legal status of these territories and their native inhabitants was established long before the Geneva Conventions were created. It is a matter

of common knowledge that the mandates were established on the principle of non-annexation. Moreover, the creation of the League Mandates did not involve "any cessation of territory or transfer of sovereignity" to the mandatory.[1] This view was expressed by the International Court of Justice in its Advisory Opinion on the Legal Status of South West Africa (Namibia), and was expressed as early as 1923 by the Permanent Mandates Commission of the League of Nations. In its report of that year (1923), the Commission examined the opinions of writers for and against the attribution of sovereignty to the mandatory and accepted view that the mandatory has no sovereignty on the mandated territory.[2] The report of the Commission unequivocally stated that "under the mandate system the mandatory state is merely the government of a territory which does not belong to it,"[3] and that, the mandated territory, even when administered as an integral part of the mandatory (as in the case of C mandates)", "constitutes a distinct entity from the international point of view."[4]

Thus, the legal status of mandated territories makes Article 3 of the Geneva Convention inapplicable, and therefore excludes the characterization of the conflict between the native inhabitants of a mandated territory and the mandatory Power, as non-international, moreover the legal status of the native mandated terrotories clearly calls for the application of the Fourth Geneva Convention, and thus testifies to the international

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1. See ICJ Reports (1950), pp. 128-133, at 132.
2. Quincy Wright, Status of the Inhabitants of Mandated Territories, A.J.I.L., Vol. 18, 1924, pp. 306-315, at 306.
3. Ibid., p. 308.
4. Ibid., pp. 309-10.

character of such armed conflicts.

The legal status of the native inhabitants of mandated territories was made absolutely clear in a resolution adopted by the council of the League of Nations in its meeting of April 23, 1923. The text of the resolution runs as follows:

"The Council of the League of Nations,

Having considered the report of the Permanent Mandates Commission on the national status of the inhabitants of territories under B and C mandates;

In accordance with the principles laid down in Article 22 of the Covenant;

Resolves as follows:

1. The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the Mandatory Power and cannot be identified therewith by any process having general application.
2. The native inhabitants of a mandated territory are not invested with the nationality of the Mandatory Power by reason of the protection extended to them.
3. It is not inconsistent with (1) and (2) above that individual inhabitants of the mandated territory should voluntarily obtain naturalization from the Mandatory Power in accordance with arrangements which it is open to such Power to make, with this object under its own law.
4. It is desirable that native inhabitants who receive the protection of the Mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate."[1]

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1. Quoted from Quincy Wright, Ibid., pp. 313-14.

As the native inhabitants of a mandated territory were not nationals of the Mandatory Power, the Fourth Geneva Convention relative to the protection of civilian persons became applicable to them. According to Artcile 4, paragraph 1, of the said Convention:

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or occupying Power of which they are not nationals." (Emphasis added).

Thus, on the authority of the legal status of mandated territories and their peoples, it cannot reasonably be argued that the term 'Powers' in Article 2, paragraph 3, common to the Geneva Conventions, referred only to states, and not to entities other than states. In a word, the peoples of mandated territories were 'Powers' within the meaning of Article 2 common to the Geneva Conventions.

The legal status of colonies and their inhabitants (i.e., non-self-governing territories) was not as clear as that of mandated territories. But by 1960, the separate and distinct status of the territory of 'a colony or other non-self-governing territory' from that of a colonial Power was clearly recognized. This was done by the General Assembly of the United Nations in its famous "Declaration on the Granting of Independence to Colonial Countries and Peoples", and was expressly laid down in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:

> "The territory of a colony or other non-self-governing

territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles."[1]

This 'separate and distinct' status of the territory of a colony or other non-self-governing territory from that of the state administering it, clearly prevents the characterization of the armed conflict between the administering state and the people of the colony or other non-self-governing territory, as an armed conflict of non-international character.

As Professor Schindler had stated in his lectures at the Hague Academy of International Law:

"The position of a liberation movement as a 'Power' within the meaning of Article 2 (3) (of the Geneva Conventions) and possibly of the provisions of accession[2] is particularly strong, if a territory can be ascribed to it with a status separate and distinct from the State administering it, as is the case for colonies, mandates and trust territories. In such case, the international character of a conflict is intensified by the element of territory."[3]

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1. Text in Brownlie (ed.), Basic Documents in International Law, (Second edition, 1978), p. 39.
2. Articles 60/59/139/155 of the First, Second, Third and Fourth Geneva Conventions of 1949, respectively.
3. D. Schindler, 163 Recueil des Cours, (1979 - II), p. 138.

Nevertheless, it should be noted that the talk about wars of national liberation and liberation movements in terms of 'colonies, mandates and trust territories' is too classical and does not correspond with the modern concept of wars of national liberation, as Professor Schindler himself seems to admit.[1] But such talk is sufficient to prove the point that the term 'Powers' in Article 2, paragraph 3, of the Geneva Conventions, referred to states, as well as to entities other than states.

4.2.2. Objections on Grounds of Legislative Policy

The amendments (CDDH/I/5, CDDH/I/11 and CDDH/I/13) which explicitly characterized wars of national liberation as armed conflicts of international character within the meaning of Article 2 of the Geneva Conventions have also been criticised by a number of Western delegations on the grounds that they were based on political and subjective criteria; that they confused jus ad bellum with jus in bello; that they resurrected the old concept of just war; that they were discriminatory; that they were modelled on certain particular situations. These criticisms were apparently the result of misconceptions and lack of communication between the proponents and opponents of the amendments, but they have the merit of bringing into sharp focus the very policy underlying the so-called international humanitarian law and the traditional distinction between armed

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1. See, ibid., pp. 136 - 139. See further, this Chapter, Section 6.

conflicts of international character and armed conflicts of non-international character. In this discussion each of these grounds of criticism will be taken as basis for further elaboration.

a) A frequently recurrent objection on ground of legislative policy was that the amendments proposed by supporters of the international character of wars of national liberation were based on purely political and subjective criteria in the sense that the characterization of the conflict would depend on the political motivation or subjective judgement of one of the parties to the conflict - elements which cannot serve as valid legal criteria and which go against the very essence of humanitarian law.[1] Some statements in this respect may be quoted for illustration.

Thus the French representative said:

> "Considerations of elements such as motivation, justice and legitimacy, which it was quite normal to discuss in the United Nations, would be fatal in an assembly held under the auspices of the ICRC. Humanitarian law must remain free of any notion of political motivation or subjective judgment ... ."[2]

The representative of the United States of America agreed with the French representative and went on to say:

> "Who was to decide whether a struggle in which people were involved against their own government was an international struggle? Humanitarian law and its

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1. See also Abi-Saab, 165 Recueil des Cours, (1979-IV), pp. 380 - 382.
2. Girard (France), CDDH/I/SR.2, para. 9.

attendant responsibilities could not be based on vague concepts which introduced the concept of rightness and wrongness of a conflict, and thus jeopardized the granting of an equal degree of protection to all concerned. Internal terrorism could not be made legitimate merely by calling it an international conflict. Concepts such as "alien domination" and "racist regimes" had yet to be defined. Political considerations should be banished from the discussion, and the Committee should confine itself to ensuring better protection for all war victims through the development of humanitarian law."[1]

And in the view of the representative of the United Kingdom:

"... it was a basic principle of the Geneva Conventions, The Hague Conventions and other instruments that legal and humanitarian protection should never vary according to the motives of those engaged in a particular struggle. Moreover, to discriminate between the motives of those engaged in the struggle would violate essential principles of human rights."[2]

And in the view of the representative of Belgium:

"Wars of national liberation were anachronisms which would soon be ended and ought not to be covered by Protocol I. It would be imprudent to create a precedent by changing the categories of international law (sic) because of the motivation behind a given type of conflict."[3]

And in the same vein the representative of Switzerland said:

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1. Prugh (U.S.A.), CDDH/I/SR.2, para. 51-52.
2. Draper (UK), CDDH/I/SR.2, para. 45.
3. Breuker (Belgium), CDDH/I/SR. 2, para. 34.

"The other proposed amendments (i.e. other than emendment CDDH/I/12) tended to establish a particular category of conflicts on the basis of subjective criteria stemming from the causes of those conflicts and the aims of the parties ... His delegation believed that it would be very dangerous, and against the spirit of humanitarian law, to classify armed conflicts on the basis of non-objective and non-legal criteria."[1]

Also in the same vein the representative of Canada said that:

"He would view with anxiety the inclusion of provisions which would make the protection of the victims of armed conflict depend upon the motivations of such conflicts."[2]

Perhaps the most misleading statement in this respect was that made by the representative of Spain who said that:

"Humanitarian law should aim at the protection of all mankind without distinction, and that Protocol I should apply to all armed conflict whatever their motivation and should include no subjective criterion. His delegation was therefore against amendments CDDH/I/11 and Add. 1, CDDH/I/13, and above all, CDDH/I/5 and Add. 1."[3]

It has been rightly observed with regard to these criticisms that they reveal a fundemental misunderstanding. For what is 'legal' in contrast to political in international law? 'Legal' is an adjective describing what is based on a rule of law; and according to amendment CDDH/I/11, the criterion of the

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1. Pictet (Switzerland), CDDH/I/SR.3, para. 13.
2. Caron (Canada), CDDH/I/SR.3, para. 16.
3. Rodriguez Roman (Spain), CDDH/I/SR.3, para. 19.

envisaged category of conflicts is the principle of self-determination, which is a legal principle.[1] It is true that amendment CDDH/I/5 did not refer to self-determination but to struggles against 'colonial and alien domination and racist regimes', but even then a stable meaning has developed within the United Nations for these categories as special cases of denial of self-determination, though they may fall slightly short of covering the full scope of the principle of self-determination as elaborated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.[2]

If, however, 'political motivation' referred not to the criteria of the amendments, but to the intentions of their sponsors (supposedly to upgrade wars of national liberation) one may ask with Professor Abi-Saab whether consciously ignoring one of the major forms of post-war (1945) armed conflicts was less political and more humanitarian than explicitly providing for them in Protocol I, with a view to alleviating the sufferings they are bound to occasion.[3]

As for the criticism of 'subjectivity', it has also been observed that it was based on a misunderstanding, because the amendments, including the one which has finally become paragraph 4, of Article 1, of Protocol I, did not refer to the intention of liberation movements, but to their objective situation, and whether it warranted the application of the principle of self-

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1. Abi-Saab, 165 Recueil des Cours, (1979-IV), p. 380.
2. Loc. cit.
3. Loc. cit.

determination or not.[1] It is true, as was noted above, that the principle of self-determination has its ambiguities, but it is also true that these are no more than in the case of other generally accepted principles of international law, and even of some provisions of the Conventions and Protocols.[2]

Finally, it should be noted that in reply to the above mentioned criticisms, supporters and sponsors of the amendments which came under attack rejected these criticisms out of hand. Some statements may be quoted for illustration. The representative of Romania said that there could be no question of introducing political concepts into humanitarian law. The question was that of the relationship between humanitarian law and general international law, since the former could not be conceived in isolation from the latter. He stressed that the conflicts referred to in proposed amendments CDDH/I/5, CDDH/I/11 and CDDH/I/13 were a reality and charged those who wished them to be included in the category of internal war of being "motivated by political considerations."[3]

The representative of Cameroon said that he would be prepared to follow the advice of some delegations that juridical and political questions should not be confused provided a

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1. Loc. cit. In his article on "The Attitude of Western Countries", Professor Charles Lysaght of Ireland who represented his country at the Diplomatic Conference stated that the "case was, in essence, founded on the nature of the conflict rather than its motivation or justification. It was the existance of a colonial, alien or a racist regime and the absence of self-determination rather than any motivation of those taking up arms that made the conflict international." Cassese (ed.), The New Humanitarian Law of Armed Conflict, 1979, p. 351.
2. Abi-Saab, op. cit., p. 380.
3. Cristescu (Romania), CDDH/I/SR.2, para. 53; and CDDH/I/SR.3, para. 30.

satisfactory reply was given to two questions. First, according to the theory put forward by some Western delegates (that wars of national liberation were armed conflicts of non-international character), the repressive operations carried out in Mozambique by the Portugese Government would qualify as police operations which were essentially within the domestic jurisdiction of Portugal; was that purely a question of law or a question of politics? Secondly, was it the Conference's intention to draw up an abstract body of law with no roots in reality? Indeed, was it possible to ignore all realities of a political nature?[1]

The representative of Tanzania was not so diplomatic; he put it bluntly thus:

> "Struggles for national liberation were undeniably international conflicts, and his delegation was not prepared to accept a humanitarian law drawn up solely in the interest of the imperialist Powers."[2]

The representative of the Mozambique Liberation Front (FRELIMO) regarded the international character of wars of national liberation as "a matter of simple logic; unless it was claimed that the members of FRELIMO were Portugese, it had to be recognized that the struggle they were waging was international."[3]

Indeed, the representative of FRELIMO put his finger on one of the objective criteria for distinguishing an armed conflict of an international character from that of a non-international character within the meaning of the Articles 2

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1. Mbya (Cameroon), CDDH/I/SR.2, para. 57.
2. Kabuaye (Tanzania), CDDH/I/SR.3, para. 23.
3. CDDH/I/SR.5, para. 16.

and 3 of the Geneva Conventions. As we shall see later in the discussion, international law provides three objective tests or criteria for determining objectively whether an armed conflict is of an international or non-international character. These are: nationality, territory, and the principle of self-determination. At this stage, it may be sufficient to note that if the insurgents and the incumbents were of the same nationality, belong to the same national territory, and the government was conducting itself in accordance with the right of peoples to self-determination and thus was representative of the whole people belonging to the territory of the State without distinction as to race, creed or colour, the conflict would undoubtedly be of a non-international character. If any of these three conditions were missing, the armed conflict must be treated as one of an international character.[1]

Other delegates had in fact touched on one or more of these criteria. Thus the representative of Guinea-Bissau said:

> "The legitimate and organized struggle of peoples who wished to regain their national independence could not be regarded as an internal conflict, since the adversaries were different peoples of differnt races from different geographical backgrounds."[2]

The representative of the Pan Africanist Congress (PAC) was more elaborate. He said that:

> "by far the most important issue in relation to Article 1 was that of national liberation wars. In that connexion a number of very pertinent questions had been

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1. See below, this Chapter, Section 5.
2. CDDH/I/SR.5, para. 38.

asked: for example, who was to define such concepts as 'peoples', 'national liberation wars', 'national liberation movements' or the 'right to self-determination?'The answer was that they would be defined in the same way as definitions had been arrived at in the case of the 1949 Geneva Conventions and earlier Conventions. In other words, the work would be done by legal experts and diplomatists. When they had done so, national liberation wars would have been definitively identified as international conflicts. For that was what they certainly were regardless of their degree of intensity. The Africans of Mozambique, Angola and Guinea-Bissau were nations, and totally different nations from the Portugese nation, not 'parts' of it. The same applied to the inhabitants of all the islands which surrounded the African continent and were under foreign domination, to the African inhabitants of South Africa, Rhodesia and Namibia and to the Palestinians. The separate and independent national existence of the peoples subject to foreign domination was recognized by the entire national community, except of course by the alien groups which exercised authority over them."[1]

The last statement to be quoted here in conection with the criticisms made by Western delegations and quoted above, is the statement of the representative of Nigeria, introducing amendment CDDH/I/41 and Add. 1, on behalf of the 51 Powers which sponsored it. He said:

"The arguments on which that amendment was based were

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1. CDDH/I/SR.6, para. 14.

those that had been invoked with regard to the earlier amendments. In that conection, operative paragraphs 3 and four of Resolution 3103 (XXVIII), adopted by the General Assembly on the report of the Sixth Committee, were of outstanding importance. Moreover, the amendments reiterated some of the actual terms used by the jurists of the Sixth Committee, such as 'peoples', 'colonial and alien domination' and 'racist regimes'. Self-determination was one of the basis principles of the United Nations Charter, and its interpretation could not lead to any confusion. All such terms had now been incorporated in international legal terminology. The position of peoples engaged in liberation struggles was similar to that of peoples living in occupied territory, which was referred to in Aricle 2 common to the four Geneva Conventions."[1]

a) Another series of objections on the ground of legislative policy contended that the amendments entailed a move from jus in bello to jus ad bellum; that they had resurrected the dangerous doctrine of 'just war' and had introduced a discrimination in the field of humanitarian law, thus violating a basic principle of humanitarian law - that of the equality of the parties.[2]

Here again the objections misconstrued the amendments. For while many delegations had spoken of the legitimacy of the armed struggle against colonial and alien domination and against racist regimes, and while this legitimacy had been reaffirmed in

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1. CDDH/I/SR.5, para. 45.
2. Prugh (U.S.A.), CDDH/I/SR.2, para. 51; Pictet (Switzerland), CDDH/I/3, para. 13; Kalshoven (Netherland), CDDH/I/SR.4, para. 40.

many United Nations resolutions of both the Security Council and the General Assembly, it was the fact of the denial of self-determination, and not simply the legitimacy of the struggle for self-determination, which constituted the basis for the international character of these armed conflicts. As to the alleged ensuing discrimination it was answered as follows:

> "Other delegations had criticised the proposal (CDDH/I/11) on the ground that it confused jus ad bellum with the preferential treatment to one of the parties to a conflict. Yet it was the existing system that gave preferential treatment to one of the parties, by refusing protection to the national liberation movements. On the contrary, according to emendment CDDH/I/11, humane treatment should be afforded equally to both parties."[1]

To this it should be added that the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations reiterates more than once that:

> "Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence."

Violation of this duty has no other name than 'aggression', and the resistance to such forcible action by the peoples has no name other than self-defence. But even if we use the milder descriptions - 'forcible action' instead of 'aggression', and 'resistance' to this forcible action instead of 'self-defence', equality of the parties to the conflict before humanitarian law

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1. Abi-Saab (Egypt), CDDH/I/SR.5, para. 8.

would still constitute a discrimination between the parties to the conflict in the sense that the state which resorts to 'forcible action which deprives peoples of their right to self-determination and freedom and independence' would still be entitled to 'legitimate military necessity'. The 'forcible action' which is illegal would thus, paradoxically, become legal when committed under the jus in bello, and a double discrimination ensues when the conflict is characterized as one of non-international character since the lawful resistance would be denied legitimate military necessity and members of national liberation movements would become 'criminals'. Nowhere has international law been so divested of any sense of justice as in the claim that wars of national liberation were armed conflicts of non-international character.

It should be emphasised that recognition of the international character of wars of national liberation means no more than that the national liberation movement is entitled to *a legitimate military* necessity in accordance with the laws and customs of wars and that members of national liberation movements are lawful combatants. This leaves the adversary equally entitled to a 'legitimate' military necessity and to the protection of the laws and customs of war. The whole transaction therefore is still in favour of the party to the conflict which denies a people its right to self-determination, freedom and independence. If the justice of the cause of liberation movements were to be pushed to its logical conclusions the 'legitimate' military necessity which is allowed to the party against whom a war of liberation is waged must be withdrawn.

A comparable case was made by the Chief French and British Prosecutors before the International Military Tribunal at Nuremburg. The Chief Prosecutor M. Francois de Menton said:

> "What does this (the Kellog - Briand Pact) mean, if not that all acts committed as a consequence of this aggression for the carrying on of the struggle thus undertaken will cease to have the juridicial character of acts of war? ...
>
> Acts committed in the execution of a war are assaults on persons and goods which are themselves prohibited but are sanctioned in all legislations. The state of war could make them legitimate only if the war itself was legitimate. In as much as this is no longer the case, since the Kellog-Briand Pact, these acts become purely and simply common law crimes."[1]

In closely comparable argument in his closing address, Sir Hartley Shawcross, the Chief British Prosecutor stated:

> "The killing of combatants in war is justifiable, both in international and in Municipal laws, only where the war itself is legal. But where a war is illegal, ... there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless bands."[2]

According to McDougal and Feliciano, the International Military Tribunal did not explicitly deal with the arguments

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1. Cited in McDougal and Feliciano, Law and Minimum World Public Order, 1967, p. 531. See also Schwarzenberger, International Law, Vol. 2, (Armed Conflicts), 1968, pp. 100-105.
2. Ibid., p. 531.

put forward by Sir Hartley Shawcross and M. de Menthon, but the judgement as a whole suggests that their argument was not accepted.[1] However, the United States Miltary Tribunal of Nuremberg, they argue, was more explicit in rejecting the prosecutors' argument. Some of their illustrative examples may be indicated.

In the case of the United States v. List et al., the prosecution contended that since Germany's wars against Greece and Yugoslavia were aggresive wars, the German occupation troops were there unlawfully and gained no 'rights' whatever as an occupant. The tribunal met this contention by saying:

> "For the purpose of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellog-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against persons or property is a crime or that any or every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defence ..."[2]

In another case (United States v. Alstotter), the same tribunal refused to consider as relevant the criminal nature of Germany's aggression in determining whether the harsh German penal laws and the court decisions under those laws constituted war crimes or crimes against humanity. The Tribunal was unable to accept the conclusion that every German soldier who marched under orders, or who fought in his homeland was a criminal and

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1. Ibid., p. 533.
2. Loc. cit.

a murderer. It was pointed out by the Tribunal that if this view were accepted, the rules of warfare would no longer be the criteria of unlawful conduct in hostilities and that the pronouncement of guilt in any particular case would be reduced to a mere formality.[1]

The gist of all these arguments by the Tribunal is that the criminal character of the war is irrelevant to the conduct of hostilities; that even the aggressor has a 'legitimate' military necessity as the victim of aggression; and that the rules of jus in bello are the only valid criteria for determining whether the conduct of hostilities in any particular case was lawful or unlawful.

This indeed amounts to saying that although the whole war on the part of the aggressor is illegal the aggressor has a legal right to destroy the victim of aggression, provided that the destruction is carried out in accordance with the rules of jus in bello, which is logically absurd. If the whole war is illegal its parts must be illegal and the aggressor must be resonsible for the whole cost of the war in human and physical resouces.

This does not mean that jus in bello would become redundant. This law must be respected by all parties to the conflict, since its rules constitute criteria for determining 'individual criminality', and above all, constitute standards of the humane treatment due to the victims of armed conflicts, regardless of the characterization of the resort to force as legal or illegal. But until, and unless, the so-called

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1. Ibid., p. 533 - 34.

'legitimate military necessity' is denied to the party which in the judgement of the international community is considered to be guilty of unlawful use of force, the just and lasting peace which is the main purpose of the United Nations, would remain as remote an objective as it has always been in an international system of power politics, and the so-called humanitarian law would continue to serve as an instrument of power politics in disguise.

c) Another criticism of the amendments which explicitly characterized wars of national liberation as international in character was that the amendments envisaged only particular cases. This criticism was suggested, rather explicitly formulated, and was answered as follows:

> "The sponsors of the proposal (CDDH/I/11) had been reproached with placing undue emphasis on special situations. Nevertheless, a number of important principles in international humanitarian law had originated in such situations: thus the second paragraph of Article 2 of the Geneva Conventions[1] had been adopted because of what happened in Denmark during the Seceond World War; paragraph 3 of Article 4 of the Third Geneva Convention had its origin in General de Gaulle's French Liberation Movement and in Italian resistance to the facist authorities ... the latter of those two provisions clearly supported the proposition that liberation

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1. The second paragraph of Article 2 common to the Geneva Conventions provides: "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

struggles ... had to be considered as international conflicts in the sense of the Geneva Conventions of 1949."[1]

To the same effect was the following statement made by the representative of Egypt:

> "... it had been said that the proposal in document CDDH/I/11 envisaged only particular cases; but that was true of international law as a whole, and the Geneva Conventions in particular, which had been gradually built up on the bais of specific situations revealed in international practice."[2]

d) Another criticism on grounds of legislative policy was that "wars of liberation were anachronisms which would soon be ended"[3], and that the Protocol should be restricted to "permanent rather than transitory situations."[4]

This objection had been anticipated by the Egyptian delegate in introducing the 15 - Power amendment (CDDH/I/11). He said:

> "We all hope that the occasion for wars of national liberation will not arise, and that wisdom will prevail. But we have to plan our action, especially in such a major legislative endevour, on the assumption that unfortunately they may be with us for some time to come."[5]

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1. Longva (Norway), CDDH/I/SR.3, para. 35.
2. Abi-Saab (Egypt), CDDH/I/SR.5, para. 3.
3. De Breucker (Belgium), CDDH/I/SR.2, para. 34.
4. Partsch (Federal Republic of Germany), CDDH/I/SR.3, para. 17.
5. Abi-Saab (Egypt), CDDH/I/SR.2, para. 9, quoted verbatim by Abi-Saab, 165 Recueil des Cours, p. 382.

4.2.3. Objections on the Grounds of Practicability

These were the most substantive objections concerning the applicability of the substantive regulations of the Geneva Conventions and Protocol I to wars of national liberation.

It was said in this regard that the amendments were incompatible with the structure and economy of the Geneva Conventions and Protocol I; that the substantive rules of these Conventions were modelled on conventional warfare and required for their implementation by the parties the existance of mechanisms available only to states; that their application to wars of national liberation would impose on liberation movements heavy obligations which they would be in no position to fulfil, whence the discrimination between the parties to the conflict.[1]

The ascertainment of the veracity and import of these objections would require the examination of the Geneva Conventions and Protocol I article by article, an examination which cannot be made here.[2] For the purposes of this discussion it may be sufficient to note that in view of these objections a Working Group representing the various regional groups of states was in fact set up to examine the implications of the adoption of Article 1 of Protocol I. The Working Group met throughout the Second Session of the Diplomatic Conference (1975) and had unanimously concluded that no changes in the Protocol were

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1. See in this respect the statements made by : De Breucher (Belgium), CDDH/I/SR.2, para. 31-32, and CDDH/I/SR.4, para.25; Cassese (Italy), CDDH/I/SR.3, para. 38; Kalshoven (Netherlands) CDDH/I/SR.4, para. 39; Draper (U.K.), CDDH/I/SR.2, para. 44, and CDDH/I/SR.4, para. 25; Prugh (U.S.A.), CDDH/I/SR.4, para. 4. See also Baxter, The Geneva Conventions of 1949 and Wars of National Liberation, in Rivista Di Dirritto Internazionale, Vol. LVII, fasc. 2 - 1974, pp. 196 - 197.
2. Abi-Saab, 165 Recueil des Cours, 1979, pp. 382 - 83.

required.[1]

This conclusion should come as no suprise. As the representative of Norway, replying to the representative of the Netherlands who claimed that application of the Geneva Conventions would be difficult in cases where hostilities only took the form of infiltration, had said:

> "The problem involved might be compared with that of upholding the equality between the occupiers and the occupied, a problem which had never prevented military operations from being regarded as international conflicts in the sense of the Geneva Conventions."[2]

The representative of Egypt put it more forcefully:

> "Some delegations had said that the national liberation movements would be unable to apply the provisions of the Conventions and the Protocol because the conditions of their struggle were different in practice from those of international conflicts. That was a false distinction: the material conditions of national liberation struggles were similar to those of resistance movements against foreign occupation, which were specifically mentioned in the (Geneva) Conventions and were classified as international conflicts; it had not been considered that the special conditions of the struggles of such movements would prevent them from applying the Conventions."[3]

It is also useful to recall that in 1948, the Seventeenth

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1. Charles Lysaght, The Attitude of Western Countries, in Cassese (ed.) The New Humanitarian Law of Armed Conflict, 1979, p. 354. See also the statement made by the representative of Egypt, Abi-Saab, CDDH/SR.36, para. 69.
2. Longva (Norway), CDDH/I/SR.4, para. 45.
3. Abi-Saab, Egypt, CDDH/I/SR.5, para. 7.

International Red Cross Conference which met in Stockholm had approved a fourth paragraph common to the draft (Geneva) Conventions extended the application of the Conventions to armed conflicts of non-international character. It was not adopted by the Geneva Diplomatic Conference of 1949, not because of any unsurmountable legal difficulty or impossiblity of application, but because of the lack of political will on the part of the majority of States at that time to go that far. However, the main point remains that the proposal was made by the ICRC, the organization most intimately involved with the application of the Conventions. The ICRC and the many delegations which at that time supported the Stockholm text of paragraph 4 of common Article 2 of the Draft Geneva Conventions would be disrupted by the adoption of the Stockholm text.

Moreover, at the very Diplomatic Conference in which all the objections discussed so far had been made there were states like Monaco, Lichtenstein and the Holy See, which are parties to the Geneva Conventions. Can it be realistically argued that their material capacity to fulfil the obligations under the Geneva Conventions are greater than, or even equal to, some of the liberation movements which participated in the work of the Diplomatic Conference ?

Liberation movements at the Diplomatic Conference were particularly sensitive to the argument that only states were capable of applying the Geneva Conventions; they pointed out that they had been applying the Conventions, while their adversaries, which were supposedly capable of applying the Conventions had always violated them.[1] The representative of

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1. See footnote 1 on next page.

the Mozambique Liberation Front - FRELIMO, after giving specific examples of the application of the Geneva Conventions by liberation movements, quite correctly, summed up the problem of the application of the Geneva Conventions by saying:

> "The essential requirement, indeed, was not the technical apparatus or the material means, but the will to apply the principles of humanitarian law and the political outlook of the parties. Cases were known where the States had departed from the established rules far more grossly than the liberation movements. If the rules had to be adapted, that might be due to the special conditions of guerrilla warfare and not to the fact that the parties were or were not states."[2]

5. The Binding Quality of Article 1, Paragraph 4, of Prtocol I, which Proclaims the International Character of Wars of National Liberation

So far, the various amendments to the ICRC text of draft Article 1 of Protocol I have been reviewed, as well as the various arguments put for and against the amendments. The outcome - paragraph 4 of Article 1 of Protocol I - has already been quoted at the beginning of this Chapter. It provides that armed conflicts of international character within the meaning of Article 2 common to the four Geneva Conventions of 1949

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1. Armaly (Palestine Liberation Organization - PLO), CDDH/I/SR. 5, para. 34; Monteiro (Mozambique Liberation Front - FRLIMO), CDDH/I/SR.4, para. 46.
2. Monteiro (Mozambique Liberation Front - FRELIMO), CDDH/I/SR. 5, para. 18.

"include 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, 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." A motion for a separate vote on this paragraph was put forward by the Israeli delegation, but the Conference rejected the motion, and Article 1 as a whole was adopted by 87 votes in favour, one against (Israel), and 11 abstentions. It seems that the result would not have been different had paragraph 4 been put to a separate vote, for no state had said that it would have voted differently if the paragraph was put to a separate vote. Indeed, if it were not for the Israeli delegation which insisted on a vote, the Article would have been adopted by consensus.

However, according to Article 95 of Protocol I, the Protocol shall enter into force 6 months after two instruments of ratification or accession have been deposited. As of 31 March 1981, the Protocol had been ratified or acceded to by 17 states. The Protocol is therefore already a binding law to those states which had deposited instruments of ratification or accession. The Protocol was also signed by 62 states. This includes all Western States, all East-European States (except Albania), and some African, Asian, and Latin American States.[1] In addition, three liberation movements had also signed the Protocol: the Palestine Liberation Organization, (PLO), the South West Africa

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1. See, ICRC, Doc. DD/JUR - No. 9/6, dated 31.03.1981 - JJS/gr.

People's Organization (SWAPO), and the Pan-African Congress (PAC) of South Africa.[1]

By virtue of Article 18 of the Vienna Convention on the Law of Treaties (1969), the signing of a treaty by a state obliges that state "to refrain from acts which would defeat the object and purpose" of the treaty "until it shall have made its intention clear not to become a party to the treaty."

However, none of the states which had signed the Protocol were apparently engaged in a war of national liberation in the narrow sense of the term. By contrast the states which are currently engaged in wars of national liberation in the narrow sense of the term, e.g. Israel and South Africa, have not even signed the Protocol. Indeed, as noted above, Israel had voted against Article 1 of Protocol I. Moreover, Article 95 of Protocol I expressly states that the Protocol "shall enter into force six months after two insruments of ratification or accession have been deposited", and that;

> "*For each Party to the Conventions* (*i.e.* the Geneva Conventions) thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession."[2]

Does this mean that the state, or government, against which a war of national liberation is being fought, cannot be bound by the Geneva Conventions and Protocol I until it had acceded to the Protocol ?

To Professor Dinstein of Tel-Aviv University the answer to

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1. CDDH/SR.59, para. 5.
2. Protocol I, Art. 95, para. 2.

this question appears to be "yes". He says so in two slightly different ways. Thus in an article published in 1976 (i.e. two years after the adoption of Article 1 of Protocol I by Committee I of the Diplomatic Conference), he wrote:

> "In recent years, Afro-Asian countries - bolstered by the Eastern European bloc - have been pressing for an automatic application of the laws of inter-state warfare to "wars of liberation", i.e. wars of peoples under alien domination for the implementation of their right of self-determination. But, under existing international law, the applicability of the laws of war to an internal conflict - of whatever type - is determined not by the justice of its cause, but by the fact of recognition of the rebels as a belligerent party. It matters not if the rebels are fighting for or against self-determination. Either way, the laws of warfare will be operative in relations between the rebels and the Government only if the latter has recognized the former as a belligerent party."[1]

Much has been said about this alleged rule of "existing international law" in Chapters One and Two of this thesis. It has been indicated there that such a rule has never been a rule of customary international law and that even if it ever existed, (and there is no evidence in the practice of states to suggest that it ever did exist), it is no longer a rule of existing international law. The alleged rule that the laws of warfare become operative in the relations between the'rebels' and the 'government' only if the latter had recognized the rebels as a

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1. Yoram Dinstein, The International Law of Civil Wars and Human Rights, Israel Year Book on Human Rights, 1976, p. 76 - 77.

belligerent power, had existence only in the minds of a minority of writers. In theory, dependence of the applicability of the laws of warfare to civil war upon recognition of belligerency by the government engaged in civil war or by third states, was a "progressive" theory at a time when it was contended that international law governs only the relations between states. But it has never acquired the status of a customary rule of international law. Indeed, such a theory was proposed at the Geneva Diplomatic Conference of 1949 by one or two delegates, but the Conference rejected it. Nevertheless, in legal literature, the alleged rule of Dinstein's 'existing' international law survived as a Zombie, often resurrected to cloak with legal texture, vindictiveness, depravation and depravity.

Dinstein's other argument is more directly relevant to our discussion. In an article published in 1979, he stated that what paragraph 4 of Article 1 of Protocol I purports to do is to lay down an authoritative interpretation of Article 2 common to the four Geneva Conventions of 1949. But he described this interpretation which has been accepted explicitly or implicitly by all states except Israel, as being "as abitrary as it is obligatory (for contracting parties of the Protocol)."[1]

In commenting on this view it should be remebered first that the Protocol as a whole has been adopted within the framework of 'reaffirmation and development' of existing humanitarian law applicable in armed conflicts. In part, it provides "a detailed elaboration of the basic rules of the Hague Regulations, which has passed in to customary

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1. Yoram Dinstein, The New Geneva Protocols, Year Book of World Affairs, 1979, p. 266.

law,"[1] while in another part "its provisions assert themselves as the proper interpretation of the Geneva Conventions."[2] Indeed, with few exceptions, such as the rules relating to 'civil defence'[3] which are wholly new, it is arguable that there is a presumption to the effect that the Protocol's provisions are already binding on the parties to the Geneva Conventions of 1949, either as elaborations of customary rules (and therefore provide evidence on the content of such rules), or as authoritative interpretation of conventional rules laid down in the Geneva Conventions. Such a presumption does not conflict with the requirements of accession and ratification, it simply puts the onus of proof on the persons or party to the conflict which contends that a certain rule is not binding.

In this respect it should be noted that Professor Dinstein did not offer any explanation or produce any argument as to why, in his view, Article 1, paragraph 4, of Protocol I, which, according to him, purports to lay down an authoritative interpretation of Article 2 common to the Geneva Conventions of 1949, can only bind tha Parties to the Protocol. Article 2 common to the Geneva Conventions is binding on all the parties to these Conventions, so why its authoritative interpretation should not be binding even on those who had opposed that interpretation ? Authoritative interpretation is not an offer to contract; it is a determination of the meaning of the text so interpreted - a determination of the most persuasive

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1. Israel in Lebanon - The Report of the International Commission to enquire into reported violations of International Law by Israel during its invasion of the Lebanon. published by Ithaca Press, London, 1983, p. 28.
2. Loc. cit.
3. See Articles 61 to 67 of Protocol I.

character which no court of law may conceivably ignore, regardless of accession or ratification. It certainly binds the parties to the treaty which explicitly or implicitly had accepted the interpretation or at least estops them from challenging that 'authoritative' interpretation. But would such an interpretation bind or estop an objecting state ?

In raising this question one is not oblivious to the distinction usually made between 'interpretation' and 'application' of treaties. 'Interpretation' is the process of determining the meaning of the text, while 'application' is the process of determining the consequences which, according to the text, should follow in a given situation.[1] In the case of Article 1, paragraph 4, of Protocol I, however, this distinction seems merely technical. The question is simultaneously one of interpretation as well as of application of the Geneva Conventions to wars of national liberation. If, nevertheless, it was advisable to keep this distinction, the above question may be formulated as follows: what are the consequences of the authoritiative interpretation of a multilateral treaty to an objecting party ?

Neither the Vienna Convention on the law of treaties, nor legal literature (to my knowledge) seem to give an explicit answer to this question. But the common sense of law suggests that authoritative interpretations must be considered as being conclusive on the objecting state. Thus, as long as the state which objects to Article 1, paragraph 4, of Protocol I, remains

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1. See Briggs, The Law of Nations, 1952 (second edition), p.896; Schwarzenberger, International Law and Order, 1971, p. 116.

a party to the Geneva Conventions, it will be regarded by other parties as being in violation of these Conventions.

Reservations and denunciation are the only possible means by which an objecting state may protect itself against the consequences of authoritative interpretations of a treaty. In the case of Article 1, paragraph 4, of Protocol I, neither of these options seems possible. Reservation is not possible because it will be incompatible with the object and purpose of the Geneva Conventions and Protocol I.[1] However, denunciation is possible under the Geneva Conventions. But common Articles 63/62/142/158 of the four Geneva Conventions respectively, restrict the effects of denunciation. These Articles inter alia, provide th t "a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict (to which the Conventions are applicable) shall not take effect until peace has been concluded, and until after operations connected with release, repatriation and re-establishment of the persons protected by the present Convention(s) have been terminated."

Finally, it is probably worth emphasizing that Article 1, paragraph 4, of Protocol I, has been presented by the vast majority of states as being a codification of a customary rule, or more precisely, a customary interpretation of an existing rule. Initially, Western States opposed this rule, but later on they seem to have acquiesced in, as their vote on Article 1 of Protocol I indicates. The only state which persisted in its

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1. See Article 19 of the Vienna Convention on the Law of Treaties (1969), text in Brownlie (ed.), Basic Documents in International Law, second edition, 1978, pp. 233 et seq.

objection was Israel. In such a case, the question to be asked is whether a state can prevent a rule of customary international law from becoming binding on it. According to Dr. Akehurst the answer appears to be yes, "provided that the state opposes the rule in the early days of the rule's existence (or formation) and maintains its opposition consistently thereafter."[1] But in a footnote to this statement he added: "This result can be avoided if the 'new rule' can be presented as an interpretation of and old rule which is binding on the dissenting State."[2] In other words, opposing, and consistently maintaining opposition to a new customary rule does not prevent the new rule from becoming binding on the dissenting state, if the new customary rule can be presented as an interpretation of an old rule which is binding on the dissenting state. It seems irrelevant whether the 'old rule' which is binding on the dissenting state was of conventional or customary character. In either case the 'new customary rule' would still be binding on the dissenting state.

As a matter of fact, this is precisely the case of paragraph 4, of Article 1, of Protocol I. As Professor Abi-Saab stated with reference to the amendments which finally became paragraph 4 of Article 1, of Protocol I.

> "The position of the sponsors of the amendments was based on the idea that there already exist a legal conviction and international practice, hence a customary rule of

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1. Akehurst, Custom as a Source of International Law, The British Year Book of International Law, 1974-75, p. 24. Dr. Akehurst probably had in mind a 'new rule' interpreting an 'old customary rule' which is binding on the dissenting state.
2. Ibid., p. 24, n.2.

general international law to the effect that wars of national liberation are of an international character."[1]

The summary records of the Diplomatic Conference provide abundant evidence on the position of the sponsors just stated. Some of these statements may be quoted in evidence. Thus, in introducing amendment CDDH/I/11 and Add. 1 to 3 on behalf of its 15 sponsoring states, the Egyptian representative Professor Abi-Saab said:

> "Participants were thus not being asked to accept anything new; it was merely proposed that they should affirm explicitly in the field of humanitarian law what they had already accepted as binding law within the United Nations and within General International Law."[2]

With reference to the same amendment, the representative of Yugoslavia said:

> "The amendment contained nothing new; all it did was to make explicit a rule which had developed over the past quarter of a century and had now been generally accepted."[3]

The representative of the German Democratic Republic, in introducing his groups amendment, said:

> "The new paragraph which the sponsors of amendment CDDH/I/5 and Add. 1 were proposing to add to Article 1 of draft Protocol I embodied the principles of resolution 3103 (XXVIII) and was designed to codify international law already in force."[4]

With regard to the same amendment the representative of the

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1. Abi-Saab, 165 Recueil des Cours, (1979-IV), p. 376.
2. Abi-Saab,(Egypt), CDDH/I/SR.2. para. 10.
3. Obradovic (Yugoslavia), CDDH/I/SR.2, para. 17.
4. Graefrath (German Democratic Republic), CDDH/I/SR. 2, para. 38.

Soviet Union said:

> "The sole object of the proposal was to embody in humanitarian law a rule which was already in existence and which took into account the realities of time."[1]

More conclusive of course, is the language of resolution 3103 (XXVIII) of 12 December, 1973, which was adopted by the General Assembly of the United Nations by 83 votes in favour, 13 against, and 19 abstentions. It may be recalled that operative paragraph 3 of this resolution, proclaims in the most positive language, that:

> "The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes."

It was this rule which paragraph 4 of Article 1 of Protocol I was intended to codify. Clearly then, paragraph 4 was not a new rule, but an authoritative interpretation of common Article 2 of the Geneva Convention. It is also clear that this interpretation was presented as a codification of a customary rule. Therefore, in the light of the above discussion, it must be submitted that paragraph 4 of Article 1 of Protocol I is legally binding on dissenting states notwithstanding the Protocol's provisions regarding accession and ratification.

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1. Boulanevkov (USSR), CDDH/I/SR.3, para. 4.

6. The Locus Standi of Liberation Movements in International Humanitarian Law

The international character of wars of national liberation entails the application of international humanitarian law in its entirety to these wars, but the legal basis of this application vary according as to whether the rules of international humanitarian law were of customary or of a conventional nature.

Rules of customary international law apply to wars of national liberation de plein de droit. They are binding on the parties to the conflict irrespective of any declaration of consent to be so bound, and irrespective of the fact that the customary rules have been laid down in conventions. In this respect mention may be made of the Hague Regulations annexed to the Fourth Hague Convention of 1907 on the laws and customs of War on Land. The wide-spread view on this Convention is that it had already passed into customary international law.[1] The classical evidence on the cutomary character of the rules laid down in this Convention is the dictum of the Nuremberg International Tribunal stating that:

> "The rules of land warfare expressed in the Convention undoubtedly represented an advance over the existing international law at the time of its adoption ... but by 1939 these rules laid down in the Convention were regarded

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1. See for example, Abi-Saab, 165 Recueil des Cours (1979), p. 399; Adam Roberts and Richard Guelff, Documents on the Laws of War, 1982, p. 44; Israel in Lebanon - The Report of the International Commision to enquire into reported violations of International Law by Israel during its invasion of the Lebanon, published by Ithaca Press, 1982, p. 27.

as being declaratory of the laws and customs of war."[1]

The situation with regard to the Geneva Conventions and their additional Protocol I is, however, rather different. Although these Conventions are based on the principles of customary international law, they are still summarily treated as Conventions whose application to a certain armed conflict requires the parties to the conflict to be also parties to these Conventions. In other words, application of these and other applicable conventions to wars of national liberation raises the problem of the accession of liberation movements to these Conventions, which is the main subject of this section.

It should be noted that the problem of the locus standi of liberation movements in international humanitarian law is wider than the problem of accession. It includes - in addition to the problem of accession - two other problems raised at the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, namely, the problem of the representation and participation of liberation movements in the Diplomatic Conference, and the problem of signing the Final Act of the Conference by liberation movements. Both problems have already been discussed briefly in this chapter, and it seems unnecessary to examine them in detail.[2]

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1. Cited in Abi-Saab, op. cit. p. 441, n. 58.
2. See below, Section 3.1. of this chapter. For more details, see Abi-Saab, 165 Recueil des Cours (1979-IV), pp. 403 - 405; Baxter, Humanitarian Law or Humanitarian Politics? The Harvard Law Journel, vol. 16, 1975, pp. 9-11; Kalshoven, Reaffirmation and Development of the International Humanitarian Law Aoplicable in Armed Conflict, Netherland Year Book of International Law, 1974, pp. 26-29. On the Controversy over signing the Final Act of the Diplomatic Conference by the liberation movements which participated in the work of the Conference, see CDDH/SR.59.

Suffice it here to note that these two problems were not merely procedural matters, but affirmations of the international personality of liberation movements (or the peoples which they represent), as well as of the legal equality of the parties to the conflict as far as international humanitarian law is concerned. This section, therefore, will concentrate on the problem of the accession of liberation movements to the Geneva Conventions and Protocol I.

6.1. Accession of Liberation Movements to the Geneva Conventions and Protocol I: The Problem in General

The consent to be bound by a treaty may be expressed in different ways. It may be expessed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval of accession, or by any other means if so agreed.[1] Multilateral treaties normally provide for two of these procedures, namely, ratification and accession. The difference between the two seems to be a matter of form rather than of substance.[2] However, it may generally be said that ratification is the procedure open to the 'Power' which had already signed the treaty, while accession is the proceedure open to the 'Power' which had not signed the treaty. This seems to be the implication of the common Article of the Gneva Conventions regarding accession, which is quoted below.

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1. See Articles 11 to 18 of the Vienna Convention (1969) on the Law of Treaties. Text in Brownlie, Basic Documents in International Law, second edition, 1978, pp. 231 et seq.
2. See Abi-Saab, op. cit. p. 400.

The Geneva Conventions of 1949 provide for two kinds of accession. The first is full accession by virtue of common Article 60/59/139/155, which provides:

> "From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention." (Emphasis added)

The ot er is ad hoc accession or acceptance of the Convention for the purposes of a given conflict by virtue of paragraph 3 of common Article 2, which provides:

> "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties t reto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof." (Emphasis added)

The main difficulty facing liberation movements in resorting to either of these procedures is that the accession has to emanate from a 'Power', a term which the colonial Powers maintained referred only to 'states', and not to entities other than 'states'. This matter has already been discussed at length in a previous section in this Chapter.[1] The basic thesis in that section was that the interpretation of common Article 2 of the Geneva Conventions in the light of international law as existed at the time of their adoption, as well as in the light of the text of the Conventions, supports

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1. See below, this Chapter, Section 4.2.1.

the thesis that the term 'Powers' in Article 2, paragraph 3, common to the Geneva Conventions, includes, in addition to states, entities other than states, that is to say, peoples fighting against colonial and alien domination and racist regimes, in the exercise of their right of self-determination. That such peoples were 'Powers' within the meaning of the Geneva Conventions, was implicit in the practice of the United Nations since 1968, which culminated in the adoption of resolution 3103 (XXVIII), of 12 December, 1973, and was finally laid down (also implicitly) in Article[1], paragraph 4, of Protocol I, and finally, in Article 96, paragraph 3, of Protocol I, which provides:

> "The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
>
> a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
>
> b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
>
> c) the Conventions and this Protocol are equally binding upon all Parties to the conflict."

Article 96 of Protocol I, as a whole, was adopted in

plenary by an impressive majority verging on unanimity; only Israel voted against the Article, while two other states (Thailand and Spain) abstained. The result of the vote was 93 in favour, one against, and two abstentions.[1] It is probably obvious from the text of Article 96, paragraph 3, that it was heavily inspired by that of common Article 2, paragraph 3, of the Geneva Conventions, in that it adopts the procedure of ad hoc accession to the Geneva Conventions and Protocol I.

The effects of the unilateral declaration addressed to the depository which are laid down in sub-paragraphs (a), (b), and (c), are self-evident. Yet to remove any doubt about their proper meaning, a few remarks may be necessary.

According to sub-paragraph (a) the Geneva Conventions of 1949 and Protocol I are brought into force for the liberation movement as a Party to the conflict with immediate effect. The 'immediate effect' is not a concession to liberation movements; it is in conformity with common Articles 61/60/140/157, respectively, of the Geneva Conventions of 1949, which provides:

> "The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict."

Nor indeed the method by which the Conventions and the Protocol are brought into force for the liberation movement is

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1. CDDH/SR. 46, para. 75.

new. Multilateral conventions are open conventions (to those who are legally competent to become parties to them), and are normally brought into force by means of a unilateral act. Ratifications, notifications of accession and declarations are unilateral acts under different names, or different forms of unilateral acts, by which a 'Power' undertakes 'to respect and ensure respect' for the Geneva Conventions of 1949 and their additional Protocol I 'in all circumstances"[1], that is to say, in all situations to which the Conventions are applicable.[2]

The last remark to be made with regard to sub-paragraph (a) is that it should be read in the light of paragraph 1 of Article 96, which provides: "When the Parties to the Convention are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol." Conversely, when the Parties to the conflict are only Parties to the Geneva Conventions of 1949, but are not Parties to the Protocol, only the Geneva Conventions (and of course rules of customary international law as well) would be applicable. This is a rule of simple legal logic, which, nevertheless, have been expressly formulated in Article 30, paragraph 4(b) of the Vienna Convention on the law of treaties, which provides:

> "as between a State Party to both treaties and a State Party to only one of the treaties, the treaty to which both states are Parties govern their mutual rights and obligations."

The 'Powers' against which wars of national liberation are fought are already Parties to the Geneva Conventions. This is

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1. Common Article 1 of the Geneva Conventions of 1949 and Article 1, para. 1, of Protocol I.
2. ICRC Commentary on the Geneva Conventions, Pictet (ed.) Third Convention, p. 18; Fourth Convention, p. 16.

probably why the converse of paragraph 1 of Article 96, of Protocol I (quoted above) has not been stated in the Article itself. At any rate, sub-paragraph (b) of Article 96 of Protocol I leads to the same result as it states:

> "the said authority (i.e., the liberation movement) assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol."

In assuming the rights and obligations of a High Contracting Party, the liberation movement would be bound by the Geneva Conventions if the adverse Party was also a Party to these Conventions. It would also be bound by the Protocol if the adverse Party was bound by it. But if the adverse Party was neither a Party to the Conventions nor to the Protocol (as was the case of Rhodesia - Zimbabwe), then only the rules of customary international law would be applicable.

Sub-paragraph (c) which provides that the Geneva Conventions and the Protocol "are equally binding upon all Parties to the conflict" is a rather untraditional provision. Certainly, it does not mean that the declaration by a liberation movement to be bound by the Protocol would ipso facto have the effect of bringing the Protocol into force for the 'Power' against which a war of liberation is fought. No notification of accession by whosoever could have that effect. Sub-paragraph (c) was probably intended to assure the critics that the legitimacy of wars of national liberation and the justice of the cause for which a liberation movement is fighting are without prejudice to the 'equally binding' character of the Geneva Conventions and the Protocol upon all Parties to the conflict.

In brief, the locus standi of the liberation movement in international law is the same as that of a state, and the effects of the declaration addressed by the liberation movement to the depository are the same as in any notification of accession made by a state involved in an international conflict. The only difference between the notification of accession made by a state and the declaration made by the liberation movement is that the latter is ad hoc, not permanent accession.

But not every insurgent or revolutionary movement styling itself a national liberation movement is legally competent to undertake to apply the Geneva Conventions and Protocol I by means of a declaration addressed to the depositary. As if such an undertaking is a 'privilege', certain conditions have to be fulfilled before it can validly be made. Some of the conditions to be fulfilled relate to the Parties to the conflict; others relate to the conflict itself. But as the effect of such conditions is to disqualify the liberation movement, if they were not fulfilled, they may legitimately be discussed in relation to the movement itself. These conditions are the subject of the following section.

6.2. The Conditions for a Valid Accession by Liberation Movements

Article 96, paragraph 3, of Protocol I provides a direct answer: "The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the

Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary."

This text disolves into three conditions: the first relates to the 'authority' (i.e., the liberation movement) which should be representing a people; the second relates to the adversary against which the liberation movement or the people it represents is engaged in armed conflict, which should be a High Contracting Party; while the third condition relates to the conflict itself - which should be of the type referred to in Article 1, paragraph 4, of Protocol I.

Each of these conditions bears elaboration. Moreover, during the discussion, and after the adoption, of Article 1, paragraph 4, other conditions have been proposed or expressed in explanation of votes. One such condition related to the 'intensity' of the conflict, while another condition related to the 'recognition' of the liberation movemnt. It is necessary, therefore, to examine these 'other' conditions as well, in order to determine whether they should be included among the conditions which qualify a liberation movemnt to make a valid "unilateral declaration addressed to the depositary". Each of these conditions, be it actual or not, will be examined in a separate sub-section.

6.2.1. The Condition that the Armed Conflict be of the Type Referred to in Article 1, Paragraph 4, of Protocol I

One of the conditions which a liberation movement has to fulfil in order to be competent to make a valid, though temporary, notification of accession to the Geneva Conventions

and Protocol I by means of a unilateral declaration addressed to the depository, is that it should be representing a people engaged against a High Contracting Party "in an armed conflict of the type referred to in Article 1, paragraph 4", of Protocol I. This paragraph states that armed conflicts of international character in the meaning of Article 2 common to the Geneva Conventions:

> "... include 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, 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."

Opinions differ on the material scope of this text. Writers who directly or indirectly share the view of the Belgian delegate to the Diplomatic Conference that "wars of liberation were anachroisms which would soon be ended", tend to interpret the provisions of Article 1, paragraph 4, restrictively and bemoan in passing its narrowness.[1]

For example, Professor Schindler states with reference to Article 1, paragraph 4, that:

"The term 'wars of liberation' is narrowed down in several

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1. E.g. D. Schindler, Different Types of Armed Conflicts, 163 Recueil des Cours, (1979-II), p. 137-139; Cassese, A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict, in Cassese (ed.), The New Humanitarian Law of Armed Conflict, 1979, pp. 466-470; Charles Lysaght, The Attitude of Western Countries, in Cassese (ed.), ibid., p. 354.

respects by this provision. In the first place, the wars of liberation are confined to struggles against 'colonial domination', 'alien occupation' and 'racist regimes'. All other kinds of wars of liberation are excluded, such as wars of secession and struggles against oppressive regimes."[1]

Oddly enough, Professor Schindler finds support to this 'exclusion' in the reference in Article 1, paragraph 4, to

> "the 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."

This reference, according to Professor Schindler, is a "second restriction, whose main effect is to confirm the first one"[2], quoted above. His argument runs as follows:

> "... this Declaration states that the territorial integrity and political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples may not be dismembered or impaired. Wars of secession which are fought beyond decolonisation, such as the wars of Biafra 1967-1970, of Bangladesh 1971, or the struggles in the border regions of Ethiopia (Western Somalia-Ogaden, 1977-1978, and Eritrea, still going on at present), are therefore, not considered wars of liberation according to Article 1 (4). The same holds true for struggles against an oppresive regime which is not a racist regime or a

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1. D.Schindler, op. cit., p. 137.
2. Loc. cit.

regime of alien occupation."[1]

The strangeness of this analysis calls for several remarks.

First, contrary to Professor Schindler's suggestion colonial wars are not wars of secession, because, in the words of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:

> "The territory of the colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist untill the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purpose and principles."

Second, Professor Schindler invokes the so-called "safeguarding clause" of the principle of self-determination to justify the exclusion from the concept of wars of national liberation 'wars of secession' and 'struggles against an oppresive regime which is not a racist regime or a regime of alien occupation'. The 'safeguarding clause', contrary to Profe-sor Schindler, does not support such a sweeping exclusion. The so-called 'safeguarding clause' states as follows:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent

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1. Ibid., pp. 137-138.

> States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus posessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

This provision may exclude from the concept of wars of national liberation 'some' but not 'all' wars of secession. In other words, wars of secession which occur in independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and are thus posessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour, may be excluded from the concept of wars of national liberation for the simple reason that they are not fought for self-determination.

But even if wars of secession were excluded from the concept of wars of national liberation altogether, which is not the case, it would still be impossible to exclude from the concept of wars of national liberation armed conflicts waged by peoples against their oppressive rulers. An oppressive regime, by definition, does not conduct itself in compliance with the principle of equal rights and self-determination of peoples. It may be sufficient here to note that by virtue of the principle of equal rights and self-determination of peoples "peoples have the right freely to determine ... their political status and to pursue their economic, social and cultural advancement." Moreover, observance of human rights and fundemental freedoms is a sine qua non of compliance with the principle of equal rights and self-determination of peoples. Wars against oppressive regimes, therefore, cannot be excluded from the

concept of wars of national liberation.

Third in the light of the foregoing criticism, the dilema of the restrictive approach to the concept of wars of national liberation seems obvious: it either leads to a distortion of the principle of self-determination, or leads to discrimination between different forms of denial of self-determination. In order to avoid such a distortion and discrimination, all armed conflicts fought by peoples for their right of self-determination must be considered wars of national liberation.

Indeed, Article 1, paragraph 4, of Protocol I, is not averse to such a conclusion which may be arrived at by considering the enumeration "colonial domination and alien occupation and racism", as being examplary, not exhaustive enumeration of cases of denial of self-determination, as did the Australian delegation at the end of the First Session of the Diplomatic Conference. The Australian delegation initially abstained when Article 1 of Protocol I was put to vote in Committee, because, "it feared that the terms used in paragraph 4 might be too restrictive and might exclude all other conflicts other than those enumerated."[1] But at the end of the First Session of the Diplomatic Conference in Plenary, the Australian representative renewed his delegation's support to Article 1, because,

> "After due consideration, his delegation had realised that if paragraphs 3 and 4 were taken together and if the word 'include' in paragraph 4 was taken literally, the list could be interpreted as not being exhaustive. On the

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1. Cited in , Abi-Saab, 165 Recueil des Cours, (1979-IV), p.398; and Cassese (ed.), The New Humanitarian Law of Armed Conflict, 1979, p. 468. n. 13.

basis of that interpretation, his delegation supported the text of Article 1."[1]

As a matter of fact, the narrow concept of wars of national liberation is not so much a result of the wording of Article 1, paragraph 4, as of the tendency to confine that wording to the actual cases of the peoples which were represented at the Diplomatic Conference by their liberation and of the tendency to confine the concept of wars of national liberation to the colonial context. As Professor Abi-Saab explains with regard to the formula 'colonial and alien domination against racist regimes' which has been used in United Nations resolutions:

> "proceeding from thr hard-core case of classical colonial rule, the concept of colonialism was refined and extended within the United Nations to include other varieties of colonization producing the same result of denial of self-determination to whole peoples, which have been designated as alien domination and racist regimes. In fact, both partake of the same phenomenon of "colonies of settlement", which are generally designated as "alien domination" and of which "racist regimes" are a species or a special case."[2]

Elaborating on the concept of 'alien domination' and 'racist regimes' in the colonial context, Professor Abi-Saab says:

> "It is not the mere act of a group of people emigrating and settling in another country which constitutes the 'alien domination'; but it becomes so when the colonies

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1. Loc. cit.
2. Abi-Saab, 165, Recueil des Cours, (1979-IV), p. 394.

of settlement are established to the detriment of the local populations, i.e., when the settlers, while severing their formal ties with their mother countries, exercise a colonial policy vis-a-vis these populations which denies them their right to self-determination; and this either by chasing them out of their territory, or by regrouping them against their will in certain areas, prohibiting them from others, appropriating communal and private lands, etc., or in more general terms, by subjecting the local population to an alien rule which denies them basic rights and equal treatment.

As the systemic discrimination by the settlers against local populations, which characterizes 'alien domination', is invariably based on the different 'origins' of the two human groups, it constitutes by definition a 'racist regime', whatever the criterion used to identify these different origins, e.g., race, religion, etc. (Though the term 'racist regime' is more particularly used to denote cases where race is the exclusive criterion.)"[1]

The change in the term of reference from 'colonial and alien domination and racist regimes' to 'colonial domination and alien occupation and racist regimes', which was done at the request of Latin American countries, did not mean a change of substance, according to Professor Abi-Saab.

"Their *objection was not to the inclusion* of the phenomenon of 'colonies of settlement' in the category of situations which can give rise to wars of national liberation, but

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1. Ibid., p. 394.

> to the words as such; and this for reasons which are particular to the Latin American context. It was to exclude any possible interpretation (of Article 1, paragraph 4) by dissident movements that certain governments are under 'foreign domination', hence armed insurrection against them constituted wars of national liberation."[1]

But whether or not the change in terminology meant a change of substance, the fact remains that the above analysis would still confine the concept of wars of national liberation to the context of decolonization. Indeed, if the formula 'colonial and alien domination and racist regimes' which was used in United Nations resolutions, and the formula 'colonial and alien domination and racist regimes' which has been used in Article 1, paragraph 4, of Protocol I, were identical in substance, their interpretation in the light of the practice of the United Nations and of the actual cases of the liberation movements which participated in the work of the Diplomatic Conference would hardly take us beyond the colonial context. But such an interpretation, as noted above, would lead to a distortion of the right of self-determination as well as to discrimination between different forms of denial of self-determination.

To be sure, there is no conclusive evidence that either the United Nations or the Diplomatic Conference had intended to confine the concept of wars of national liberation to the context of decolonization. The fact about Article 1, paragraph

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1. Ibid., p. 395.

4, is that it left the concept of wars of national liberation 'open ended'. The most assured thing about the formulae 'colonial and alien domination and racist regimes', and 'colonial domination and alien occupation and racist regimes', is that they were intended in the first place to cover the cases of liberation movements which were fighting against such regimes, and which were in fact invited to participate in the work of the Diplomatic Conference as representatives of their peoples. Beyond those actual cases the question is one of interpretation.

Thus, the term 'colonial domination' may be interpreted as covering cases of 'political' as well as 'economic' alien or foreign domination. But such an interpretation would only intensify ideological conflicts. Moreover, the fact that the terms 'colonial and alien domination' had been replaced by the terms 'colonial domination and alien occupation' with a view to exclude any interpretation by dissident movements that certain governments are under 'foreign domination' and therefore armed insurrection against them constituted wars of national liberation, seems to exclude the possibility of extending the concept of wars of national liberation beyond the 'political' decolonization.

On the other hand it is wrong to confine the term 'alien occupation' to belligerent occupation.[1] The reference to 'alien

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1. Baxter, The Geneva Conventions of 1949 and Wars of National Liberation, in Rivista di Diritto Internazionale, 1974, pp. 194-195; and Cassese, A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict, in Cassese (ed.), The New Humanitarian Law of Armed Conflict, 1979, p. 468, speaks only of belligerent occupation. Baxter, loc. cit., even introduces a distinction between 'lawful' and 'unlawful' occupation, a distinction which is irrelevant for the application of the Geneva Conventions, since in either case the Conventions are applicable.

occupation' would not have been necessary if only belligerent occupation was envisaged.[1] It would not have been necessary because belligerent occupation, whether it was the result of a 'lawful' or 'unlawful' use of force, is expressly covered by Article 2, paragraph 2, common to the Geneva Conventions, which provides:

> "The Conventions shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with armed resistance."

The provision on 'alien occupation', says Professor Schindler, "will mainly cover cases in which it is not clear or controversial whether they fall under Article 2 (2) of the Convertions, such as the case of Namibia, the case of Western Sahara which, after its release from Spanish rule in 1976, was divided between Morroco and Mauritania, the case of a State which uses its troops stationed in another State with the permission of that State, to gain power therein, or the case of those parts of Palestine which are not under belligerent occupation of Israel, but form part of the State of Israel."[2]

The case of a state which uses its troops stationed in another state with the permission of that state, to gain power therein, was probably mentioned to illustrate that "the connection" of the concept of wars of national liberation "with decolonization does not necessarily hold good for the term "alien occupation".[3] Professor Schindler probably had in mind

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1. D.Schindler, 163 Recueil des Cours, (1979-II), p. 138; Abi-Saab, 165 Recueil des Cours, (1979-IV), p. 395.
2. Schindler, op. cit., p. 138.
3. Loc. cit.

the cases of Soviet intervention in Hungary (1956) and Czechoslovakia (1968). These, however, are special cases of the so-called'intervention by invitation', and a part of a wider subject which is the impact of 'foreign state aid' on the applicable international humanitarian law. In this respect, it is useful to recall that in 1971 the ICRC submitted the following proposal to the Conference of Government Experts:

> "When, in case of non-international armed conflict, one or the other Party, or both, benefit from the assistance of operational armed forces afforded by a third State, the Parties to the conflict shall apply the whole of the international humanitarian applicable in international armed conflict."[1]

The Conference of Government Experts examined this proposal at length, but it did not endorse it. The subject was not raised again at the Diplomatic Conference. Therefore, it cannot be said that foreign aid in troops, whether the troops were stationed in a state with its permission, or were invited in, were cases of alien occupation in the sense of Article 1, paragraph 4.

Perhaps, beside the reference to self-determination in Article 1, paragraph 4, the only term which may extend the concept of wars of national liberation beyond the colonial context is the reference to 'racist regimes'. A racist regime is by definition a regime which practices racial discrimination. In the "International Convention on the Elimination of All

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1. ICRC Report on the Work of the Conference of Government Experts, First Session, 1971, pp. 50-52.

Forms of Racial Discrimination"[1], adopted by the U.N. General Assembly as annex to resolution 2106 (XX) on 21 December 1965, the term "racial discrimination" means 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundemental freedoms in the political, economic, social, cultural or any other field of Public Life."[2]

The Convention entered into force on 4 January, 1969, by 31 December, 1977, it was ratified or acceded to by 97 states and 13 other signatures.[3] The definition of 'racial discrimination' may therefore be considered as being generally accepted. Consequently, any government or state practicing such 'racial discrimination' is by definition a racist regime, and the group of human beings or the 'people' engaged in armed conflict against such a regime would be fighting in the exercise of its right of self-determination, and therefore, would be engaged in a war of national liberation.

This interpretation of the term 'racist regimes' would carry the concept of wars of national liberation beyond the process of decolonization, and would bring us very close to the spirit of the principle of equal rights and self-determination of peoples as elaborated in the Declaration on Principles of

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1. Text in Brownlie (ed.), Basic Documents in International Law, second edition, 1978, pp. 191 et seq.
2. Article 1, paragraph 1.
3. United Nations Action in the Field of Human Rights, United Nations Publications, New York, 1980, Sales No. E. 79. XIV.6, p. 49. On 'Measures' taken by the United Nations for the elimination of racial discrimination, see ibid., pp. 45-94.

International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

6.2.2. Intensity of the Armed Conflict

Another question relating to the armed conflict is whether it sh uld reach a certain level of intensity before the liberation movement can make a valid declaration in accordance with paragraph 3 of Article 96 of Protocol I. The Australian and British delegations thought that it should. Thus, explaining its affirmative vote on Article 1 of Protocol I, the Australian delegation stated that:

> "In supporting Article 1 as a whole, Australia understands that Protocol I will apply in relation to armed conflicts which have a high level of intensity."[1]

The British delegation was even more explicit; at the time of signature it declared that it signed Protocol I on the basis of the following understanding:

> a) in relation to Article 1, that the term 'armed conflict' of itself and in its context implies a certain level of intensity of military operations which must be present before the Conventions or the Protocol are to apply to any given situations, and that this level of intensity cannot be less than that required for the application of Protocol II, y virtue of Article 1 of that Protocol, to internal conflict."[2]

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1. CDDH/SR. 36. (Annex).
2. Roberts and Guelff, Documents on the Laws of War 1982, p. 461 - 62.

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h) in relation to paragraph 3 of Article 96, that only a declaration made by an authority which genuinely fulfils the criteria of paragraph 4 of Article 1 can have the effects stated in paragraph 3 of Article 96, ..."[1]

Thus, according to the British statement of understanding the liberation movement should be in control of a part of its national territory and should be able to carry out 'sustained and concerted' military operations, i.e. conventional warfare. Liberation movements carrying out a guerrilla warfare would not, according to the British view, be qualified to make a valid declaration and thus bring the Geneva Conventions and the Protocol into force.

In commenting on this view it should be noted first that Britain was in a minority of one in this understanding. It was not supported even by Britain's closest ally - the United States of America. Indeed, as Mr. Aldrich, head of the American delegation to the Diplomatic Conference had noted at a panel of the American Society of International Law:

"the British statement had caused the U.S. Government some concern because of the implication that a rather quick or low-level conflict, which was clearly an international armed conflict, might not be covered. It had in mind incidents such as the 1968 seizure of the Pueblo (an American navy vessel) in which it would want to assert that the protections of Protocol I applied and feared that wish might be put in question by the British statement."[2]

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1. Ibid., p. 462.
2. Proceedings of the American Society of International Law, 1980, p. 207.

Among international lawyers, Professor Draper seems to be the only one to support the British statement, and that was probably because he was a member of the British delegation to the Diplomatic Conference, but probably more so because of his strong dislike (to put it mildly) of liberation movements and to guerrilla warfare in general.[1] However, Professor Draper contends that nothing in the Protocols repudiates the British interpretation.[2] He was wrong; there are many provisions in the Geneva Conventions and the Protocols which explicitly repudiate the British interpretation.

First of all, it should be noted that neither the text of Article 1, paragraph 4, nor the text of Article 96, paragraph 3, nor their legislative history, nor indeed any provision of the Geneva Conventions and Protocol I, whether implicitly or explicitly, seem to require any degree of intensity in the armed conflict for the application of the Geneva Conventions and Protocol I. The correct analogy, if one is needed, cannot be on Article 1 of Protocol II which is concerned with armed conflicts of non-international character, but on similar situations in the context of armed conflicts of international character, i.e. governments in exile and resistance movements in occupied territory. Since the adoption of the Geneva Conventions of 1949, no one has ever suggested that a government in exile or a resistance movement in occupied territory should be in control of a part of its territory before the Geneva Conventions and Protocol I become applicable to it. Liberation

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1. See for example, Draper, Wars of National Liberation and War Criminality, in Michael Howard (ed.), Restraints on War, Oxford University Press, 1979, pp. 135 et seq.
2. Ibid., p. 150.

movements are in the same situation as governments in exile and resistance movements.[1]

Second, since 1968, the General Assembly of the United Nations in numerous resolutions has been demanding the application of the Geneva Conventions to armed conflicts in which peoples are fighting against colonial and alien domination and racism, without the condition of intensity and regardless of the intensity of the armed conflict.[2]

Third, the 'beginning and end' of the application of the Geneva Conventions and Protocol I are specified in these Conventions and are not open to misinterpretation. Some of these provisions may be quoted in evidence.

Article 5 of the Third Geneva Convention relative to the treatment of prisoners of war is entitled "Beginning and End of Application." It provides in paragraph 1 that:

> "The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation." (emphasis added)

Article 6 of the Fourth Geneva Convention relative to the protection of civilians in time of armed conflict is even more explicit; its first paragraph provides:

> "The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2." (emphasis added).

The ICRC Commentary on this provision is even more revealing. It says:

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1. See Abi-Saab, 165 Recueil des Cours, (1979-IV), pp. 412-415.
2. See D.Schindler, 163 Recueil des Cours, (1979-II), pp. 139-140.

> "The words 'any conflict' may mean declared war or any other armed conflict covered by Article 2. By using the words 'from the outset' the authors of the Convention wished to show that it became applicable as soon as the first acts of violence were committed, even if the armed struggle did not continue. Nor is it necessary for there to have been many victims. Mere frontier incidents may make the Convention applicable, for they may be the begining of a more widespread conflict."[1]

These comments were made long before Protocol I came into being, but since wars of national liberation are now covered by Article 2 common to the Geneva Conventions, these comments apply to such wars.

Finally, Article 3 of Protocol I, which is also entitled "Beginning and End of Application" provides:

> "Without prejudice to the provisions which are applicable at all times:
>
> a) The Conventions and this Protocol shall apply from the beginning of any situations referred to in Article 1 of this Protocol."

In all these provisions it is expressly stated that the Geneva Conventions and Protocol I apply from the 'beginning' of an armed conflict of international character. It is also obvious that no degree of intensity whatsoever has been required. Indeed, it would be absolutely absurd to suggest, let apart to state, that a war of liberation begins when a part of the national territory has already been liberated. The concept of armed

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1. Pictet (ed.), Commentary on the Fourth Geneva Convention of 1949, Geneva, ICRC, 1958, p. 59.

conflict, as far as armed conflicts of international character, including wars of national liberation, are concerned, is used and understood in the literal meaning of armed conflict, i.e. fighting.

Cynics might argue that in such a case any band of criminals might style themselves a 'liberation movement' and claim the benefits of the Geneva Conventions and Protocol I. To such cynicism Article 43 of Protocol I provides the answer by defining the "armed forces of a Party to the conflict." Article 43, paragraph 1 states:

> "The armed forces of a Party to the 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."

This provision clearly shows that application of the Geneva Conventions and Protocol I is a function, not of recognition or intensity of military operations, but of organization and discipline and above all, the political will to respect and ensure respect of these Conventions.

In conclusion, it may confidently be stated that no degree of intensity whatsoever is a prerequisite for making a declaration in accordance with Article 96, paragraph 3, of Protocol I, nor the validity of the declaration to produce the effects stated in that paragraph is dependent on any degree of

the intensity of the military operation. As the provisions quoted above expressly state, the Geneva Conventions and Protocol I apply to wars of national liberation as defined in Article 1, paragraph 4, from the beginning of the armed conflict, i.e., from the beginning of the fighting or the armed hostilities, as any interstate armed conflict.

6.2.3. The Claim that a Declaration by a Liberation Movement can only be made if the Adversary was a Party to Protocol I.

The first sentence of paragraph 3 of Article 96 of Prtocol I declares that:

> "The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Aticle 1, paragraph 4, may undertake to apply the Conventions and this Protocol by means of a unilateral declaration addressed to the depository."

In his lectures at the Hague Academy of International Law, Professor Schindler misconstrued this statement when he commented by saying:

> "A declaration according to Article 96 can only be issued if a people is involved in a war of liberation against a High Contracting Party. This provision will greatly restrict the applicability of Protocol I to wars of liberation since one cannot expect that such countries as South Africa or Israel, against which wars of liberation are fought, will become contracting parties to the Protocol. Probably none of the recognized liberation

movements of today will ever be able to make a declaration according to Article 96 of Protocol I."[1]

This clearly indicates that in Professor Schindler's view a liberation movement can only make a declaration of accession to the Geneva Conventions and Protocol I if the Party against which a war of liberation is fought was a Party to Protocol I.

The implication of this view make it absurd indeed. The primary purpose, if not indeed the sole purpose, of paragraph 3 of Article 96 of Protocol I was to ensure at least the protection of the Geneva Conventions to "liberation movements of today." It was those cases which engaged the United Nations from 1968. And although textually, the words "against a High Contracting Party" may be construed as excluding the former liberation movements in Rhodesia (now independent Zimbabwe), there is no evidence to suggest that such a case was intended to be excluded. In fact, the General Assembly of the United Nations had repeatedly called upon the United Kingdom as the administering Power responsible for Rhodesia to ensure the application of the Geneva Conventions to that conflict and to quell the rebellion of the racist white minority which unilaterally declared the independence of Rhodesia in 1965.[2]

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1. D.Schindler, 163 Recueil des Cours, (1979-II), p. 141.
2. For example, in resolution 2508 (XXIV) of 21 November, 1969, on the question of Rhodesia, the General Assembly of the United Nations, inter alia, "calls upon the Government of the United Kingdom, in view of the armed conflict in that territory and the inhuman treatment of prisoners, to ensure the application to that situation of the Geneva Convention relative to the treatment of Prisoners of War and of the Geneva Convention relative to the protection of Civilian Persons in Time of War, both dated 12 August 1949." For a summary of United Nations Action with respect to Southern Rhodesia (Zimbabwe), see "United Nations Action in the Field of Human Rights", New York, 1980, United Nations Publications, sales No. E79.XIV.6, pp. 34 - 38.

In view of these facts one is inclined to think of the words "against a High Contracting Party" as being either a reminder of the contractual character of the Geneva Conventions and Protocol I; or as being merely a drafting oversight, which is more likely.

At any rate, the drafting history of paragraph 3 of Article 96 of Protocol I, its declared purpose, and its text, do not support Professor Schindler's view quoted above.

With regard to its drafting history, it should be noted that Article 96, paragraph 3, was drafted after prolonged negotiations conducted by an informal working group comprising representatives of various geographical regions and political persuasions, as well as representatives of liberation movements.[1] One therefore cannot realistically expect the supporters of liberation movements and the liberation movements themselves to participate in a working group negotiating a text that would have the effect of making the application of the Conventions and/or the Protocol dependent on the will of the Party to the conflict against which a war of liberation is fought.

The declared purpose of paragraph 3 of Article 96, of Protocol I, "was to establish a procedure whereby national liberation movements would have the same rights and obligations as the High Contracting Parties to the Geneva Conventions of 1949 and to Protocol I."[2] This clearly indicates that the liberation movement can make a declaration in accordance with Article 96, paragraph 3, if the other Party to the conflict

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1. See the speech of Mr. Longva (Norway), introducing the amendment containing the text of Article 96, paragraph 3, on behalf of its 35 sponsoring states, CDDH/I/SR.67, para. 56 - 61, para. 61.
2. Ibid., CDDH/I/SR.67, para. 57.

against which a war of liberation is fought was a Party to the Geneva Conventions. To suggest, as Professor Schindler has done, that the liberation movement can only make a declaration if the adversary was a party to Protocol I amounts to saying that the Geneva Conventions do not apply to wars of national liberation independently of Protocol I, which is absurd. It is worth recalling in this respect that from the moment the depositary to the Geneva Conventions receives the declaration, the liberation movment "assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions and this Protocol."[1] This means that if the adverse Party was a Party to the Geneva Conventions the liberation movement becomes bound by these Conventions; if the adverse Party was also a Party to the Protocol then the Geneva Conventions and the Protocol become binding on the liberation movement.

Indeed, a liberation movement may still make a valid declaration even if the adverse Party was neither a Party to the Geneva Conventions nor to the Protocol, and consequently assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions and to Protocol I. These are open Conventions and the declaration by a liberation movement is merely an expression of the will to be bound by them and such a declaration cannot be made subject to the will of the other party to the conflict against which a war of liberation is fought. The claim made by Professor Schindler, that the declaration by a liberation movement can only be made if the other Party to the conflict was a Party to Protocol I is

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1. Article 96, para. 3(b).

absolutely unfounded. It is not suprising therefore that Professor Schindler seems to be in a minority of one in this respect. The phrase "against a High Contracting Party", on which he based his argument may indeed be ignored altogether without loss of either form or substance. It is redundant. Indeed, the whole of this sub-section would not have been necessary if it were not for his remarks made at the beginning of this discussion.

6.2.4. Should the Liberation Movement be Recognized ?

Should the liberation movement be recognized in order to make a declaration of accession to the Geneva Conventions and Protocol I; in the case of an affirmative answer, by who ?

The first case that comes to mind is the recognition of the liberation movement by the regional intergovernmental organization. After all, this was the basis of the invitation of liberation movements to the Diplomatic Conference. Thus, in resolution 3102 (XXVIII) of 12 December 1973, the General Assembly of the United Nations:

> "Urge(d) that the national liberation movements recognized by the various regional international organizations concerned be invited to participate in the Diplomatic Conference as observers in accordance with the practice of the United Nations."

Acting on this recommendation, but after a long controversy, the Diplomatic Conference adopted by consensus a resolution by which, inter alia, it decided "to invite the national liberation movements, which are reognized by the regional intergovernmental

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organizations concerned, to participate fully in the deliberations of the Conference and its Main Committees," on the understanding that only delegations representing States were entitled to vote.[1]

However, neither Article 1, paragraph 4, nor Article 96, paragraph 3, require that the liberation movement be recognized by the intergovernmental regional oganization concerned. Could it be assumed nevertheless, that in the light of precedents of the initiation and participation in the work of the Diplomatic Conference and in the light of the practice of the United Nations in matters of invitations and the grant of observer status to liberation movements in United Nations Organizations,[2] that recognition of the liberation movement by the regional intergovernmental organization was taken for granted as a condition?

The answer is probably negative. According to Professor Abi-Saab, the attempt to impose the condition of recognition by the regional intergovernmental organization concerned, did not succeed in the Conference and cannot be read in the language of Article 96 as it stands.[3]

In this respect it is worth recalling that in the course of the debate on the amendments to draft Article 1 of Protocol I, Turkey proposed an amendment which explicitly made the application of the Geneva Conventions and Protocol I to wars of national liberation conditional to the recognition of the liberation movement by the regional intergovernmental organization

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1. For the complete text of the resolution, see Abi-Saab, 165 Recueil des Cours (1879-IV), p. 405.
2. See for example resolution 3237 (XXIX) of 22 November 1974, by which the General Assembly of the United Nations granted the Palestine Liberation Organization (PLO) 'observer status' in the Assembly, and the resolution cited therein.
3. Abi-Saab, 165 Recueil des Cours, (1979-IV), p. 408.

concerned.[1] The amendment, however, was not followed through, but the condition of recognition found expression in some interpretations and explanations of votes. Thus upon signing the Protocol, the United Kingdom stated with regard to Article 96, paragraph 3, that "in light of the negotiating history, it is to be regarded as necessary also that the authority concerned be recognized as such by the appropriate regional intergovernmental organization."[2]

The delegation of Turkey, as might be expected, reiterated its position in the explanation of vote on Article 1 of Protocol I. It stated that the Article "applied to armed conflicts recognized by regional intergovernmental organizations such as the League of Arab States or the Organization of African Unity, which were universally and widely accepted."[3]

The delegation of Indonesia seems to have had no trouble with the question of recognition. In its view, "the liberation movements referred to in paragraph 4 of Article 1 are limited only to those liberation movements which have already been recognized by the respective regional intergovernmental organization concerned, such as the Organization of African Unity and the League of Arab States."[4] This is indeed too restrictive.

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1. See Amendment CDDH/I/42.
2. Reproduced in Adam Roberts and Richard Guelf (ed.), Documents on the Laws of War, 1982, p. 462.
3. Toperi (Turkey), CDDH/SR. 36, para. 121.
4. CDDH/SR. 36, (Annex.).

However, the delegations of the United Kingdom, Turkey and Indonesia, seem to have been the only delegations to raise the question of recognition. On the other hand, no delegation expressly stated that recognition by the regional intergovernmental organization concerned, was not a prerequisite. But since neither the text of Article 1, paragraph 4, nor the text of Article 96, require any sort of recognition, one may hold with Professor Abi-Saab and Professor Schindler, that recognition of the liberation movement by the regional intergovernmental organization is not necessary and that such a condition cannot be read in the text of Article 1, paragraph 4, and Article 96, paragraph 3.[1] In other words, it may be assumed that the Conference had not wished to make the application of the Geneva Conventions and Protocol I subject to any sort of recognition, whether collective or individual.

This is in fact more in keeping with the policy adopted since 1949 to rid the law of armed conflict from the requirement of recognition, particularly recognition by the adversary. It is to this problem that we now turn our attention.

Recognition of the liberation movement by the adversary usually arises in the context of the prisoner of war status. The Third Geneva Convention relative to the treatment of prisoners of war, as well as Protocol I, make it clear that application of these Conventions to members of liberation movements is not subject to recognition of the liberation movement as a state, a government, a belligerent Power or authority, by the adverse party to the conflict. Thus, Article 4 of the Third Geneva

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1. Abi-Saab, 165 Recueil des Cours, (1979-IV), p. 408; D. Schindler, 163 Recueil des Cours, (1979-II), p. 142.

Convention states that it applies to "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the adverse Detaining Power."[1] The same of course applies to the members of militias and volunteer corps belonging to the liberation movement provided they fulfil the four conditions - that of being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; and that of conducting their operations in accordance with the laws and customs of war.[2]

Protocol I is even more explicit. Article 43, paragraph 1, of Protocol I states that:

> "The armed forces of a Party to the 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."[3]

Paragraph 2 of Article 43, states that members of the armed forces of a Party to the conflict (other than medical personnel and chaplains covered by Article 33 of the Third Geneva Convention) are combatants, that is to say, they have a right to participate directly in hostilities. And Article 44, paragraph 1, of Protocol I, states that "Any combatant, as defined in Article 43, *who falls into the power of an adverse Party shall* be a prisoner of war."

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1. Article 4 (A) (3) of the Third Geneva Convention of 1949.
2. Article 4 (A) (2) of the Third Geneva Convention of 1949.
3. Emphasis added.

Thus it is made perfectly clear that the Geneva Conventions and Protocol I are applicable regardless of whether the Parties to the conflict recognize each other or not. In other words, non-recognition of the liberation movement by the adversary is no justification for the denial of the protection afforded by the Geneva Conventions and Protocol I to the people fighting a war of national liberation and to its liberation movement.

6.2.5. The Liberation Movement should Represent a People.

Since the liberation movement prosecutes the war of national liberation in the name of the people, it seems logical to require that it be representative of the people. But how can the representative character of the liberation movement be ascertained ?

Of course it would be unrealistic to require the liberation movement to produce formal evidence of its representation; a formal evidence, for example, by democratic methods, requires the co-operation of the very Party to the conflict against which the war of liberation is fought. As such co-operation is impossible even to envisage, one has to be contented by informal means, such as the mobilization of the people to demonstrate in support of the struggle waged by the liberation movement, the response to calls for strikes and material support to the liberation movement. In general, all forms of active and passive resistance by the people constitute evidence of support to the liberation movement and hence testify to the representative character of the liberation movement.

Recognition by other states of the liberation movement or recognition by intergovernmental organizations also provide evidence on the representative character of the liberation movement, although, as stated earlier, such recognition is not a prerequisite for the issue of a declaration in accordance with Article 96, paragraph 3, of Protocol I.

Moreover, the very fact of the forcible denial of the right of self-determination, and in general, the repressive policies of the Party against which a war of liberation is fought should be considered as the best evidence on the representative character of the liberation movement. After all, the war of liberation is a means to an end; which is the exercise of the right to self-determination. Therefore, in this writer's view, the representative character of the liberation movement should be presumed. It is a presumption that can only be rebutted by allowing the people to exercise freely its right to self-determination. This, it is submitted, is the better solution from a humanitarian point of view. For what is at stake is the application of international humanitarian law and the protection which it provides to the civilian population and combatants. To deny such protection on the pretext that the liberation movement is unrepresentative is to add another injustice to the denial of the right of self-determination.

CHAPTER FOUR

THE BASIC RULE OF DISTINCTION BETWEEN THE CIVILIAN POPULATION AND COMBATANTS AND BETWEEN CIVILIAN OBJECTS AND MILITARY OBJECTIVES

1. The Principle of Distinction

All humanitarian international law - whether customary or conventional - is largely based on a basic distinction between combatants and non-combatants and between civilian and military objects.

As a rule combatants and military objects constitute military objectives, that is to say, it is permissable to attack.

This rule was included in one of the earliest multilateral conventions on the conduct of hostilities, namely the Declaration of St. Petersburgh of 1868.[1] In uncompromising terms the Declaration lays down that "the only legitimate object which States should endevour to accomplish during war is to weaken the military forces of the enemy," and that for this purpose, "it is sufficient to disable the greatest possible number of (armed) men."

The Declaration goes on to state that the object of war, which is the weakening of the military forces of the enemy, "would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable," and that "the employment of such arms would, therefore, be contrary to the laws of humanity."

It should be noted that the Declaration of St. Petersburg was not formulated by sentimentalists but by military strategists who were quite aware of the fact that "war is a mere continuation of policy by other means." The Declaration,

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1. See text in: Friedman, The Law of War, A Documentary History, Vol. 1, 1972, pp. 192-193; Roberts and Guelf, Documents on the Laws of War, 1982, pp. 30-31.

therefore, reflected the political philosophy of 19th Century military strategists.

Apparently, with an eye on the principles embodied in the Declaration of St. Petersburg, the British Manual of Military Law (1958), remarks that:

> "Before the First World War the tendency was to regard hostilities as being restricted to the armed forces of the belligerents, and to differentiate between them and the ordinary citizens of the contending States who did not take up arms. As the result, however, of the practice followed by the belligerents in the two world wars, it is no longer possible to say that international law protects the civilian population from injury which is incidental to attack upon legitimate military objectives."[1]

Each of these two statements calls for comment. The first statement in this quotation regarding the tendency to regard hostilities as being restricted to the armed forces of the belligerents is only true as far as the military strategy was concerned, and apparently, only in so far as war between European states were concerned, and even then, apparently only in theory; practice was completly different. Of the reasons which impelled him to write his famous treatise on the laws of war, in 1623 Grotius wrote:

> "There were many and weighty considerations impelling me to write a treatise on the subject of law. I observe everywhere in the Christian world a lawlessness in

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1. Great Britain, War Office, The Law of War on Land, Being Part III of the Manual of Military Law, 1958, p. 8, para. 13, quoted in Whiteman, Digest of International Law, Vol. 10, 1968, p. 136.

warfare, of which even barbarous nations would be ashamed. And arms once taken up, there would be an end to all respect for law, whether human or divine, as though a fury had been let loose with general licence for all manner of crime."[1]

If this were the kind of warfare conducted between the self-styled 'civilized Western Powers', the type of warfare which such Powers waged against what they considered as peoples of inferior civilization should come as no suprise, especially during the colonial era. In 1906, the English writer F.W. Hirst, drew attention to the "peculiarly barbarous type of warfare" which civilised Powers waged against "tribes of inferior civilization." "When I contemplate such modern heroes as Gordon, and Kitchener, and Roberts, I find them in alliance with slave dealers or Mandarins, or cutting down fruit trees, burning farms, concentrating women and children, protecting military trains with prisoners, bribing other prisoners to fight against their fellow countrymen. These are performances which seem to take us to the bad old times. What a terrible tale will the recording angel have to note against England and Germany in South Africa, against the United States in the Philipines, against France in Madagascar and Tonquin, against Spain in Cuba, against the Dutch in the East Indies, against the Belgians in the Congo State."[2]

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1. Liesje van Someren, Umpire to the Nations: Hugo Grotius, (London - Dennis Dobson), 1965, p. 121. This book is a biography of Hugo Grotius.
2. F.W. Hirst, The Arbiter in Council, 1906, p. 230, cited in Q. Wright, The Bombardment of Damascus, A.J.I.L., 1926, p. 266.

Certainly the record is not any better, whether in interstate or non-interstate armed conflicts which took place since the First World War.

With regard to the statement that as a result of the pratice in two world wars it is no longer possible to say that international law protects the civilian population from injury which is incidental to attack upon legitimate military objectives, it should be said that it is misleading. Never in international law were the civilian population and civilian objects considered to be protected against injury or damage which is incidental to attacks upon legitimate military objectives. What actually happened during the two World Wars and particularly in the Second World War is that the concept of military objectives was stretched to such an extent that any talk about distinction between combatants and non-combatants and between civilian and military objects became meaningless. The concept of military objectives went so far as to make the morale of the civilian population a primary object of attack. This was not done as mere reprisal *but was adopted* as a policy. For example, following what had been described as "a comprehensive review of the enemy's (present) political, economic and military situation", Air Vice-Marshal Bottomely, the British Deputy Chief of the Air Staff, in two directives to Air Marshal Sir Richard Peirse, stated that "the primary object of your operations should now be focused on the morale of the enemy civil population and, in particular, of the industrial workers."[1]

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1. British directives of 9 July, 1941 and 14 February, 1942, as quoted by David Johnson, Rights in Air Space, 1965, pp. 48-49. The story of the British 'strategic bombing' is well
(cont. on the following page)

Such military strategy was exactly the opposite of that proclaimed in the Declaration of St. Petersburg of 1868, which, in the final analysis proved to be the correct strategy. Thus, as if to commemorate the centenary anniversary of the Declaration of St. Petersburg, the General Assembly of the United Nations, in resolution 2444 of 19 December 1968, affirmed the following principles "for observance by all govermental and other authorities responsible for action in armed conflicts":

a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

b) That it is prohibited to launch attacks against the civilian population as such;

c) That distinction must be made at all times between persons taking part in hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

This resolution was adopted by 111 votes for, none against, and no abstentions. Its significance lies probably not so much in affirming these customary principles of international law, or even in recognizing the necessity of of applying basic humanitarian principles in armed conflict, but in the fact that it marked the end of an era of disenchantment with the law of armed conflict and the beginning of a new concern by the United Nations in the resect of human rights in armed conflicts of all types. Thus, in operative

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(cont. from previous page) analysed in pp. 44-57 of Johnson's book,as well as by Geoffry Best, Humanity in Warfare, 1980, pp. 262-285.

paragraph 2 of Resolution 2444, the General Assembly invited the Secretary-General of the United Nations, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study:

a) Steps which could be taken to secure the better application of existing international conventions and rules in all armed conflicts;

b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.

In operative paragraph 3 of Resolution 2444, the General Assembly requested the Secretary-General "to take all other necessary steps to give effect to the provisions of resolution 2444, and to report to the General Assembly at its next session on the steps he had taken. Further, in operative paragraph 4, the General Assembly requested member-states to extend all possible assistance to the Secretary-General in the preparation of the study requested of him in paragraph 2 of the resolution. Finally, in operative paragraph 5, the General Assembly called upon all states which have not yet done so to become parties to the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925 and the Geneva Conventions of 1949.

Since then, respect for human rights in armed conflicts whether in general or with respect to particular cases of armed conflict or both, has become a constant topic in the work of the General Assembly of the United Nations. It is

unnecessary for the purpose of our discussion to review all the steps which had been taken in this regard;[1] suffice it here to refer to two resolutions that had a marked effect on the "reaffirmation and development of humanitarian law applicable in armed conflicts." These are Resolution 2675 (XXV) of 9 December, 1977, adopted by the General Assembly by 109 votes in favour, none against, and 8 abstentions, which affirmed "basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict; and Resolution 3103 (XXVIII) of 12 December, 1973, proclaiming basic humanitarian principles in all armed conflicts and principles of the legal status of combatants struggling against colonial and alien domination and racist regimes.

The basic principles for the protection of civilian populations in armed conflicts which were affirmed in Resolution 2675 were the following:

1. Fundamental human rights, *as accepted in international* law and laid down in international instruments, continue to apply fully in situations of armed conflict.

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1. For a review of the work of the United Nations including the reports prepared by the Secretary-General of the United Nations on "Respect for Human Rights in Armed Conflicts", see Keith Suter, An International Law of Guerrilla Warfare, 1984, pp. 37-82. The title of this book which is based on Keith Suter's Ph.D. thesis, does not reflect its content, it is more of a general report on the different stages of the revision of the laws of war in the period from 1968 to 1974, than of an international law of guerrilla warfare as such. For extracts of the reports prepared by the Secretary-General of the United Nations in 1969 and 1970, see Friedman, The Law of War, A Documentary History, Vol. 1, 1972, pp. 701-755.

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to the civilian populations.
4. Civilian populations as such should not be the object of military operations.
5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.
6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.
7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.
8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of principles for international humanitarian relief, as laid down in resolution XXVI, adopted by the twenty-first International

Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application.

A comparable resolution of weighty evidential value is the resolution adopted by the Institute of International Law at its Edinborough session (4-13 September, 1969). This resolution bears the title: "The distinction between military objectives and non-military objects in general and particularly the problem associated with weapons of mass destruction." The resolution states existing principles of international law to be observed in armed conflicts "by any de jure or de facto government, or by any other authority responsible for the conduct of hostilities", which presumably includes international as well as non-international armed conflicts. The text of the resolution of the Institute of International Law is reproduced here in full and is accompanied by unexhaustive references to texts of existing international conventions as well as comparable texts of Protocol I Additional to the Geneva Conventions of 1949. The purpose (my purpose) is to show that, notwithstanding the formalities of ratification and accession, the rules of Protocol I (Articles 48 to 67) affording protection to the civilian population against effects of military operations are, by and large, already binding on all States and other authorities responsible for the conduct hostilities. In other words, the rules of Protocol I affording protection to the civilian population are regarded here as mere clarification of already binding principles or specifications of the basic principles of distinction. This being said, we turn now to the text of the Resolution of

the Institute of International Law which reads as follows:

> The Institute of International Law,
>
> Reaffirming the existing rules of international law whereby the recourse to force is prohibited in international relations,
>
> Considering that, if an armed conflict occurs in spite of these rules, the protection of civilian populations is one of the essential obligations of the parties,
>
> Having in mind the general principles of international law, the customary rules and the conventions and agreements which clearly restrict the extent to which the parties engaged in a conflict may harm the adversary,
>
> Having also in mind that these rules, which are enforced by international and national courts, have been formally confirmed on several occasions by a large number of international organizations and especially by the United Nations Organization,
>
> Being of the opinion that these rules have kept their full validity notwithstanding the infringements suffered,
>
> Having in mind that the consequences which the indiscriminate conduct of hostilities and particularly the use of nuclear, chemical and bacteriological weapons, may involve for civilian populations and for mankind as a whole,
>
> Notes that the following rules form part of the principles to be observed in armed conflict by any de jure or de facto government, or by any other authority

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1. Text in ICRC, Document CE/3b, Geneva, 1971, Annex, pp. 76-77.

responsible for the conduct of hostilities:

1. The obligation to respect the distinction between military objectives and non-military objects as well as between persons participating in the hostilities and members of the civilian population remains a fundemental principle of the international law in force.[1]

2. There can be considered as military objectives only those by which their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.[2]

3. Neither the civilian population nor any of the objects[3] expressly protected by the conventions or agreements can be considered as military objectives, nor yet

a) under whatsoever circumstances the means indispensable for the survival of the civilian population,[4]

b) those objects which, by their nature or use, serve primarily peaceful purposes such as religious or

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1. Cf. Art. 48, 50, 51(3) of Protocol I.
2. Cf. Art. 52 of Protocol I, Art. 23(g) of the Hague Regulations of 1907, and Art. 53 of the Fourth Geneva Covention, 1949.
3. Cf. Art. 51(2) of Protocol I. The terms of such conventions or agreements usually prescribe the conditions under which 'protected objects' may loose that protection.
4. Cf. Art. 54 of Protocol I, and Art. 23, 55 to 62 of the Fourth Geneva Convention of 1949.

or cultural needs.[1]

4. Existing international law prohibits all armed attacks on the civilian population as such, as well as on non-military objects, notably dwellings or other buildings sheltering the civilian population, as long as these are not used for military purposes to an extent as to justify action against them under the rules regarding military objectives as set forth in the second paragraph hereof.[2]

5. The provisions of the preceding paragraphs do not affect the application of the existing rules of international law which prohibit the exposure of civilian populations and of non-military objects to the destructive effects of military means.[3]

6. Existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population.[4]

7. Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to

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1. Cf. Art. 53 and 56 of Protocol I, and the Hague Convention of 14 May, 1954, on the protection of cultural property in armed conflict.
2. Cf. Art. 51 (2), 52(1) and (3), 59 and 60 of Protocol I, and in general, Part II of the Fourth Geneva Convention.
3. Cf. Art. 51(7) and 58 of Protocol I, and Art. 28, 83 and 88 of the Fourth Geneva Convention.
4. Cf. Art. 51(2) of Protocol I, and Art. 27 to 34 of the Fourth Geneva Convention of 1949, especially Article 33 thereof.

specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as of 'blind' weapons.[1]

8. Existing international law prohibits all attacks for whatsoever motive or by whatsoever means for the annihilation of any group, region or urban centre with no possible distinction between military objectives and non-military objects.[2]

Although affirmed and reaffirmed in a number of resolutions adopted by governmental and non-governmental organizations as shown in the above discussion, formulation of the principle of distinction raised some controversy at the Geneva Diplomatic Conference of 1974/1977. The ICRC proposed to formulate the principle (or the Basic Rule) of distinction as follows:

"In order to ensure respect for the civilian population, the Parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives."[3]

As it stood, this draft was acceptable to the major Western states as well as to the Soviet Union, but it was

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1. Cf. Art. 35, 36, and 51(4) (5) of Protocol I. See in particular the Geneva Protocol of 1925, (Protocol for the prohibition of the use of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare).
2. Cf. Art. 51 (4), (5). But see also the Convention on the prevention and punishment of the crime of genocide, 1948, and Art. 32 of the Fourth Geneva Convention of 1949.
3. ICRC Draft Article 43, (Basic Rule).

unacceptable to some East European countries as well as to African, Asian and Latin American countries.[1] Their objection was mainly to the words 'military resources'. It was pointed out that the Declaration of St. Petersburg stated that "the only legitimate object which States should endevour to accomplish during war is to weaken the military forces of the enemy", while the ICRC text referred to the "weakening of the military resources of the adversary." 'Military forces' and 'military resources' were not the same thing. Types of military forces, it was said were set out in Article 4, paragraphs (1), (2), (3) and (6) of the Third Geneva Convention of 1949, while the concept of military resources seemed to include not only military forces but the entire logistic support of such forces, including factories and industries manufacturing war materials, power plants and so forth. Accordingly, the delegate from Venezuela who made these remarks asked the representative of the ICRC for what reasons the Declaration of St. Petersburg had been amended in the sense of amplifying the concepts contained therein.[2]

Another recurring criticism of the ICRC draft was that the expression "the destruction or weakening of the military resources of the adversary" was more appropriate in a convention on the law of war than in a convention covering the protection of the civilian population during hostilities.[3]

Eventually, a compromise solution was reached by replacing the words 'military resources' by the expression

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1. See Summary Record in Levie (ed.), Protection of War Victims, Vol. III, 1980, pp. 59-74.
2. CDDH/III/SR. 4, para. 8; Levie, Vol. 3, p. 66.
3. CDDH/III/SR. 10, para. 2; Levie, Vol. 3, p. 70.

'military objectives' and rewording the Article as to read:

> "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."[1]

In plenary, this Article was adopted by consensus. In Protocol I it figures as Article 48, and is entitled "Basic Rule." During the discussion of this rule the British delegate Mr. Eaton tended to minimise its importance. "The heads of entities responsible for applying the Conventions would consult Article 52, not Article 48," he said.[2] This view is wrong, because Article 52 is concerned with general protection of civilian objects, and therefore it is not a complete guide.

Although Article 52, like Article 48, states that "attacks shall be strictly limited to military objectives", it only gives a partial definition of '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 effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definate military advantage."[3]

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1. Article 48, of Protocol I.
2. CDDH/IIISR. 4, para. 19; Levie, Vol. 3, p. 67.
3. Article 52, para. 2, of Protocol I.

Thus Article 52 assists in drawing a distinction between non-military objects and military objectives, but it does not suffice to distinguish between the civilian population and combatants. In this respect, one has to consult Article 43 of Protocol I which offers a definition of civilians and civilian population.

The rest of this Chapter will focus on these definitions and their value in assisting to draw the distinction required in Article 48, between the civilian population and combatants and between civilian objects and military objectives.

While this distinction, as Article 48 states, is in order to ensure respect for and protection of the civilian population and civilan objects, the distinction between the civilian population and members of the armed forces assists in drawing a line between persons entitled upon capture to be treated as prisoners of war and those who are not entitled to such treatment. We begin with the definition of combatants and the categories of persons entitled to the Prisoner-of War status because Article 50 of Protocol I defines civilians negatively:

> "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third (Geneva) Convention and in Article 43 of this Protocol."[1]

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1. Article 50, para. 1 of Protocol I.

2. Combatants and Prisoner-of-War Status

2.1. The Armed Forces of a Party to a Conflict

According to Clausewitz, "where a simple conception and language is sufficient, to resort to the complex becomes affected and pendantic."[1] The definition of the armed forces laid down in Article 43 of Protocol I is simple, relatively clear, and calls only for little explanation. The Report of Committee III on this Article notes that the term 'members of the armed forces' is all-inclusive and includes both combatants and non-combatants (such as medical personnel and chaplains) and that, as elsewhere in the Protocol the term 'Party to a conflict' includes national liberation movements, by virtue of Article 1, paragraph 4, of Protocol I.[2]

Paragraph 1 of Article 43 of Protocol I defines the armed forces of a Party to a conflict as follows:

> "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 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."

Obviously, enforcing compliance with the rules of

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1. Anatol Rapoport (ed.), Clausewitz On War, Pelican Classics, 1968, p. 205.
2. Report of Committee III, Third Session, in Levie, Protection of War Victims, Vol. 2, p. 376.

international law is an obligation on the armed forces. Yet, of all peoples, the delegation of Israel wished to make a constitutive element of the concept of armed forces:

> "the delegation of Israel wishes to declare that the enforcement of compliance with the rules of international law applicable in armed conflicts is a conditio sine qua non for qualification as armed forces. Moreover, it is not sufficient that the armed forces be subject to an internal disciplinary system which can enforce compliance with the laws of war, but - as the expression "shall enforce" indictes - there has to be effective compliance with this system in the field."[1]

If the history of the Israeli armed forces was not punctuated with massacres of civilians beginning with the massacre of the inhabitants of the Palestinian village of Deir Yassin in April 1948, the very year which the state of Israel was created, to the massacre of thousands of Palestinian civilians in Sabra and Chatila camps in Beirut in September 1982, one would have forgiven the Israeli delegation for making such a declaration. The Israeli armed forces are indeed the first to be disqualified according to this declaration, as well as the Israeli government which since 1967 till the present time continued to violate the letter and spirit of the Fourth Geneva Convention relative to the protection of civilians in time of war. In 1982 an International Commision inquiring into reported violations of international law by

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1. Written explanation of vote on Article 43 of Protocol I (draft Article 41), text in Levie, Protection of War Victims, 1980, Vol. 2, p. 377.

by Israel during its invasion of the Lebanon found the Israeli armed forces and the government of Israel guilty, not only of committing aggression in violation of the Charter of the United Nations but also of violating all rules of civilized warfare prescribed by international law.[1]

The delegation of Israel, however was isolated in this declaration, the real purpose of which seems not to be concern about the enforcement of compliance with the rules of international law applicable in armed conflicts, but the attempt to maintain the Israeli myth that the Palestine Liberation Organization (PLO) were merely a 'group of terrorists' not a liberation movement. Another purpose of the Israeli declaration is to provide a pretext for denying prisoner-of-war status to captured Palestinian fighters. The Israeli declaration may best be understood against this background.

But let us assume for the sake of argument that the Israeli declaration was motivated solely by deep concern about the enforcement of compliance with the rules of international law applicable in armed conflicts. Its acceptance would still trigger a chain of negative reciprocity which eventually would do away with the system of prisoner-of-war status altogether, and even with the law of armed conflict as a whole. Surely then, the Israeli declaration must be rejected. On the other hand, it must be emphasized that the enforcement of compliance with the rules of international law applicable in

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1. See "Israel in Lebanon" - The report of the International Commission to enquire into reported violations of International Law by Israel during its invasion of the Lebanon, Ithca Press, 1983. (280 pages).

armed conflict remains an obligation on the Parties to the conflict and not only on members of the armed forces. It is significant that Article 1 common to the four Geneva Conventions of 1949 provides that:

> "The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances."

Paragraph 2 of Article 43 of Protocol I states that:

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

This provision might see to be stating the axiom: that members of the armed forces have a right to participate directly in hostilities. But there is more than meets the eye to this axiom. It happens sometimes that combatants, i.e. members of the armed forces, do not qualify for prisoner-of-war status either by reason of the fact that the conditions for prisoner-of-war status were actually not fulfilled, or, by reason of the fact that the required conditions were interpreted in such a way as to make them appear unfulfilled, and consequently not only to deny prisoner-of-war status to the members of the armed forces concerned, but also to deny their status as members of the armed forces and to treat them as ordinary criminals, even when their operations were exclusively directed against the armed forces of the adversary. Such a possibility still exists under Article 44 of Protocol I entitled "Combatants and Prisoners of War",

albeit as an exception to the rule. This will be explained later; suffice it here to note that by emphasising the combatant status of members of the armed forces it was intended to state, (and Article 44(1) of Protocol I does state), that "any combatant as defined in Article 43 who falls into the power of an adverse Party shall be a prisoner of war."

Finally, paragraph 3 of Article 43 of Protocol I addresses the possibility of a Party to a conflict incorporating in its armed forces " a paramilitary or armed law enforcement agency."

> "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."

It is not clear from the summary records of the Diplomatic Conference whether the purpose of the notification was to guarantee to the members of such a paramilitary or armed law enforcement agency the privileges of the members of the armed forces or the civilian status. In view of the generality of paragraph 2, and of the word 'incorporate' in paragraph 3, it seems that the purpose of the notification was to guarantee to such "paramilitary or armed law enforcement agency" the privileges of members of the armed forces.

With regard to the 'notification' its self, it may be noted that the Rapporteur of Committee III, Mr. Aldrich of the United States' delegation referred to it as "a simple procedural condition."[1] Mr. El Ghonemy of Egypt disagreed;

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1. CDDH/III/SR.47, para. 34; in Levie, op. cit., Vol. 2, p. 374.

his delegation considered that, in order to be valid, the notification provided for in paragraph 3 should be subject to certain conditions: it should be made in an effective manner and the adverse Party should be given sufficient time to inform its forces of the notification.[1] This seems to be a reasonable view, whatever may be the legal status of such paramilitary or armed law enforcement agency.

3. Combatants and Prisoners of War under the Geneva Convention

As far as the protection of combatants in wars of national liberation is concerned, the international character of wars of national liberation might be meaningless if it did not result in affording adequate protection to combatants, in the sense of enjoying the rights and protection attatched to the status of prisoner-of-war.

In order to be entitled to prisoner-of-war status under the Third Geneva Convention, the combatant who falls into the power of the enemy has to belong to one of the categories of persons enumerated in Article 4A (1), (2), (3) and (6) of the Convention.

These categories of persons are:

1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2) Members of other militias and members of other volunteer corps, including those of organized

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1. CDDH/III/SR.47, para. 47; in Levie, Vol. 2, p. 375.

resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

a) that of being commanded by a person responsible for his subordinates;

b) that of having a fixed distinctive sign recognizable at a distance;

c) that of carrying arms openly;

d) that of conducting their operations in accordance with the laws and customs of war.

3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

6) Inhabitants of a non-Occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

There is a tendency in legal literature to treat all members of national liberation movements as guerrillas or irregulars and to subject them to the test of sub-paragraph 4A (2) quoted above. Such an approach is erroneous for several reasons. First, it confuses the structure of the armed forces of the national liberation movement with its mode of conducting hostilities. Guerrilla warfare is a type of warfare

and may be resorted to by regulars as well as by irregulars. Second, it ignores the fact that sub-paragraph A(2) of Article 4 of the Third Geneva Convention refers, in the main, to auxiliaries of the regular armed forces referred to in sub-paragraph A(1). That is why it speaks of "members of other militias and members of other volunteer corps, including those of organized resistance movements." Such 'auxiliaries' or 'others' may exist in wars of national liberation as in interstate armed conflicts, but the fact remains that in wars of national liberation the Party to the conflict is the people itself which is fighting for its self-determination. One should therefore look to sub-paragraph A(1) when speaking of the armed forces of liberation movements and not only to sub-paragraph A(2).

Third, it is significant that sub-paragraph A(3) speaks of "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." A liberation movement is invariably such a government or an authority not recognized by the adversary, and there is nothing to prevent it from having a regular armed force. Possession of regular armed forces is not the monopoly of states, and the question of whether the armed forces were regular or irregular is a question of fact.

In brief, the question of the legal status of a member of the armed forces of a liberation movement should be examined with reference to sub-paragraphs A(1), (2), (3) and (6) of Article 4 of the Third Geneva Convention, and not only with reference to sub-paragraph A(2). In fact, this was basically the approach of an Israeli court in the case of

"the Military Prosecutor v. Omar Mahmud Kassem and others",[1] but unsuprisingly, it could not fit them in any of the above mentioned categories.

The facts of the case are simple and clear and any self-respecting court judging objectively would have found the defendents "Omar Kassem and others" entitled to prisoner-of-war status. But no Israeli court could be expected to reach such a decision without puting itself against the very ideology of the Zionist movement and the official state-policy of Israel in the Arab territory occupied by Israel in the 1967 war. The court decision reviewed below should therefore be first read against its political background. Officially, Israel does not recognize the West Bank as occupied territory and has refused to apply to the occupied Arab territories the Fourth Geneva Convention of 1949 since 1967. Consequently, the interpretation of the provisions of Article 4 of the Third Geneva Convention of 1949, had to be coloured to suit Israeli objectives in the occupied territories. This being said, we proceed to the facts of the case.

Omar Kassem and his group were members of the Popular Front for the Liberation of Palestine - one of several Palestinian organizations under the umbrella of the Palestine Liberation Organization (PLO). Wearing mottled caps and green miltary dress and armed with rifles, hand grenades and ammunition and carrying other explosive materials, they 'infiltrated' from the East Bank of Jordan into the West Bank occupied by Israel. They were captured after a battle or, in

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1. 1 S.J.M.C., 402, April 13, 1969, summarized in Israel Yearbook on Human Rights, Vol. 1, 1971, pp. 456-460.

the words of the court "an encounter with the Israel Defense Forces in the course of which an exchange of fire took place." The Israeli 'military prosecutor' charged them with "armed infiltration, belonging to an unlawful association, and carrying arms and ammunition." Obviously, these are crimes under Israeli law, but they do not constitute crimes under international law. Indeed it is impossible to make such acts criminal under international law without abolishing the people's right to resist - a right recognized in Article 4 of the Third Geneva Convention, and in customary international law.[1] Accordingly, it was only natural that the preliminary argument of council for the defense against the charges was that "the defendants were entitled to the protection provided under the Third Geneva Convention as prisoners of war."[2]

The first issue considered by the court was whether it was competent to decide who is entitled to the status and treatment of prisoner of war. In support of its affirmative ruling, the Court reasoned that: first, every court of law has the basic right immanent in its very existence to determine the limits of its jurisdiction from the *material aspect*. Second, the claim to protection as prisoners of war (a

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1. But Customary international law did not protect the *participants in a people's* resistance in occupied territories, see generally, I.P.Trainin, Questions of Guerrilla Warfare in the Law of War, A.J.I.L., Vol. 40, 1946, pp. 534 et seq.; R.R.Baxter, The Duty of Obedience to the Belligerent Occupant, British Year Book of International Law, Vol. 27, 1950, pp. 235 et seq.; also, Baxter, So-Called Unprivileged Belligerency, British Year Book of International Law, Vol. 28, 1951, pp. 323 et seq., especially, pp. 333 et seq. For a survey of practice, prior to the Geneva Convention of 1949, see Lester Nurick and Roger W. Barret, Legality of Guerrilla Forces under the Laws of War, A.J.I.L. Vol. 40, 1946, pp. 563 et seq.
2. See Israel Yearbook on Human Rights, Vol. 1, 1971, p. 456.

protection which, said the court, is not included in the web of the military enactment concerning rules of responsibility for offences, but is included in the rules of customary and conventional law as to the treatment of prisoners of war) is a claim involving denial of the Court's powers to try offences attributed to the defendants. Therefore, it was concluded, the court must even incidentally to the question of its powers, decide whether to classify the defendants as prisoners of war. The court fortified this conclusion by invoking Article 5 of the Third Geneva Convention which stipulates that:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competant tribunal."

The intention of this Article, said the court, is to withhold from military commanders the power to determine whether persons captured in combat operations are prisoners of war, and to vest that power in a court in which the question can be decided according to accepted principles of law and justice.[1]

But did the court really decide according to accepted principles of law and justice ?

We are told that the question of the legal status of Omar Kassem and his group was discussed with reference to the

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1. See Israel Yearbook on Human Rights, Vol. 1, 1971, p. 457.

provisions of subsections A (1), (2), (3) and (6) of Article 4 of the Third Geneva Convention,[1] which in our view is the correct approach, but this is only the starting point, and in a way, may be seen as merely procedural. The crucially substantive matter is the manner in which the different provisions are construed. Thus we are told that the Court ruled that the defendants - Omar Kassem and his group - "were not to be classified among the categories of persons mentioned in the provisions of Article 4 A(1), (2), (3) and (6) of the Third Geneva Convention" in view of the following findings (quoted below verbatim):[2]

> "1. The defendants belong to the organization known as The Popular Front for the Liberation of Palestine. The Organization exists not only in Jordan, but also has leaders and branches in other countries in the Middle East. In Jordan it operates independently according to the insructions of its leaders. The Organization is not part of the Jordanian army or of any body of recognized legal status in Jordan, and is considered an illegal organization in Jordan itself where it operates in underground manner without any approval from the Jordanian authorities. The Jordan government has sometimes taken action to prevent it from operating in Jordanian territory, in the West Bank, and in Israel, and even on several occasions employed its armed forces against the Organization's bases.

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1. Israel Yearbook on Human Rights, Vol. 1, 1971, p. 458.
2. Israel Yearbook on Human Rights, Vol. 1, 1971, pp. 457-58.

"2. The aim of the Organization is to strike at the very foundations of the State of Israel and to destroy it. One of its principles is armed struggle, meaning the use of force, including terrorism, murder, and sabotage, to solve the problem. The members of the Organization take the same approach to civilian objectives as to military objectives.

"3. The Organization has committed various acts of violence, including grenades thrown and explosives placed in various locations where civilians congregate (such as the Mahane Yehuda Market in Jerusalem and Tel Aviv Central Bus Terminal, and attacks on El-Al aircraft at Athens and Zurich).

"4. Members of the Organization sometimes wear military uniform and carry arms openly outside inhabited areas, although they sometimes refrain from doing so in the course of operations for fear of being caught.

Before assessing the relevance of these findings some clarifications need to be made. The findings in (1), are on the whole, correct. But it should be added that the illegality of the Popular Front for the Liberation of Palestine (PFLP) in Jordan was mainly due to the Marxist ideology of the Organization, and partly due to the conflict between the Palestine Liberation Organization (PLO) and Jordan on the question of the representation of the Palestinian People. It was not until the Arab summit in Rabat, 1974, that Jordan recognized the PLO as the sole representative of the Palestinian people. The Israeli court was therefore fishing in troubled water when it made much of the illegality of the

PFLP in Jordan, as will be shown below.

With regard to the findings in (2) and (3) of the Court, it should be noted that, almost without exception, whenever the PFLP or any other Palestinian organization carried out an operation against a civilian or what appeared to be a civilian target, the operation was invariably classified as 'retaliation' or 'reprisal'. Unfortunately, subject to Article 33 of the Fourth Geneva Convention of 1949,[1] reprisals against civilian objects were not illegal under international law, prior to the adoption of Protocol I of 1977.[2] But of course, no Israeli court could be expected to classify as reprisals, any of the operations carried out by Palestinian organizations. On the contrary, they have been considered as violations of international law, and as evidence that Palestinian organizations do not respect the laws and customs of war and therefore do not qualify for prisoner-of-war status, or even qualify as a 'Party to the conflict'. To be sure, from a formal point of view, neither the Israeli government, nor the Israeli courts consider the Palestinian people or its present representative - the Palestine Liberation Organization - a

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1. Article 33 of the Fourth Geneva Convention of 1949 states (inter alia): "Reprisals against protected persons and their property are illegal." But Article 4 of the said Convention defines the persons protected by the Convention as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict of which they are not nationals." Unfortunately, this has not been interpreted as prohibiting reprisals altogether; it needed Protocol I additional to the Geneva Conventions of 1949 to complete the ban on reprisals.
2. Article 51, para. 6, of Protocol I provides: "Attacks against the civilian population or civilians by way of reprisals are prohibited." And Article 52, para. 1, of Protocol I provides: "Civilian objects shall not be the object of attack or of reprisals."

Party to the conflict. In their eyes the conflict is between Arab states and Israel - not a conflict betwee the Palestinian people and world Zionism with Israel as its striking arm - as the Palestinians see it, or even a Palestinian/Israeli conflict The Palestinian People does not exist in formal Israeli thinking. Consider for example the 'willful blindness' in the following statement made by the former Israeli Prime Minister Levi Eshkol in an interview with the Israeli newspaper Davar, in 1969. Levi Eshkolwas one of the early zionist immigrants to Palestine in the early years of this century. He said in that interview:

> "What are the Palestinians? When I came here there were 250,000 non-jews, mainly Arabs and Bedouins. It was desert - more than under developed. Nothing. It was only after we made the desert bloom and populated it that they became interested in taking it from us."[1]
>
> (Note that he did not say how many Jews there were when he came to Palestine)

Consider also the willful blindness, contradiction and arrogance in the words of another Israeli Prime Minister, Golda Meir:

> "How can we return the occupied territories? There is nobody to return them to."[2]
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> "There was no such thing as Palestinians... It was not as though there was a Palestinian people in Palestine considering itself as a Palestinian people, and we came

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1. Davar, January 24, 1969, cited in Alfred M. Lilienthal, The Zionist Connection, 1978, p. 146.
2. Cited in Alfred Lilienthal, Ibid., p. 146.

and threw them out and took their country away from them. They did not exist."[1]

So the by now estimated four million or more Palestinians were 'nobody' in the eyes of the former Israeli Prime Minister Golda Meir, and Levi Eshkol negatively defined the population of Palestine which was almost one hundred per cent Arab when he went to Palestine,[2] (including a Jewish-Arab minority).

Given this attitude of the politicians it becomes hardly suprising that the Israeli judiciary followed suit. Indeed, as early as 1952, the Israeli Supreme Court of Israel (sitting as Court of Criminal Appeals) in the case of Diab v. Attorney General, said:

"We have never acknowledged that the Arab States (1948) came to assist the Arabs of Palestine and that their war aim was to establish an independent Palestinian State within the former mandatory boundaries (of Palestine)."

And with reference to Palestinian fighters in that war, the Supreme Court of Israel said:

They were, intentionally or unintentionally, tools of

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1. Ibid., Loc. cit.
2. Consider the following changes in the population and land-ownership as a result of Jewish immigration between 1895 and 1946 based on the official British "Survey of Palestine" (1946):

	Population			%		No. Jew Sets.
Year	Arabs	Jews	Total	Arabs	Jews	
1895	435,000	47,000	500,000	99·5	0·5	14
1919	642,000	58,000	700,000	97·5	2·5	71
1939	977,500	445,500	1,423,000	94·4	5·6	231
1944	1,211,000	529,000	1,740,000	93·5	6·5	259
1946	1,364,000	608,000	1,973,000	93·4	6·6	373

(figs have been rounded. A census was taken in 1922 and 1931).

the invaders and it was the invader's aims which were decisive."[1]

The attitude of the Israeli court in the case of "Omar Kassem and Others" was thus a continuation of what has all the way been held by Israeli politicians as well as by Israeli courts. This will become even more evident when we examine the manner in which the Israeli court construed the provision of sub-paragraph A(2) of Article 4 of the Third Geneva Convention. But let us first continue the consideration of the Court's findings in the case of "Omar Kassem and Others" quoted in (1) to (4) above. We have so far commented on the findings in (1), (2) and (3).

With regard to the Court's finding in (4) that the members of the Popular Front for the Liberation of Palestine "sometimes wear military uniform and carry arms openly outside inhabited areas, although they sometimes refrain from doing so in the course of operations for fear of being caught", it seems that the Court's intention was to say that the members of the Organization do not always distinguish themselves from the civilian population. In this respect, it should be noted that the Popular Front for the Liberation of Palestine, like all other Palestinian Organizations in the PLO, has a political as well as a military wing. It is therefore in the nature of things that not all the members of the organization wear military uniform.

Nevertheless, on the basis of its findings the court ruled that Omar Kassem and his group were not to be

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1. Diab v. Attorney General, cited in Whiteman, Digest of International Law, Vol. 10, pp. 29-30, at 30.

classified among the categories of persons mentioned in section A(1), (3) and (6) of Article 4 of the Third Geneva Convention of 1949. That sub-paragraph A(6) is inapplicable in this case is uncontested because there was no levee en masse. But the Court did not tell us why, in view of its findings, Omar Kassem and his group were not to be classified among the categories of persons mentioned in Article 4 A(1), that is to say, they should neither be classified as "members of the armed forces of a Party to the conflict" nor as "members of militias or volunteer corps forming a part of such armed forces." Nor did the Court explain why Omar Kassem and his group were not to be classified as "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

Objectively speaking, the Popular Front for the Liberation of Palestine is such an 'authority' which is not recognized by the Detaining Power, and the question of 'regularity' of the armed forces is a question of fact.

Some explanation, however, was given when the Court considered the legal state of the defendants with reference to sub-paragraph A(2) of Article 4 of the Third Geneva Convention. The persons entitled upon capture to prisoner-of-war status according to Article 4 A(2) are:

> "Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such organized resistance movements fulfil the following

conditions:

a) that of being commanded by a person responsible for his subordinates;

b) that of having a distinctive sign recognizable at a distance;

c) that of carrying arms openly;

d) that of conducting their operations in accordance with the laws and customs of war."

In the case of the (Israeli) "Military Prosecutor v. Omar Mahmud Kassem and Others" the Israeli Court relied heavily on the words "belonging to a Party to the conflict" and made them "the most basic condition for the classification of irregular forces as prisoners of war."[1] Since the words "belonging to a Party to the conflict", as well as the four conditions (a, b, c, d) of Article 4 A(2) quoted above, are open to different interpretations, and since it is on the interpretation of these conditions that the fate of the prisoner depends, it seems necessary to consider them in some detail.

3.1. Belonging to a Party to the conflict. In referring to the provision of Article 4 A(2) of the Third Geneva Convention, the Israeli Court in the case mentioned above, pointed out that:

> "the most basic condition for the classification of combatants of irregular forces as prisoners of war is their belonging to a belligerent party. If they do not belong to a Government or State for which they fight

1. Israel Yearbook on Human Rights, Vol. 1, 1971, p. 458.

the combatants do not have the right to enjoy the status of war upon capture."[1]

Thus, the Israeli Court interpreted the words "belonging to a Party to the conflict" as meaning "belonging to a State." In explaining this conclusion, the Court said:

"It is natural that, in international conflicts, the Government which previously possessed an occupied area should encourage and take under its wing the irregular forces which continue fighting within the borders of the country, give them protection and material assistance, and that therefore a "command relationship" should exist between such Government and the fighting forces, with the result that a continuing responsibility exists of the Government and the commanders of its army for those who fight in its name and on its behalf."[2]

The Court went so far as to state that the Third Geneva Covention "excludes those forces - even regular armed units - which do not yield to the authority of the State and its organs of government. The Convention does not apply to these at all. They are to be regarded as combatants not protected by the international law dealing with prisoners of war, and the occupying Power may consider them as criminals for all purposes."[3]

Thus, even if Omar Kassem and his group were regular members of the armed forces of Jordan, or, even if the Popular Front for the Liberation of Palestine were part of the regular

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1. Ibid., pp. 458-9.
2. Ibid., p. 559.
3. Loc. cit.

armed forces of Jordan, they would still in the Court's view be considered as criminals for all purposes because they "do not yield to the authority of the State and its organs of government."

No one else seems to have construed Article 4 A(2) of the Third Geneva Convention as the Israeli Court has done. In particular, no one seems to have ever suggested that regular and irregular forces which do not yield to the authority of a state or its organs of government are to be regarded as combatants not protected by the international law dealing with prisoners of war and that the occupying Power may consider them as criminals for all purposes. Professor H. Lauterpacht summarised the position of irregulars under the Hague Regulations thus:

> "Of such irregular forces two different kinds are to be distinguished - first, such as authorised by the belligerents; and, secondly, such as acting on their own initiative, and on their own account, without special authorisation. Formerly, it was a recognized rule of international law that only the members of authorized irregular forces enjoyed the privileges due to the members of the armed forces of the belligerents; members of unauthorized irregular forces were considered to be war criminals, and could be shot when captured. During the Franco-German war in 1870, the Germans acted throughout according to this rule with regard to the so-called 'franc-tireurs', requiring the production of a special authorisation from the French Government from every irregular combatant whom they captured, failing which

he was shot. But according to Article 1 of the Hague Regulations this rule is now obsolete. Its place is taken by the rule that irregulars enjoy the privilege due to members of the armed forces of the belligerents, although they do not act under authorisation provided (1) that they are commanded by a person respnsible for his subordinates; (2) that they have a fixed distinctive emblem recognisable at a distance; (3) that they carry arms openly; and (4) that they conduct their operations in accordance with the laws and customs of war."[1]

Article 1 of the Hague Regulations of 1899 and 1907 (as well as Article 9 of the unratified Brussels Declaration of 1874) which prescribed these four conditions for militias and volunteer corps, expressly state that:

"The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:..."

"In countries where militia and or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

The stipulation that in countries where militia or

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1. Oppenheim - Lauterpacht, International Law, Vol. 2, 1952, pp. 256-57. In the Trials of Major war criminals at Nuremberg it was stated that: "Many of the defendants seem to assume that by merely characterizing a person a partisan, he may be shot out of hand. But it is not so simple as that. If the partisans are organized and are engaged in what international law regards as legitimate warfare for the defence of their own country, they are entitled to be protected as combatants." It was also stated: "As the Hague Regulations state expressly, if they (the partisans) fulfill the four conditions, "the laws, rights, and duties of war" apply to them in the same manner as they apply to regular armies. See "The Einstatzgruppen Case", cited in Whiteman, Digest of International Law, Vol. 10, p. 163.

volunteer corps constitute the army, or part of it, they are included under the denomination 'army' would have been superfluous if, as the Israeli Court contended, a "command relationship" between such forces as mentioned in Article 4 A (2) of the Third Geneva Convention, and a state Party to the conflict were a legal requirement. For if "other militias and other volunteer corps, including organized resistance movements" were to belong to a Party to the conflict in the sense of a "command relationship", they would cease to be irregulars in the meaning of Article 2 A(4), and become regular militias or volunteer corps under Article 4 A(1).[1]

This is not merely a logical conclusion. There is overwhelming evidence that under both the Hague Regulations and the Geneva Conventions of 1949, the intention was to regard resistance movements as a Party to the conflict for purposes of the prisoner-of-war status. But there is no evidence to suggest that a 'command relationship' between a state Party to the conflict and a resistance movement was necessary for members of the resistance movement to be legally entitled to be treated as prisoners of war.

In the ICRC Commentary on the Third Geneva Convention we read the following:

> "The Conference of Government Experts (1947) had generally agreed that the first condition preliminary to granting prisoner-of-war status to partisans was their forming a body having a military organization."[2]

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1. This conclusion was made by W. Thomas Mallison and Sally V. Mallison, "The Juridicial Status of Irregular Combatants under the International Law of Armed Conflict, Case Western Reserve Journal of International Law, 1977, p. 37 et seq., at p. 55.
2. ICRC Commentary III, Pictet (ed.) 1960, p. 58.

And this:

> "...the delegates to the 1949 Conference reverted, at the suggestion of the Netherlands Delegation, to the principle stated in Article 1 of the Hague Regulations of 1907, which made a distinction between militias and volunteer corps forming part of the army and those which are <u>independent</u>."[1] (emphasis added)

Clearly, one cannot use the word 'independent' to describe resistance movements which are under the command of the government of a state Party to the conflict or its regular army. According to the ICRC Commentary:

> "It is essential that there should be a de facto relationship between the resistance organization and the Party to international law which is in a state of war, but the existance of this (de facto) relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance movement is fighting."[2]

Probably the best statement to conclude the above discussion and refute the allegation made by the Israeli Court to the effect that a 'command relationship' should exist between the resistance movement and the government of a state Party to the conflict, in order to be entitled to be treated as prisoners of war, is that of the United States Army Field Manual (1956). Commenting on the condition of Article 4 A(2)

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1. Ibid., p. 57.
2. Loc. cit.

of the Third Geneva Convention, which states that the members of other militias and members of other volunteer corps and resistance movements, in order to qualify for prisoner-of-war status, should, inter alia, be commanded by a person responsible for his subordinates, the U.S. Army Field Manual categorically states:

> "State recognition, however, is not essential, and an organization may be formed spontaneously and elect its own officers."[1]

The Israeli Court was therefore wrong in interpreting the phrase "belonging to a Party to the conflict" as meaning, or requiring, a "command relationship" between resistance movements and the government of the state whose territory is occupied. The resistance movement, it is submitted, has been considered as a Party to the conflict for purposes of prisoner of war status, that is to say, a subject of international law, since the Brussels Declaration of 1874, and definitely so, since the Hague Conferences of 1899 and 1907. Any other interpretation would make a mockery of the stipulation in Article 1 of the Hague Regulations, that the laws, rights, and duties of war appply not only to armies, but also to militias and volunteer corps fulfilling the four prescribed conditions, and would smack of bad faith.

Finally, it should be pointed out that the term "Party to the conflict" refers not only to states and resistance movements in interstate armed conflicts, but also to peoples fighting in the exercise of their right of self-determination

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1. Cited in Whiteman, Digest of International Law, Vol. 10, p. 133.

against colonial domination and alien occupation and against racist regimes, as proclaimed in paragraph 4 of Article 1 of Protocol I.

Resistance movements, as well as members of militias and members of volunteer corps which do not constitute part of the regular army of a Party to the conflict have to fulfil four conditions in order to be qualified for prisoner-of-war status under 4 A(2) of the Third Geneva Convention. These conditions may briefly be explained as follows:

3.2. Command by a Responsible Person. According to the United States Army Field Manual (1956), this condition is fulfilled "if the commander of the corps is a commisioned officer of the armed forces or is a person of position and authority or if the members of the militia or volunteer corps are provided with documents, badges, or other means of identification to show that they are officers, noncommissioned officers, or soldiers so that there may be no doubt that they are not persons acting on their own responsibility. State recognition, however, is not essential, and an organization may be formed spontaneously and elect its own officers."[1] The ICRC Commentary also states that it is not a requirement that the members of resistance movements be commanded by regular officers of the armed forces; "the leader may be either civilian or military."[2] He is responsible for action taken on his orders as well as action which he was unable to prevent. His competence must be considered in the same way as that of

1. Whiteman, Digest of International Law, Vol. 10, p. 133.
2. ICRC Commentary III, Pictet (ed.), 1960, p. 59.

a military commander.[1]

Subordination to a resoonsible commander has perhaps been easy enough to fulfil. It is in fact difficult to see how guerrillas could function at all as a military force unless such subordination were first acheived.[2] Yet, in the case of 'Omar Kassem and Others' referred to above, the Israeli Court contended that the condition of being commanded by a person resonsible for his subordinate has not been proved to the Court.[3] This seems to be in flat contradiction with the Court's finding that "the defendants belong to the organization known as The Popular Front for the Liberation of Palestine", and that "the organization exists not only in Jordan, but also has leaders and branches in other countries in the Middle East", and that the Organization "operates independently according to the instructions of its leaders."[4] It is difficult to see how an organization could have all these characteristics without being commanded by a person responsible for his subordinates. This, however, goes to show how arbitary can be a court bent on denying prisoner-of-war status to persons entitled to it. It also shows the necessity for an international tribunal to determine the legal status of the persons claiming to be entitled to prisoner-of-war status, instead of leving it to political leaders or to the judiciary of the adverse Party to the conflict.

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1. Loc. cit.
2. McDougal and Feliciano, Law and Minimum World Public Order, p. 548.
3. Israel Yearbook on Human Rights, Vol. 1, 1971, p. 459.
4. Ibid., p. 457.

3.3. ', Fixed Distinctive Emblem Recognizable at a Distance.

In addition to being organized under a responsible command, members of resistance movements are required to wear a fixed distinctive emblem recognizable at a distance. According to the U.S. Army Field Manual, this condition is satisfied by the wearing of military uniform, but less than the complete uniform will suffice. A helmet or headdress which would make the silhouette of the individual readily distinguishable form that of the ordinary civilian would satisfy this requirement.[1] This is also the view expressed by the authors of the ICRC Commentary on the Third Geneva Convention. The Commentary mentions an arm-band, a cap, (although it says this may frequently be taken off and does not seem fully adequate), a coat, a shirt, an emblem or a coloured sign worn on the chest.[2] It hardly needs mentioning that to be distinctive the sign must be the same for all the members of any one resistance movement. But it is not essential that the sign be notified to the adverse Party, although this may be desirable in order to avoid misunderstanding.[3]

The term 'recognizable at a distance' is open to interpretation. According to the ICRC Commentary, "the distinctive sign should be recognizable by a person at a distance not too great to permit a uniform to be recognized."[4]

In the case of "Omar Kassem and Others", the condition of wearing a fixed emblem recognizable at a distance was the only condition which the Israeli Court was prepared to admit

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1. See Whiteman, Digest, Vol. 10, p. 133.
2. ICRC, Commentary III, Pictet (ed.), 1960, p. 60.
3. Loc. cit.
4. Loc. cit.

as being fulfilled.[1] And this was apparently due to the fact that the evidence was too strong for refutation - the group was dressed in a complete military uniform. Yet, the Court made it look like a concession on its part. This is how the Court put it:

> "As to the second condition, in spite of the evidence that the defendants, when seen from a distance did not look like saboteurs, the Court was ready to hold that they wore mottled caps and green clothes, which were not customary with the inhabitants of the area in which they were captured, and therefore this condition was fulfilled."[2]

Perhaps political leaders the world over would have been very grateful to the Israeli Court if it could provide them with a clue to how saboteurs look, whether from a distance or at very close range.

3.4. Carrying Arms Openly.

The third condition which members of militias and members of volunteer corps and resistance movements have to fulfil in order to qualify for prisoner-of-war status upon capture is the carrying of arms openly. But what does the term 'openly' mean in this respect? The United States Army Field Manual (1956) seems to interpret 'openly' as meaning 'visibly'. It states that this requirement is not satisfied by the carrying of weapons concealed about the person or if the individuals hide their weapons on the approach of the enemy.[3] This is all the

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1. Israel Yearbook on Human Rights, Vol. 1, 1971, p. 459.
2. Loc. cit.
3. See Whiteman, Digest, Vol. 10, p. 133.

American Manual had to say about this condition. It amounts to prescribing a way of carrying arms and even kinds of weapons which have to be carried. This seems unreasonable. War has never been a fair game; suprise is a factor in military operations. There seems to be therefore more realism in the interpretation made by the ICRC Commentary of this condition. It says:

> "although the difference may seem slight, there must be no confusion between carrying arms 'openly' and carrying them 'visibly' or 'ostensibly'. Suprise is a factor in any war operation, whether or not involving regular troops."[1]

This provision, according to the ICRC Commentary, is intended to guarantee the loyalty of the fighting, "it is not an attempt to prescribe that a handgrenade or a revolver must be carried at belt or shoulder rather than in a pocket or under a coat."[2]

The ICRC Commentary goes on to say that "the enemy must be able to recognize partisans as combatants in the same way as members of regular armed forces, whatever their weapons."[3] If this is the case, then the condition of carrying arms openly would seem redundant since the enemy would be able to recognize partisans by the wearing of a fixed distinctive emblem recognizable at a distance. Another way of looking at this condition is to regard it as an alternative means of distinguishing between combatants and non-combatants, as is

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1. ICRC, Commentary III, Pictet (ed.), 1960, p. 61.
2. Loc. cit.
3. Loc. cit.

now the case under Protocol I.

At any rate it must be admitted that arms are carried openly, if they are carried as soldiers normally carry them.

The question which is not easy to answer and which is common to the three conditions of wearing a fixed distinctive emblem recognizable at a distance, the carrying of arms openly, and the conducting of hostilities in accordance with the laws and customs of war, is whether, with regard to these conditions, the members of resistance movements are to be judged individually or collectively, i.e. as an organization.

Opponents of resistance and or liberation movements are naturally inclined to judge the members of resistance movements individually and collectively, as did the Israeli Court in the case of 'Omar Kassem and Others." With regard to the carrying of arms openly, the Court ruled that:

> "the phrase 'carrying arms openly' is not to be construed as carrying arms in places where arms and the persons bearing them cannot be seen.[1] Moreover, it does not refer to bearing of arms such as Kalatchnikov assault rifles in the course of their use in an engagement. That the defendants used their weapons during their encounter with the Israel defence forces is obvious, but on the other hand no weapons were identified as being in their possession until they started firing at the Israel Defense Forces. Likewise, it has been established that the Organization to which the defendants belong operates in underground manner and does not carry arms openly.

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1. This amounts to saying that guerrilla warfare is illegal.

Therefore, it cannot be held that members of the organization bear arms openly."[1]

According to such an interpretation no member of a resistance movement or a liberation movement would qualify for prisoner-of-war status under the Geneva Conventions, or even under Protocol I which requires a combatant to carry 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.

More realistic is the interpretation which requires the members of resistance movements (or liberation movements) to wear a fixed distinctive sign recognizable at a distance and to carry arms openly, only during military operations,[2] or to use the more restrictive lanuague of Protocol I, only during military engagements.[3] Any other interpretation would offend against not only the very simple logic of guerrilla warfare which depends on mobility, secrecy and suprise, but also would put in motion a chain of negative reciprocity (reprisals and retaliation) which eventually might take away whatever remained of the respect for the laws and customs of war. Thus, in a way, denial of the prisoner-of-war status on controversial pretexts can be counter-productive to the Party to the conflict which

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1. Israel Yearbook on Human Rights, Vol. 1, 1971, p. 460.
2. See Mallison and Mallison, The Juridicial Status of Irregular Combatants under the International Humanitarian Law of Armed Comflict, Case Western Reserve Journal of International Law, Vol. 9:39, 1977, p. 58: "The open arms requirement, like that of the distinctive sign, is only applicable during military operations."
3. Article 44(3) of Protocol I.

denies it to members of the other Party to the conflict.[1] This seems to be true regardless of the legal status of the Parties to the conflict or of the characterisation of the conflict as international or non-international. In a word, the question of whether the conditions of wearing a distinctive sign, the carrying of arms openly, and compliance with the rules of civilized warfare were satisfied or not should be considered with reference to the particular case of the captured persons, not with reference to the organization as a whole. Only in this manner would the fourth condition (i.e. compliance with the laws and customs of war) make sense in the case of guerrilla warfare.

3.5. Compliance with the Laws and Customs of War

The importance of this condition can hardly be exaggerated. "unless war is to degenerate into a savage contest of physical forces freed of all restraints of compassion, chivalry and respect for human life and dignity, it is essential that the accepted rules of warfare should continue to be observed."[2] The problem, however, is in ascertaining the scope and content of this condition. The Commentary of the ICRC recognizes that "the concept of the laws and customs of war is

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1. Consider for instance the many cases of air hijacking and the taking of hostages by some Palestinian Organizations in order to secure the release of Palestinian combatants held prisoners in Israeli jails. Palestinian Organizations would not have been pushed to take such measures if Israel treated captured combatants as prisoners of war. One has also to think of the execution of American prisoners by the Viet-Cong during the war in Vietnam, and the execution of French prisoners by the Algerian Liberation Front (FLN) during the Algerian war of independence, as measures to stop the execution by South Vietnam and France, respectively, of members of these liberation movements.
2. Oppenheim-Lauterpacht, International Law, Vol. 2, 1952, p. 218.

rather vague and subject to variation as the forms of war evolve."[1] The Stockholm Draft of the Geneva Conventions attempted to clarify the intention of the Parties on at least one point by including the express obligation for partisans (i.e. irregulars combatants) to "treat nationals of the Occupying Power who fall into their hands in accordance with the provisions of the present (Third Geneva) Convention."[2] But this provision was deleted by the drafters of the Convention in 1949, who did not wish to depart from the terms of the Hague Regulations.[3]

The vagueness of the concept of "the laws and customs of war" under the Hague Conventions of 1899 and 1907, came to the fore during the formulation of the Nuremberg and Tokyo Charters for the trial of so-called 'major war criminals' following the Second World War.[4] However, for purposes of those trials the following acts, or any of them, were considered as crimes coming within the jurisdiction of the International Military Tribunals of Nuremberg and Tokyo, and for which there shall be "individual responsibility":

> "a) Crimes against peace: namely, planning, perpetration, initiation or waging of a war of aggression, or war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

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1. ICRC, Commentary III, Pictet (ed.), 1960, p. 61.
2. Loc. cit.
3. Loc. cit.
4. On this point, see Schwarzenberger, International Law, Vol. 2, (armed conflict), 1968, pp. 479-483.

"b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

"c) Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[1]

The principles of international law recognized by the Charter of the Nuremberg Tribunal were affirmed by the General

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1. Article 6 of the Charter of the Military Tribunal of Nuremberg. For the complete text of the Charter, see Friedman, The Law of War, A Documentary History, Vol. I, 1972, pp. 885-893.

Assembly of the United Nations in 1946.[1] Moreover, in the Geneva Conventions of 1949 and their Additional Protocols of 1977, there are provisions dealing specifically with "grave breaches" under these Conventions.[2] Accordingly, whatever may be the 'vagueness' of the concept of the "Laws and customs of war" it may be said that a reasonable guide exists regarding what resistance movements may be expected to comply with. In our view, it is in the catalogue of "grave breaches" that one should look when judging whether members of resistance movements conduct their o erations in accordance with the laws and customs of war.

According to Article 130 of the Third Geneva Convention of 1949, the following acts are "grave breaches" of the Convention, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention.

Usually it is not difficult for resistance movements and liberation movements to comply with the Third Geneva Convention. The difficulty for resistance and liberation movements is in the taking of prisoners, not in looking after them. As a matter of fact, nothing in the conduct of military operations pleases members or resistance and liberation movements than the taking

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1. Friedman, ibid., Vol. 2, pp. 1027-29.
2. Articles 50, 51, 130, and 147, respectively, of the four Geneva Conventions of 1949, and Article 85 of Protocol I.

of prisoners of war, for this is the most assured way of compelling the adversary to treat the members of resistance and liberation movements as prisoners of war, or at least secure their exchange when they fall in the hands of the adversary.

Application of the Fourth Geneva Convention relative to the protection of civilian persons raises a technical problem when the liberation movement and the government or authority against which the war of liberation is directed are of the same nationality. Paragraph 1 of Article 4 of the Fourth Convention defines the persons protected by the Convention as being "those who, at the given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." This, for example, is the case of South Africa. The civilian population in such a case are at least under the protection of Article 3 common to the Geneva Conventions. But in view of the international character of war of wars of national liberation and of the numerous appeals of the General Assembly to the colonial Powers and those occupying foreign territories as well as to the racist regimes... to ensure the application to the fighters for freedom and self-determination of the provisions of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August, 1949, and the Geneva Convention relative to the Protection of Civilians in Time of War, of 12 August, 1949,[1] it seems clear that the intention of the General

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1. U.N. General Assembly Resolution No. 3103 (XXVIII) of 12 December, 1973.

Assembly of the United Nations was to regard the Fourth Geneva Convention applicable notwithstanding Article 4 of the Convention.

According to Article 147 of the Fourth Geneva Convention, any of the following acts, if committed against persons or property protected by the Convention would constitute a grave breach of the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of hostile Power, or wilfully depriving a protected person of the rights of a fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

While the'grave breaches' enumerated in the Geneva Conventions offer a reasonable guidance as to what members of liberation movements may be expected to respect, the rules regulating the actual conduct of miltary operations have always been vague, and the problem was further compounded by the permissability of reprisals. True, reprisàls against persons and property protected by the four Geneva Conventions are prohibited, but it was only recently with the adoption of Protocol I in 1977 that the ban on reprisals was extended to civilians and civilian objects which did not benefit from the protection of the Fourth Geneva Convention. Thus, it may be generally stated that where reprisals are permissable, it would be unreasonable to expect liberation movements not to resort to

them when the adverse Party persists in its violation of the Geneva Conventions. In such a case, the Geneva Conventions become the only applicable standard as to whether the members of the liberation movement, or the movement as a whole, respect the laws and customs of war. In this regard, it may be stated without prejudice that liberation movements have better records in respecting the Geneva Conventions than their opponents.

Of course, colonial and alien and racist regimes would never characterize any act of war committed by members of liberation movements as reprisals. In their eyes, members of liberation movements are 'terrorists', and by their laws, liberation movements are 'terrorist organizations'. The "regular and fair trial" in such circumstances become an occasion for the court concerned to vent its political spleen, regardless of whether the captured members of a liberation movement have themselves committed any war crime or not. It is a fact of life that justice has seldom been obtained in political trials, and has never been obtained for members of liberation movements in the courts of their enemies.

On the international level, as well as in legal literature the question is of course different, and although the question of reprisals has seldom been invoked by international lawyers in the discussion of the compliance with the laws and customs of war for purposes of prisoner-of-war status, some writers have made it the focus of their analysis of this condition.[1] But, opinions differ as to when the condition of compliance with the

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1. E.g. Mallison and Mallison, The Juridicial Staus of Irregular Combatants under the International Humanitarian Law of Armed Conflict, Case Western Reserve Journal of International Law, pp. 58-65.

laws and customs of war by members of national liberation movements may be regardard as fulfilled. A minority of the experts consulted by the ICRC in 1969 and 1970, expressed the view that:

> "while all belligerents are required to observe the laws and customs of war, this requirement is even greater for guerrillas, since for them alone it is the constitutive element to obtain the status of prisoner of war in case of capture. The members of the regular armed forces, in fact, when captured, retain their status as prisoner of war, this being in virtue of Articles 4, 5 and 85 of Geneva Convention III of 1949."[1]

This view seems to proceed from the assumption that members of resistance movements or liberation movements are "unlawful combatants" or "criminal civilians" unless their lawful combatancy is proven by fulfilling the conditions stipulated in Article 4 A(2) of the Third Geneva Convention. Such a view was in fact proposed by the Russian delegation to the Brussels Conference of 1874. The Russian delegation proposed to add the following qualification to Article 9 of the Brussels Declaration (which corresponds to Article 1 of the Hague Regulations of 1899 and 1907):

> "... Armed bands not complying with the above-mentioned conditions (of Article 9 of the Brussels Declaration) shall not possess the rights of belligerents; they shall not be considered as regular enemies, and in case of

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1. ICRC, Doc. CE/6b entitled, "Rules Applicable to Guerrilla Warfare", (submitted to the Conference of Government Experts), 1971, p. 14.

capture shall be proceeded against judicially."[1]

Such a conclusion was unacceptable to the Brussels Conference and there is no evidence to suggest that it was accepted or intended by the Geneva Diplomatic Conference of 1949.

According to the United States Army Field Manual (1956) the condition of compliance with the laws and customs of war is fulfilled "if most of the members of the body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime."[2] This clearly indicates that the individual members of the organization who have committed war crimes would still retain their prisoner-of-war status upon capture. This view was expressly upheld in the Report of the Secretary-General of the United Nations on "Respect for Human Rights in Armed Conflicts."

The Report of the Secretary-General submitted to the General Assembly in 1970 commented thus:

> "The last condition set forth in the Conventions is that combatants should "conduct their operations in accordance with the laws and customs of war." It is generally agreed that this condition refers to the respect of the laws and customs of war by the movement or corps as a whole, whether or not individual members fulfil this condition. In case of grave breaches of the Conventions by individual guerrillas, these guerrillas may, and should, of course, be punished, but after a trial giving all the

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1. Cited in Lester Nurick and Roger W. Barret, Legality of Guerrilla Forces under the Laws of War, A.J.I.L., 1946, p. 565.
2. Whiteman, Digest of International Law, Vol. 10, p. 133.

guarantees of due process and without losing the status of prisoner of war that they may have acquired."[1]

The Report of the Secretary-General also raises the question of the treatment of guerrillas who themselves have respected the laws and customs of war while the movement as a whole has induldged in practices inconsistent with these laws and customs. This, says the Report, "may be a problem deserving special consideration."[2] In this respect, it should be noted that under Protocol I any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.[3] Moreover, as a rule, it is expressly stated that violations of the rules of international law applicable in armed conflict "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..."[4] In the absence of strong evidence to the contrary, the solution adopted in Protocol I should also be adopted for the Geneva Convention. Any other solution would create insoluble practical difficulties and would lead to logical comtradictions, and in humanitarian terms, it would be counter-productive.

4. Combatants and Prisoners of War under Protocol I of 1977

The four conditions of priviliged combatancy or

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1. Report on Human Rights in Armed Conflicts, Doc. A/8052, September 18, 1970, partially reproduced in Friedman, The Law of War, 1972, pp. 723 et seq., at 736.
2. Loc. cit.
3. Article 44 (1) of Protocol I.
4. Article 44 (2) of Protocol I.

"qualifications of belligerents" as they are described in Article 1 of the Hague Regulations of 1899 and 1907, were a 19th century compromise between the demands of 'patriotism', on the one hand, and the demands of what Professor Geoffrey Best called "the essentials of the occupier's dream: a docile accepting population, behaving as if conquest and transfer to the victor's sovereignty had already happened"[1], on the other hand. Put rather differently, the four conditions were an attempt to reconcile the comflicting demands of the democratic conception of war as an affair of the people as a whole, not simply its regular armed forces, and the 'militaristic' conception of war as an affair of the regular armed forces of the state of which the 'civilian population' should stay aloof.

It does not need much ingenuity, however, to discover that the 'compromise' has always tilted heavily in favour of the 'militarists' throughout the process known as the 'codification' of the laws and customs of war, or, what has become customarily known as 'the reaffirmation and development of humanitarian law applicable in armed conflict'. It may be sufficient to mention that it was only in 1949 that members of militias and members of volunteer corps, including members of resistance movements operating in or outside their own territory, even if their territory was occupied, became expressly entitled to prisoner-of-war status upon capture provided that they fulfilled the four conditions discussed in the preceding section. This was considered by some commentators "an important concession" to members of resistance movements in

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1. Geoffrey Best, Humanity in Warfare, 1980, p. 190.

occupied territories.[1] The revolutionary character of this rule is, however, less real than apparent.[2] This is so, not only because Article 4 A(2) of the Third Geneva Convention requires members of organized resistance movements to fulfil the four conditions (i.e. responsible command; a fixed, distinctive, recognizable sign; open carrying of arms; and observance of the laws and customs of war), but also because there was no agreement on the interpretation of these conditions.

Two of these conditions were particularly singled out for criticism even before the Geneva Conventions of 1949 came into being - the condition of carrying arms openly, and that of wearing a fixed distinctive emblem recognizable at a distance. These two conditions, according to Professor Draper, are directed against the effectiveness of guerrilla fighters and guerrilla warfare.[3] But Professor Trainin argued that the unconditional requirement of a uniform for guerrilla troops "is not supported even by simple military logic." His argument runs as follows:

> "The conditions of guerrilla warfare are unusual. Guerrilla troops attack suddenly, by suprise. Could a uniform or distinguishing marks prevent suprise, which is the principal method of guerrilla warfare? What importance does a uniform have when guerrilla troops meet with the enemy at a close range? The intention and the activity of the guerrillas would be obvious even

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1. ICRC, Commentary III, Pictet (ed.), Geneva, 1960, p. 59.
2. McDougal and Feliciano, Law and Minimum World Public Order, 1967, p. 85.
3. Draper, The Relationship Between the Human Rights Regime and the Law of Armed Conflict, Israel Yearbook on Human Rights, Vol. 1, 1971, p. 201.

without a uniform."[1]

Further, he argued that, to link the right of the people to defend its native land and its honour to a uniform would be to carry the question of defense to an absurdity. Patriotism is not packed only in a uniform, just as it is impossible for the activities of the spontaneous hurricane to be set forth in the rules of a meteorological observatory.[2]

Trainin also criticised the condition of carrying arms openly:

> "One of the demands of those opposed to the guerrilla movement was that weapons be carried openly. This demand appeared, as a rule, where there were still no weapons such as those used today, when weapons consisted largely of rifles, machine guns and artillery. Now not only the regular army but the guerrillas as well use all contemporary weapons, even to tanks and aviation. Art consists partly in camouflaging weapons... Military sagacity was directed to this end. Today a person would be laughed at who proposes to decamouflage the weapons of contemporary warfare. But such a laughable demand was made by the Hitlerites to their enemies."[3]

Trainin went on emphasizing that the guerrilla troops set out to acheive the objectives which were given, and these never conflicted with international law. "From the point of view of these objectives, directed towards the liberation of their native land, it is entirely immmaterial how the aggressor

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1. I.P.Trainin, Questions of Guerrilla Warfare in the Law of War, A.J.I.L., Vol. 40, 1946, p. 558.
2. Loc. cit.
3. Ibid., pp. 559-60.

is destroyed - by weapons carried openly or concealed. It was important that they be destroyed."[1]

The requirement of wearing a fixed distinctive emblem recognizable at a distance was also criticised by some Western writers. As early as 1951, Professor Baxter (at the time Major, and member of the Judge Advocate General's Corps, United States Army) criticised this requirement and made a prophecy that 25 years later came true. He wrote:

> "The soldier in uniform or the member of a volunteer corps with a distinctive sign have a protected status upon capture, whilst other belligerents not so identified do not benefit from any comprehensive scheme of protection. ... There is considerable justice in the contention that to make the difference between life and death hang on the type of clothes worn by the individual is to create a 'clothes philosophy' of a particularly dangerous character. Indeed, the emphasis on the properly uniformed belligerent may only be a survival from the type of war fought by closely grouped ranks of soldiers, in which firing upon even individual detached soldiers was regarded as a violation of international law.[2] As As the current tendency of the law of war appears to be to extend the protection of prisoner-of-war status to an ever-increasing group, it is possible to envisage a day

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1. Ibid., p. 560.
2. Article 69, General Orders No. 100, 24 April, 1863, prepared by Dr. Francis Lieber for the government of United States forces in the field, stated: "Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect."

when the law will be so retailored as to place all belligerents, however garbed, in a protected status."[1]

That envisaged day came in 1977 when the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law applicable in armed conflicts, at the Plenary meeting of 26 May, adopted Article 44 of Protocol I Additional to the Geneva Conventions of 1949, by 73 votes to one (Israel), with 21 abstentions.[2]

Before commenting on Article 44 of Protocol I, it may be useful to have a look at the ICRC's proposed solution to the problem of prisoners of war. It is obvious probably, from the discussion in the preceding section, that the main problem which remained without a satisfactory solution since the Brussels Conference of 1874 was the problem relating to members of militias or members of volunteer corps and members of resistance movements which operate independently of the 'regular' armed forces of the state or of the central government. Indeed, the position of members of militias and members of volunteer corps and members of resistance movements operating in occupied territories and under the authority of the central government or its armed forces were not in a better position than those who operated independently since all have to fulfil the four

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1. R.R. Baxter, So-Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs, British Yearbook of International Law, Vol. 28, 1951, p. 343. In Baxter's article, the word 'guerrilla' is applied to armed hostilities by private persons or groups of persons who do not meet the qualifications established in Article 4 of the Third Geneva Convention of 1949, or corresponding provisions of the earlier Conventions. Ibid., p. 333. McDougal and Feliciano, Law and Minimum World Public Order, 1967, pp. 544 et seq., also use the term 'guerrilla' in the sense used by Baxter.
2. CDDH/SR.40, para. 15; Levie, Protection of War Victims, Vol. 2, 1980, p. 516.

conditions discussed in the preceding section. For such bodies of 'irregulars', 'partisans', or 'guerrillas' as they are often called, the ICRC proposed to loosen the restrictions on their entitlement to prisoner-of-war status by means of an interpretative protocol of the four conditions which the members of such bodies had to fulfil. To this effect, the ICRC proposed the following text of draft Article 42 of draft Protocol I entitled "New Category of Prisoners of War":

> "1. In addition to persons mentioned in Article 4 of the Third (Geneva) Convention, members of organized resistance movements who have fallen into the hands of the enemy are prisoners of war provided such movements belong to a Party to the conflict, even if that Party is represented by a government or an authority not recognized by the Detaining Power, and provided that such movements fulfil the following conditions:
>
> a) that they are under a command responsible to a Party to the conflict for its subordinates;
>
> b) that they distinguish themselves from the civilian popuation in military operations;
>
> c) that they conduct their military operations in accordance with the Conventions and the present Protocol.
>
> 2. Non-fulfilment of the aforementioned conditions by individual members of the resistance movement shall not deprive other members of the movement of the status of prisoner of war. Members of a resistance movement who violate the Conventions and the present Protocol shall, if prosecuted, enjoy the judicial guarantees provided by

the Third Convention and, even if sentenced, retain the staus of prisoners of war."

In a 'Note' accompanying this text, the ICRC stated that if, as many governments wished, the Diplomatic Conference should decide to mention in the present Protocol members of movements of armed struggle for self-determination, a solution would be to include in this Article (i.e. draft Article 42) a third paragraph worded as follows:

"3. In cases of armed struggle for self-determination as guaranteed by the United Nations Charter 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", members of organized liberation movements who comply with the aforementioned conditions shall be treated as prisoners of war as long as they are detained."

This draft Article was based on the discussion which took place at the second session of the Conference of Government experts in 1972.[1] It represents a compromise between the different schools of thought expressed in that session, but contrary to its title, it did not introduce a new category of prisoners of war; it simply 'codified' the widespread and generally accepted liberal interpretation of Article 4 A(2) of the Third Geneva Convention.[2] The reader may therefore take it as a summary of our discussion of these conditions as shown in

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1. See ICRC Report on the Work of the Conference of Government Experts, second session, 1972, Vol. 1, pp. 133-135, paras., 3.53 - 3.69.
2. Abi - Saab, Wars of National Liberation in the Geneva Conventions and Protocols, Recueil des Cours of the Hague Academy, Vol. 165, (1979 - IV), p. 423.

the preceding section, but it should be noted that even such a liberal discussion is easier to make in theory rather than to apply in practise. For example, it is not easy to state with any certainty 'when' an organization, taken as a whole, may be said to have fulfilled the requirement of conducting its military operations in accordance with the laws and customs of war. Similarly, it is difficult to ascertain whether the resistance or liberation movement fulfils the requirements of distinction in military operations. These difficulties may also jeopardise the chances of the individual member who did not commit any war crime since the Detaining Power would be inclined to judge him in the light of the often propagandistic characterization of the movement as a whole as a 'terrorist organization'. Above all, in so far as the above mentioned conditions may be regarded as constitutive elements of the prisoner-of-war status as far as members of resistance and liberation movements are concerned, they perpetuate the traditional inequality between combatants belonging to the armed forces of a Party to the conflict and those which operate independently. Moreover, the solution which the ICRC envisaged for liberation movements was already overtaken by the adoption of Article 1, paragraph 4, of Protocol I which treats the people (or the liberation movement) as a Party to the conflict whose armed forces may, and in fact invariably do, consist of regulars as well as irregulars, while the ICRC proposal treats them invariably as irregulars.

For all these reasons, the Diplomatic Conference found the proposal of the ICRC unsatisfactory. The main purpose of the ICRC proposal, however, was endorsed, but the Diplomatic Conference devised an alternative method of acheiving it.

The work of the Working Group of Committee III and the work of the Committee itself on the question of combatants and prisoner-of-war status was largely facilitated by a list of 15 questions prepared by the Rapporteur of Committee III, Mr. Aldrich, head of the United States delegation.[1]

Among these questions was the following: should there be separate standards for the PW (prisoner of war) entitlement of combatants who do not satisfy the requirements of Article 4 of the Third Geneva Convention, or should there be a single standard applicable to all members of the armed forces of a Party to the conflict?

This indeeed was the crux of the problem of entitlement to prisoner-of-war status since the Brussels Conference of 1874. Under the Brussels Declaration, as well as under the Hague Regulations of 1899 and 1907, and under the Geneva Conventions of 1949, there was one standard for regular members of the armed forces and a standard for the so-called irregulars/partisans/guerrillas. The double-standard approach was heavily criticised by a number of delegates whose statements are too numerous and lengthy to be reviewed here.[2] The responses of the representatives in the Working Group of Committee III revealed overwhelming support for an effort to develop a single standard for entitlement to prisoner-of-war status which would be applicable to regulars and irregulars alike. This was reflected in paragraphs 1 and 2 of Article 44 of Protocol I, which provide as follows:

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1. For this list of questions, see Levie, Protection of War Victims, Vol. 2, 1980, pp. 465-466.
2. See, ibid., pp. 378-547.

"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 conflict, 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."

As defined in Article 43, paragraph 2, all members of the armed forces of a Party to the conflict (other than medical personnel and chaplains covered by Article 33 of the Third Geneva Conventions) are combatants, that is to say, they have the right to participate directly in hostilities. The armed forces of a Party to the conflict, according to Article 43, paragraph 1, "consist of all organized armed froces, 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."

The one standard concept for entitlement to prisoner-of-war status for regulars and irregulars alike raised the fear that the rule might encourage uniformed regular soldiers to dress like civilians. Ultimately, this concern resulted in the reference in paragraph 3 of Article 44 to situations where an armed combatant cannot distinguish himself from the civilian

population and to a 'saving clause' in paragraph 7 of Article 44 of Protocol I.[1] The saving clause in paragraph 7 reads as follows:

> "7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict."

But regulars who are assigned to tasks where they must wear civilian clothes, as may be the case, for example, with advisers assigned to certain resistance units, are not required to wear the uniform when on such assignments.[2]

Reverting now to paragraph 3 and 4 of Article 44 of Protocol I, it may be noted that paragraph 3 raised the question of what, if any, distinction from the civilian population was to be required. The answer was of course in the positive. Paragraph 3 provides in part, that:

> "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."

This is however, the generally recognized rule of distinction in normal situations. But the circumstances under which members of resistance and liberation movements operate are unusual. They cannot distinguish themselves from the civilian population and stand any chance of success. Therefore,

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1. Report of Committee III, Third Session, (CDDH/236/Rev.1) reproduced in Levie, op. cit., pp. 483-485, at 483, para.84.
2. Loc. cit.

an exception to the general rule of distinction had to be made in a sense of realism. Accordingly, after stating (or restating) the general rule of disinction, paragraph 3 of Article 44 went on to state that:

> "Recognizing, however, that there are situations in armed conflict where, owing to the nature of hostilities an armed combatant cannot so distinguish himself, 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 military deployment preceding the launching of an attack in which he is to participate.
>
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c)."

According to the Report of Committee III, the 'situations' in which an armed combatant cannot distinguish himself from the civilian population as required by the first sentence of paragraph 3, occur "particularly in wars of national liberation and in occupied territories."[1] Indeed, the Rapporteur, Mr. Aldrich, said he could not imagine the situation occuring except in occupied territories or in wars of national liberation, but he preferred to add the word 'particularly' to the report in order to avoid limiting the provision of paragraph 3 to the two situations in question, namely, wars of national liberation

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1. Ibid., p. 484, para., 88.

and occupied territories. It was so agreed.[1]

The practical value of 'relaxing' the requirement of distinction, however, depends on the interpretation of the words "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", particularly the words 'visible' and 'deployment'. It should be noted that the Report of Committee III is silent on the meaning of paragraph 3(b). Consequently, opinions differed. At the time of signature, the delegation of the United Kingdom made the following statement of understanding:

> "in relation to Article 44, ... the Government of the United Kingdom will interpret the word 'deployment' in paragraph 3(b) of the Article as meaning "any movement towards a place from which an attack is to be launched."[2]

In an explanation of vote the delegation of Netherlands also used the same words: "any movement towards a place from which an attack is to be launched."[3]

The delegation of Australia "would interpret 'deployment' to include a movement by a combatant to an attack."[4] While to the delegation of the Federal Republic of Germany, 'deployment' meant "any uninterrupted tactical movement towards a place from which an attack was to be launched."[5] To the Canadian delegation "deployment would have commenced when the person or

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1. Ibid., p. 477-78, paras., 8 and 10 (CDDH/III/SR.53).
2. Roberts and Guelff, (ed.), Documents on the Laws of War, 1982, p. 462. See also CDDH/III/SR.55, para., 13; in Levie, Protection of War Victims, 1980, p. 487.
3. CDDH/III/SR.56, para., 15; in Levie, ibid., p. 500.
4. CDDH/III/SR.56, para., 55; in Levie, ibid., p. 494.
5. CDDH/III/SR.55, para., 64; in Levie, ibid., p. 495.

persons concerned moved out from the an assembly point or rendezvous with the intention of advancing on their objective, and at that point, regardless of risk, arms must be carried openly."[1] Similarly, the delegation of the United States, like the delegations of the United Kingdom and Netherlands understood the phrase "military depoloyment preceding the launching of an attack" to mean "any movement towards a place from which an attack is to be launched."[2]

With regard to the word 'visible' in Article 44, paragraph 3(b), the delegation of the United Kingdom in its explanation of vote on the said Article maintained that "the existance of electronic devices, currently in common use, meant that guerrillas must anticipate being under visual observation even during darkness and other conditions of poor visibility."[3] Two other Western delegations - Australia[4] and Canada[5], also made statements to the same effect, but the delegations of the United States of America, the Netherlands, and the Federal Republic of Germany did not follow suit. This may explain why the delegation of the United Kingdom did not maintain this sort of interpretation of the word 'visible'.

At any rate, it seems gravely doubtful whether those interpretations of the words 'deployment' and 'visible' were made in good faith. Such interpretations are in fact in contradiction with the recognition that in wars of national liberation and in occupied territories, a combatant cannot

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1. CDDH/III/SR.56, para., 38; in Levie, ibid., p. 503.
2. CDDH/III/SR.56, para., 54; in Levie, ibid., p. 506.
3. CDDH/III/SR.55, para., 13; in Levie, ibid., p. 487.
4. CDDH/III/SR.55, para., 55; in Levie, ibid., p. 494.
5. CDDH/III/SR.56, para., 38; in Levie, ibid., p. 503.

distinguish himself from the civilian population without jeopardizing his safety and the chances of his success. Moreover, such interpretations cannot realistically claim to promote the protection of the civilan population; what they clearly promote is the interest of the occupying Power, or for that matter, the interest of the colonial and alien and racist regimes in the safety of their troops at the expense of the right of peoples to self-determination.

It has been said in support of the above-mentioned interpretations that, by failing to reinforce the distinction between themselves and civilians, members of resistance and liberation movements would necessarily jeopardize the protection of the civilian population they were attempting to serve.[1] This is no more than a pretext to deny the protection of either the civilian population or combatants or both, and moreover blame the responsibility on members of resistance and liberation movements. But fortunately the law does not surrender to such blackmail; Article 50 of Protocol I, for example, specifically states that 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, and that, in case of doubt whether a person is a civilian, that person shall be considered to be a civilian and should not be made the object of attack.[2] And the basic rule of distinction categorically states that the Parties to the conflict "shall direct their operations only against military

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1. E.g. by the delegation of the U.S.A. CDDH/III/SR.56, para., 54; in Levie, Vol. 2, op.cit. p. 506.
2. Paragraphs 1 and 3 of Article 50 of Protocol I.

objectives.[1] As long as this rule is respected, it should practically make no difference whether the attackers carried their arms openly or not, or whether they wore uniform or not.

Clearly then, not withstanding the ostensible purpose of paragraph 3 regarding the protection of the civilian population, its true purpose seems to be the reconciliation of the requirement of guerrilla warfare which depends on concealment and suprise, with the notion of perfidy. This is clearly demonstrated by the last sentence of paragraph 3 of Article 44 *which expressly states: "Acts which comply with the* requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

Paragraph 1 of Article 37 of Protocol I states that :

> "1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of interhational law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following are examples of perfidy:
>
> c) the feigning of civilian, non-combatant status;..."

According to this definition of perfidy, the feigning of civilian status, in order to constitute perfidy, has to be accompanied by an intent to betray the confidence which the enemy puts into that status. But the feigning of civilian status alone does not constitute perfidy, and of course, the feigning of a civilian status by a combatant carrying his arms

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1. Article 48 of Protocol I.

openly is not perfidious since it does not invite the confidence of the adversary.

Now if forfeiture of the prisoner-of-war status is linked with the concept of perfidy, (and not the contentious protection of the civilian population), the proper scope of paragraphs 3 and 4 of Article 44 becomes obvious; only betrayal of the confidence of the adversary in civilian appearance, that is to say, only perfidious acts may entail a loss of prisoner of war status. But it should be emphasised that the mere feigning of civilian, non-combatant status, in situations where it is expressly recognized that a combatant, owing to the nature of hostilities cannot distinguish himself from the civilian population, is not perfidious according to Articles 44(3) and 37(1) (c), of Protocol I, but an act of 'ruses of war' intended to mislead the enemy without betraying his confidence in the civilian appearance. Otherwise, the 'recognition' in paragraph 3 that there are situations in which a combatant cannot distinguish himself from the civilian population would become meaningless as far as the prisoner-of-war status is concerned.

The importance of the concept of perfidy to the proper interpretation of paragraph 3 and hence, to the loss of prisoner-of-war status was emphasized by some delegations. Thus, Mr. Rosas, of the delegation of Finland, emphasized that:

> "His delegation stressed the importance of the basic distinction between combatants and civilians, so as to give the civilian population the greatest possible amount of protection while taking into acount the realities of guerrilla warfare. From that angle, it wished to stress the link between paragraph 3 of Article 44 and the

> prohibition of perfidy in Article 37. The loss of combatant status for persons who deliberately feigned civilian status when they were about to attack and were visible to the adversary seemed to be a necessary sanction in order to prevent such activities."[1] (emphasis added).

The underlined words indicate the time when combatants have to show their combatant status by carrying arms openly, and thus retain their combatant status and their right to be prisoners of war.

Likewise, the Swedish delegation based its interpretation on the second sentence of paragraph 3 of Article 44 on the concept of perfidy. After stating that his delegation interpreted the passage in paragraph 3 referring to "situations in armed conflict where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself..." as applying only to guerrilla fighters during wars of national liberation and to members of resistance movements in occupied territory, the Swedish delegate, Mr. Skala went on to say:

> "Guerrilla fighters would thus comply with the rules of international law even if they were advancing in civilian clothing and with concealed arms. If they were then attacked by the adverse Party, they would still be entitled to protection under Article 44 provided that they carried their arms openly during the military engagement."

The situation was different when the guerrillas had the

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1. CDDH/III/SR.56, para., 10; in Levie, Vol. 2, p. 499.

initiative. There, the important point was that the guerrillas could not take advantage of civilian status in order to start an attack. The time limit within which they were required to show their combatant status was not stated in exact terms. The expression used was "while he is engaged in a military deployment preceding the launching of an attack." The Swedish delegation interpreted "military deployment in that context to mean military preparations immediately before an attack."[1]

The restrictive interpretation of the condition of carrying arms openly in paragraph 3(b) was also the interpretation made by the delegations of countries that were more directly concerned. Thus, the representative of the Syrian Arab Republic emphasized that "the requirement to carry arms in paragraph 3(b) should be understood in the context of the military deployment that 'immediately' preceded the attack." Further, he pointed out that the rule set forth in paragraph 3 implied that the combatant "knew or ought to know" that he was visible to the enemy, otherwise the obligation to carry arms openly did not apply.[2]

Similarly, the Egyptian delegate, Professor Al-Ghunaimi, said that in his delegation's view,

> "the expression 'military deployment' meant the last step when the combatants were taking their firing positions just before the commencement of hostilities; a guerrilla should carry his arms openly only when within range of the natural vision of his adversary. Any

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1. CDDH/III/SR.56, para., 29; in Levie, op. cit., Vol. 2, p. 502.
2. CDDH/III/SR.55, para., 37; in Levie, op. cit., Vol. 2, pp. 490-91.

other interpretation constituted an attempt to dilute the prerogatives of the champions of liberty, and betrayed the very purpose of the Article."[1]

It is important also to note that resistance and liberation movements would invariably interpret the requirement of the second sentence of paragraph 3 restrictively. The interpretation made by the representative of the Palestine Liberation Organization exemplifies the attitude of liberation movements. In the view of the PLO,

"The requirements in paragraph 3(a) and (b) regarding the carriage of arms openly 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." Any other interpretation would be abusive and contrary to the spirit of the discussion on the Article. Similarly, the phrase "while he is engaged in a military deployment preceding the launching of an attack" could only mean immediatly before the attack, often coinciding with the actual beginning of the attack. Any other interpretation would expose the combatant to certain capture before the attack could be launched."[2]

During the explanation of votes in Committee III, the PLO representative, Mr. Armali, reminded the Conference that "his delegation considered the territories occupied by the enemy to be not only those occupied as a result of the 1967 war but also those occupied by the Zionists since 1948, which

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1. CDDH/SR.41, para. 21; in Levie, op. cit., Vol. 2, p. 532.
2. CDDH/III/SR.56, para. 75; in Levie, op. cit., Vol. 2, p. 510.

covered the whole territory of Palestine."[1]

It should be noted, however, that although the restrictive interpretation is technically the correct interpretation, the fact remains that paragraph 3 is an attempt to reconcile the conflicting and apparently irreconcilable interests of the Parties to the conflict. This being so, the realistic expectation seems to be that the Parties to the conflict would continue to hold conflicting views: one invokes the restrictive interpretation of paragraph 3, the other invokes the widest possible interpretation.

Be the interpretation of paragraph 3 as it may, it must be emphasised that the forfeiture of prisoner of war status is confined to combatants who fall into the power of an adverse party "while failing to meet the requirements of the second sentence of paragraph 3." This is born out by paragraph 4 of Article 44, which prescribes the protection to which such a combatant is entitled. The text of paragraph 4 reads:

> "4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protection equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any

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CDDH/III/SR.56, para., 75; in Levie, op. cit., Vol. 2, p. 510.

offences he has committed."

According to the report of Committee III, paragraph 4 of Article 44, in essence, "provides a separate, but equal, status for combatants who are captured while failing to observe even the minimum rule of distinction set forth in the second sentence of paragraph 3. They are not to be prisoners of war, but they shall benefit from procedural and substantive protection equivalent to those accorded prisoners of war by the Third Geneva Convention and Protocol I."[1]

The Report also states that paragraph 4 "was considered as the best basis for compromise."[2] As a compromise it is open to different interpretations. To some delegations, particularly the delegations of the United Kingdom, the United States of America, and Netherlands, a combatant who falls into the power of an adversary while failing to observe the requirements of the second sentence of paragraph 3, forfeits his prisoner-of-war status as well as his combatant status, and therefore, might be tried for acts which would otherwise be considered lawful acts of combat.[3] This probably goes too far; for although Article 37 states that it is prohibited to kill, injure or capture an adversary by resort to perfidy, the feigning of a civilian non-combatant status is not among the grave breaches of Protocol I.[4] Moreover, the purpose of distinction is to promote the protection of the civilian population,

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1. Report of Committee III, third session, CDDH/236/Rev.1; text in Levie, op. cit., Vol. 2, p. 483-85, at 484.
2. Loc. cit.
3. See CDDH/III/SR.55, para. 55 (U.S.A.); in Levie, op. cit., Vol. 2, p. 487, 500, 506, respectively.
4. See Article 85, para. 3(f), of Protocol I.

not to protect enemy soldiers against suprise attacks. Therefore, if the combatant who falls into the power of an adverse Party while failing to observe the requirements of the second sentence of paragraph 3 were to be tried and punished, the penalty should at most be disciplinary. This appears to be the meaning of the "separate, but equal status for combatants who are captured while failing to observe the minimal rule of distinction set forth in the second sentence of paragraph 3", which is the essence of paragraph 4, as the Report of Committee III states.

At any rate the apparent contradiction in the text of paragraph 4 should not be exaggerated. Indeed, if the time during which a combatant has to carry his arms openly is interpreted restrictively as many delegations have done, there would seldom be an occasion for the forfeiture of prisoner-of-war status to be invoked. Even according to the wider interpretation of the term 'military deployment' in paragraph 3(b) the number of cases in which paragraph 4 might be invoked would still be very small. Seldom in practice a combatant falls into the power of the adverse Party 'while' failing to meet the requirements set forth in the second sentence of paragraph 3. In the vast majority of cases, members of resistance and liberation movements who fall into the power of the enemy, fall while <u>not</u> engaged in an attack or in a military operation preparatory to an attack, and in such a case, combatants do not forfeit their right to be combatants and prisoners of war, regardless of whether in the past they failed to meet the requirements of the second sentence of paragraph 3. This is specifically provided for in paragraph 5 of Article 44 of Protocol I which states:

"5. 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 right to be a combatant and a prisoner of war by virtue of his prior activities."

The meaning and purpose of this paragraph are well explained in the Report of Committee III. The Report states that:

"Paragraph 5.... would ensure that any combatant who is captured while not engaged in an attack or a military operation preparatory to an attack retains his rights as a combatant and a prisoner of war whether or not he may have violated in the past the rule of the second sentence of paragraph 3. This rule should, in many cases, cover the great majority of prisoners and will protect them from any efforts to find or fabricate past histories to deprive them of their protection."[1]

To this, it may be added that the phrase "while not engaged in an attack or in a military operation preparatory to an attack" seems to be wide enough to include any combatant captured 'after' an attack in which he had participated, even if in that attack he failed to meet the requirements of the second sentence of paragraph 3. For example, if a combatant throws a hand grenade at an enemy patrol and runs away and afterwards was captured, he would still be protected by paragraph 5.

In conclusion, it may be stated that Article 44, on the

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1. Report of Committee III, third session, CDDH/236/Rev.1; text in Levie, op. cit., Vol. 2, p. 483-85, at 484.

whole, remained faithful to the principle stated in paragraph 1 that, any combatant, as defined in Article 43 of Protocol I, who falls into the power of an adverse Party shall be a prisoner of war, and to the principle in paragraph 2, that, violations of the rules of international law applicable in armed comflict 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 prioner of war. The only exception to this latter rule, is where a combatant falls into the power of the adverse Party 'while' failing to carry his arms openly during a military engagement in which he is participating, or, while failing to carry his arms openly during such a time as he is visible to enemy personnel, while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. A combatant who falls into the power of an adverse Party while failing to carry his arms openly during the military engagement in which he is taking part, or during such time as he is visible to the enemy personnel while engaged in a military deployment preceding the launching of an attack in which he is to participate forfeits his right to be a prisoner of war, but remains entitled to the procedural and substantive protection provided by the Third Geneva Convention.

On the other hand, 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 does not forfeit his right to be a combatant and a prisoner of war whether or not in the past he failed to meet the requirement of carrying arms openly as defined in paragraph 3 of Article 44.

Finally, it should be noted that Article 44 is without

prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Geneva Convention. This saving clause is mentioned in paragraph 6 of Article 44. It should also be noted that all members of the armed forces as defined in Article 43 of Protocol I, are also protected by the First and Second Geneva Conventions of 1949 relative to the protection of wounded, sick and shipwrecked members of the armed forces. This is specifically stated in paragraph 8 of Article 44.

5. A Theoretical and Operational Analysis of the Definition of Civilians and Civilian Population

5.1. Methods of Definition

As has always been the case in the law of armed conflict with respect to definitions, the choice of techniques and the terms of reference pose 'real' problems of theoretical and practical importance. The ICRC broached these problems in a comprehensive study made in 1971.[1] The study categorized the opinions of experts consulted by the ICRC in 1970 on different topics of the law of armed conflict, among which was the definition of the civilian and the civilian population.

On the need for a definition, the ICRC study reveals that only a minority of the experts consulted by the ICRC hesitated, or declined to develop the idea of a definition - superfluous in their eyes. The majority of the experts insisted on the need for a balanced definition which would clearly specify the rights and duties of civilians. Such a definition, in their view, "would permit the brake to be applied to the arbitrariness which is all too frequently manifest in the practice of armed conflicts, and which directly affects the civilian population."[2]

In order to acheive this, the experts recommended various methods which the ICRC study categorized in three pairs of opposites:

1. Global or special definition;[3]

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1. See in particular, Document CE/3b, Geneva, January, 1971, pp. 17-28; and Doc. CE/6b, pp. 24-26.
2. ICRC, Doc. CE/3b, p. 17.
3. Ibid., pp. 17-19.

2. Positive or negative definition;[1]

3. Definition according to the status of the civilians or according to their function in military operations.[2]

Actually, none of these methods excludes the utilisation of the others; they overlap, combine, and may be multiplied through any possible combination. Indeed, Article 50 of Protocol I which defines 'civilians and civilian population' appears to be, in the final analysis, a combination of elements of the three categories mentioned above. Accordingly, it may be useful to examine briefly these various methods of definition.

1. A global definition in this context seems to refer to a definition that treats the civilian population as a whole, collectively, and as an entity, while the 'special definition' breaks up that collectivity into sub-categories of varying relationships to the military effort.

If this is so, it becomes not difficult to understand why some experts "felt that the civilian population, taken as a whole, cannot be defined as such *in a 'precise' legal* document and that, consequently, one must restrict oneself to defining certain categories or groups of individuals which necessarily form part of the civilian population."[3]

In the same vein, but with more sophistication, one expert spoke of the "macro-analytical" definition when referring to the civilian population as a whole and of the

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1. Ibid., pp. 19-20.
2. Ibid., pp. 20-24.
3. Ibid., pp. 17-19. Articles 14 and 15 of the Fourth (civilian) Geneva Convention of 1949, are examples of 'special definition'.

"micro-analytical" definition when refering to a specific category of the civilian population."[1]

Perhaps the attitude of the British Manual of Military Law (1958), and that of the United States Navy Manual (1959), illustrate this point. In these Manuals the population of a belligerent is divided into two classes, namely, the armed forces and the peaceful population, with each class having distinct rights and duties (macro-analytical definition), but this division with "distinct rights and duties" has been made "subject to the fact that the distinction between combatants and non-combatants has become increasingly blurred", (thus allowing for micro-analytical definition).[2]

To this, it may be added that the two Manuals have adopted a negative definition of the civilian population as well as a definition according to the status of civilians. Thus, the British Manual of Military Law (1958), states:

> "It is one of the purposes of the laws of war to ensure that the individual who belongs to one class or the other (i.e. armed forces or peaceful population) shall not be permitted to enjoy the privileges of both. Thus he must not be allowed to kill or wound members of the army of the opposing belligerents and subsequently, if captured to claim he is a peaceful citizen."[3]

In the United States Navy Manual of 1959, the population of a belligerent is likewise divided into "two general classes: the armed forces (combatants) and the civilian population

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1. ICRC, Doc. CE/3b, p. 18, n. 5.
2. See Whiteman, Digest of International Law, Vol. 10, pp. 135-137.
3. Ibid., p. 134.

(non-combatants). Each class has specific duties and rights in time of war, and no person can belong to both classes at the same time."[1]

Reverting to the 'global or special' definition of the civilian population, but without going into much detail, it is believed that only a global definition of the civilian population considered as an entity, and admitting of no loopholes, may aspire to some protection of the civilian population.

Qualifications, so general and open-ended such as "subject to the fact that the distinction between combatants and non-combatants has become increasingly blurred", in the military manuals cited above, amount to saying that the protection of the civilian population is a matter of discretion to the parties to the conflict.

2. As to the methods of positive or negative definition, it appears that the majority of experts consulted by the ICRC in 1970, were in favour of a negative definition of the civilian population.[2] The arguments against a positive definition of the civilian population were two: that it would tend to ignore or neglect certain categories of the civilian population and that it would create the grave danger of giving the impression that the categories not mentioned are considered - a contrario - as being licit personal objectives.[3]

Indeed, the same arguments can be advanced against a negative definition. For unless the categories of persons

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1. Ibid., p. 135.
2. ICRC, Doc. CE/3b, p. 19.
3. Loc. cit.

considered as permissible objects of attack were clearly defined, the temptation to expand them might be even more dangerous to the civilian population than the possible neglect of a certain category of civilians or the dangers of an interpretation a contrario.

Moreover, the notion of the civilian and the civilian population has customarily been defined negatively, and there is no evidence to suggest that a negative definition is more favourable to the civilian population as the ICRC study contends. Indeed, the ICRC itself admits that a negative definition, "obviously involves the inconvenience of raising the problem of persons considered as being military objectives."[1]

3. This leads us to the crucial problem: definition according to the status of civilians or according to their functions in military operations.

According to the ICRC study, "the status of civilians chosen to distinguish 'civil elements', (illicit objectives), from'military elements', (licit objectives), is the criterion which, historically speaking, was the first to be adopted." To the ICRC, this would seem logical because it conformed to conceptions generally held around the turn of this century and according to which only members of the armed forces, and other categories of persons enumerated in Articles 1 and 2 of the Hague Regulations of 1907 and Article 4 of the Third Geneva Convention of 1949, had the right to attack or resist the enemy.[2] Such categories of persons have already been

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1. ICRC, Doc. CE/3b, p. 20.
2. Loc. cit.

dealt with. For the purposes of our discussion here, it is sufficient to note that a definition according to the status of civilians seems to be more of a definition of 'Lawful Participation' in the armed conflict, than of a definition of the civilian population as such. Besides, it has the disadvantage of prejudging as 'criminal' acts of resistance by persons not formally belonging to the categories of persons entitled to prisoner of war status. Further, it leaves unsettled and hence, open to abuse, that category of civilians which carry out activities considered to be highly useful for purposes of defence or offense such as the workforce in war or war related industry.

Thus, on the whole, a definition of the civilian population according to the status of civilians is more to the satisfaction of the militarily powerful state which is in fact or potentially an occupying power.

Definition of the civilian population according to their function in military operations is a double edged weapon. In the abstract, it has no intrinsic value. In the concrete, it depends on which way it goes. On the whole it depends on 'which activities' would functionally assimilate civilians to combatants. We shall revert to this subject again when discussing Article 51, paragraph 3, which states that, civilians shall enjoy the protection afforded by Section I of Part 4 of Protocol I, "unless and for such time as they take a direct part in hostilities."

As far as wars of national liberation are concerned the definition of civilians and civilian population is all the more important. The main type of warfare in these armed

conflicts is guerrilla warfare, as one expert consulted by the ICRC noted:

> "Because guerrilla warfare by its infrastructure calls upon the whole population, there has often been a temptation to consider that in such a conflict there is no longer any distinction between combatants and non-combatants and to take this as a justification for the forces opposing the guerrillas not to apply the laws and customs of war."[1]

The ICRC experts, however, did not think that different criteria should be worked out for guerrilla warfare whatever the form it might take. Accordingly, the ICRC proposed a definition taking the following 'objective criteria' as its basis, to be applied in all types of armed conflict:

> " - Persons not belonging to the armed forces or any organization attached to them, and
> - Persons not participating directly in military operations,
>
> are considered to be <u>civilian persons</u> and are the <u>civilian population</u>."[2]

Perhaps the most articulate definition ever proposed by the ICRC is the following:

> "The civilian persons constitute the civilian population. Civilians are those persons who do not form part of the armed forces, nor of organizations attached to them or who do not directly participate in military operations, (or: in operations of a military character). The above mentioned persons whose activities contribute

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1. ICRC, Doc. CE/6b, p.25.
2. ICRC, Doc. CE/6b, p.25, 53, see also the ICRC Commentary.

directly to the military effort do not, for that reason, loose their status as civilians."[1]

The definition of civilians and civilian population finally adopted by the Diplomatic Conference, by and large, corresponds to this proposal of the ICRC.

5.2. Definition of Civilians and Civilian Population in Protocol I: Text and General Remarks

Article 50 of Protocol I, entitled "Definition of Civilians and Civilian Population" reads as follows:

"1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A 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."

The provisions of this Article will be commented on in the following sub-sections. Here, a few general remarks may be made.

First, in the light of the above discussion, it appears

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1. ICRC, Doc. CE/3b, p. 26.

that 'civilians' are defined negatively, universally and collectively, and according to their status. The element of 'function' i.e. the participation or non-participation in military operations, or more precisely, the loss of civilian protection against effects of hostilities appears in Article 51, paragraph 3, of Protocol I.

Second, apart from necessary drafting modifications, the present definition corresponds to ICRC draft Article 45, which in turn was taken from a proposal submitted by the experts of Australia, Belgium, Canada, the Federal Republic of Germany, the United Kingdom and the United States of America.[1] However, it may be useful to note that at the time the definition of civilians and civilian population was adopted by Committee III, Article 43, referred to in the first sentence of Article 50, was not 'yet' adopted. This Article has already been discussed. For purposes of the present discussion, it may be sufficient to note that Article 43, substantively, bears little relation to its origin - (i.e. ICRC draft Article 42). In form, however, ICRC draft Article 42, like Article 4, paragraph 2 of the Third Geneva Convention which it was intended to develop, gave the impression that members of an organized resistance movement and members of national liberation movements would be liable to be treated as civilians if they failed to fulfil the prerequisites for the enjoyment of prisoner-of-war status, even if they were actually members of the armed forces of such movements. Article 43 of the

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1. See ICRC's Report on the Work of the Conference of Government Experts, Geneva, 1972, Vol. 2, p.78, Doc. (CE/COM III/PC 78).

Protocol dispels such an impression, and, in order to avoid any such unjustified connotations, the term 'categories of persons' was preferred to the usual terms 'armed forces' or 'combatants' as explained in the following sub-section.

The third remark to be made here concerns what might be called'the problem of doubt'. The second sentence of paragraph 1 of Article 50 states that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian." Logically, there are two methods for solving the problem of doubt. They are: judgement according to appearances, and judgement according to 'available information'. The Protocol does not say which method is to be followed. Logically, the two methods do not necessarily exclude each other, and while both are open to abuse, especially in non-interstate armed conflicts characterized by guerrilla warfare, it is certainly the judgement according to appearances which provides the better protection. However, opinions had already differed on how 'the problem of doubt' should be solved, and therefore, the problem needs to be properly examined and assessed.

It should be noted that the problem of doubt is not confined to the definition of civilians and civilian population, it is a problem that pervades the whole process of planning, deciding upon and carrying out a military operation or an attack. Thus, it is a problem of primary importance to the whole question of the protection of civilians and civilian objects against effects of hostilities.

The fourth and last remark to be made here before undertaking the task of clarifying the issues raised in this

section is concerned with the last paragraph of Article 50, namely, that 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. The importance of such a provision need hardly be underlined. The extent to which the presence of 'combatants' within the civilian population has been abused in order to disguise sheer vindictiveness and direct attacks against the civilian population as such needs no pedant's footnotes to give it a sense of realism.[1]

5.3. Terms of Reference

It is important to pay attention to the words 'categories of persons', in paragraph 1. ICRC draft Article 45 used the words, "categories of armed forces", but an amendment by Belgium and Britain (CDDH/III/22) proposed to replace the term, 'armed forces', in the ICRC text by 'combatants'.[2]

It may be noted in this respect that several of the experts consulted by the ICRC in 1970 considered that the term 'combatants' was inappropriate because it tends to prejudge the legal status of the participants in the struggle.[3] As this has been the case in almost all wars of national liberation, it was feared that the amendment proposed by the

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1. See in particular, Israel in Lebanon - The Report of the International Commision to enquire into reported violations of International Law by Israel during its invasion of the Lebanon, (280 pages), published by Ithaca Press, London, 1983.
2. CDDH/III/22, 13 March, 1974, text in Levie, Protection of War Victims, Vol. 3, p. 108.
3. See ICRC, Doc. CE/6b, p. 6 et seq.

United Kingdom and Belgium, if adopted, would be open to abuse by the powers opposing the liberation movements, with a view to denying to members of liberation movements their right to prisoner of war status. It seems, however, that neither the representative of the United Kingdom, nor that of Belgium made an effort to dispel this fear. This apparently prompted the delegation of the Ukrainian Soviet Socialist Republic to state categorically that "if the words 'armed forces' were replaced by 'combatants' as it was suggested, in document CDDH/III/22, the text would unequivocally apply to members of national liberation movements, who had been recognized as combatants in a United Nations General Assembly Resolution."[1]

The Report of Committee III does not say much, and the Rapporteur (Mr. Baxter, U.S.A.), would only say that "the term 'categories of persons' had been used instead of 'categories of armed forces' to avoid controversy."[2]

The last sentence of paragraph 1 of Article 50, according to the Rapporteur of Committee III, had given the Working Group "the most difficulty" and the text was the result of "long discussions."[3] This might seem hard to believe when the ICRC draft is compared with the final text.

The ICRC draft, (Article 45, paragraph 4), stated that:

> "In case of doubt as to whether any person is a civilian, that person shall be <u>presumed</u> to be so."[4]

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1. CDDH/IIISR.6, para. 20. See also the speeches of the delegates from Tunisia, ibid., para. 14, and the U.S.S.R., ibid., para. 18.
2. CDDH/III/SR. 10, para. 16.
3. CDDH/III/SR. 10, para. 17.
4. ICRC - Draft Additional Protocols - Commentary, 1973, p.55.

The final text reads:

"In case of doubt whether a person is a civilian, that person shall be considered to be a civilian,"[1]

Judging by appearances, the problem seems to be in substituting the word'considered' for the word 'presumed'. But this was not the whole story. The fact of the matter is that Britain and Belgium proposed to amend the ICRC text so as to read:

"Unless there are grounds for supposing that he is about to commit a hostile act, a person who appears to be a civilian shall, for the purposes of this section, be treated as such."[2]

This amendment was criticized by a number of delegations. To the ICRC representative, this amendment "was too vague".[3] To other delegates, the amendment would amount to 'shoot first and justify later'. They doubted whether the legal rules could be extended to cover possible mistakes by soldiers. Further, it was pointed out that the presumption of civilian status in case of doubt might in practice aggravate the situation of the persons in question. For example, members of organized resistance movements formed among the civilian population would be liable to severe penalties if they could not prove that they belonged to such movements. The status of prisoner of war had in some cases proved far more advantageous than that of civilian.[4]

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1. Protocol I, Article 50, para. I.
2. CDDH/III/22, 13 March, 1974, text in Levie, op. cit. p.109.
3. CDDH/III/SR. 5, para. 18.
4. See for example remarks of the representatives of: Syria, CDDH/III/SR.6, para.12; Venezuela, CDDH/III/SR.6, para. 22; Poland, CDDH/III/SR.5, para.29,30: U.S.S.R., CDDH/III/SR. 5, para. 31.

In the eyes of its sponsors, however, the United Kingdom and Belgian amendment was intended above all "to avoid any specification of the contradiction which, (in their view), existed between Article 5 of the Third Geneva Convention of 1949 and Article 45 of draft Protocol I," (now Article 50).[1]

Article 5, paragraph 2 of the Third Geneva Convention of 1949 states that:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal."[2]

Obviously the presumption of P.O.W. status in this paragraph becomes operative 'after' the belligerent acts have been committed and the person or persons concerned have fallen in the hands of the enemy, while the presumption of the 'civilian status' operates 'before'. On this account they cannot possibly contradict each other.

On the other hand, the British delegate, Mr. Eaton, rejected the view that "adoption of the United Kingdom and Belgian amendment would have the effect of increasing the dangers to which the civilian population was exposed." The intention of the proposal and, in his view, its effects, were in fact the opposite. In cases of doubt such as were

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1. As stated by the Italian delegation, CDDH/III/SR. 6, para. 2.
2. See ICRC Commentary on the Third Geneva Convention, pp. 77-78.

envisaged by the paragraph, he said, "some element of subjectivity was unavoidable. The sponsors of the proposal had tried to make the criteria as strict as possible to put a heavy burden of proof on the soldier."[1]

The Report of Committee III had the following to say on the presumption that, "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian":

> "There were generally two divergent tendencies in the discussion of this paragraph in the Committee. On the one hand, it was thought desirable by some delegations that the presumption should be retained as drafted by the ICRC in order to preclude unscrupulous belligerents from denying the protection of the Protocol to civilians. On the other hand, several delegations were of the view that the provision should be redrafted in such a way as to make it more readily understandable to the soldier. It was also pointed out in the discussions that there was a possibility of conflict between this presumption and that contained in the second paragraph of Article 5 of the Third Geneva Convention of 1949. It was agreed in the Working Group that the concept of presumption gave rise to such difficulties that the word 'presumed' should be replaced by the word 'considered'. The Working Group was also of the view that the paragraph as thus amended, would not be inconsistent with Article 5 of the Third Geneva

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1. CDDH/III/SR. 6 para. 32.

Convention of 1949, as the two provisions were intended to apply to different circumstances. On that basis, it was possible to arrive at a convergence of views on the text."[1]

5.4. The Problem of Doubt and the Doctrine of 'Available Information'.

In spite of these clarifications, it is believed that not all ambiguities have been removed. The main problem is not whether the word 'considered' is more understandable to the soldier than the word 'presumed', but whether the word 'considered' has solved the problem of 'doubt'. The rule that, "in case of doubt whether a person is a civilian, that person shall be considered a civilian", still leaves the judgement to the soldier who, before acting, will have to judge whether he was in doubt. So he will have either to judge by appearances, or he will have to recall his 'available information' and in a moment make a decision whether to shoot or not. But by his very instinct of self-preservation, the soldier is more inclined to give himself, rather than his potential victim, the benefit of doubt. Thus, although the 'rule of doubt' appears on the surface to be a compromise between the protection of the soldier and the protection of the civilian, with apparent leaning towards the protection of the civilian, in practice it is more likely to be just the opposite.

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1. Report of Committee III, First Session, 1974, para. 39.

Accordingly, one may wonder whether it was wise to bring the idea of doubt into the field of the protection of the civilian population.

However, having been brought in, the rule of doubt (Article 50, paragraph 1) may be approached from two different points, which, for convenience, will be referred to here as the'Western view' and the'Chinese view'.

In almost identically worded statements, the delegations of the United States of America, the United Kingdom, Italy, Canada, and the Federal Republic of Germany said that in their view,[1] "Commanders and others responsible for planning, initiating or executing attacks, necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time." This interpretation, in their view, applies to all the Articles of Section I of Part 4 of Protocol I including Article 50 (definition of civilians and civilian population) and Article 52 (general protection of civilian objects).

At first sight, it might seem difficult to object to such statements without offending 'common sense', or discrediting the principle of good faith, or judicial precedents. But that an element of subjectivity is involved which may jeopardize the whole protection of civilians and civilian objects, should also not be underestimated.

It is of course not difficult to theorize on 'actual'

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1. For their statements see CDDH/SR. 41, Annex., and CDDH/SR.42, Annex. The statement of the United Kingdom may be found in CDDH/SR. 41, para. 121.

and'presumed' knowledge and 'error' in judgement in order to fix the limits of responsibility,[1] but it is not at all easy to put the theory into practice. Governments are still in the habit of what one writer has described as "the nationalization of truth."[2]

Propaganda warfare, charismatic attitudes, perceived or projected images whether of one's own or of the enemy's are but too ready for the'cover up', and if the worst comes to the worst and attempts to cover up war crimes did not work, either because the evidence was too strong for refutation because the insistence on the 'cover up' was more damaging, politically or militarily, a scapegoat would not be difficult to find. Thus, cases which may intrinsically be of 'systemic responsibility' could easily be watered down to 'personal responsibility'.

It is not suprising, therefore, that Lieutenant Calley was reluctantly tried and convicted as if the massacre at MyLai of an estimated 400-500 Vietnamese civilians, men, women and children, was an isolated incident. Nor is it suprising that the initial reaction of the Israeli Cabinet to the disclosure of their involvement in the massacre of Palestinian civilians in Sabra and Chatila refugee camps in Beirut between 15 and 18 September, 1982, was that they "had no direct knowledge other than news reports."[3]

The massacres of Vietnamese civilians at My Lai and of Palestinian civilians in Sabra and Chatila camps in West Beirut, suggest the general pattern in the cover-up; denial

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1. See Kalshoven, Reaffirmation and Development of International Humanitarian Law...Part II, N.Y.I.L. 1978, pp. 118-119.
2. See Julius Stone, Legal Controls of International Conflicts, pp. 318-323.
3. See The Times, Monday, Sept. 20, 1982, p. 1.

of knowledge; a pledge to launch an enquiry; and attempts to conceal naked vindictivness by the appearance and rectitude of 'real' battles. For example, in the case of My Lai, the Brigade Commander, under whose leadership Lieutenant Calley was serving, "reported the killing of 128 'combatants', in order to mask what had really happened. Soldiers who expressed distress at what had taken place were warned to keep their feelings to themselves."[1]

The massacre of Sabra and Chatila was preceeded by frequent allegations by the Israeli Defense Minister, Ariel Sharon, and his Chief of Staff, General Eitan, that the Palestine Liberation Organization (PLO.) had left two thousand of its forces behind, in civilian dress, in Sabra and Chatila camps - an allegation that has never been substantiated - either before or after the perpetration of the massacre. In fact, on the eve of the massacre the two camps were, in strict legal terminology, 'an open town' which the Israeli forces could enter without having to fight, but legally were not allowed to enter by virtue of the agreement reached through the mediation of Philip Habib, the American President's special envoy to the Middle East and according to which the PLO evacuated its forces from West Beirut. The Palestinians faithfully observed their commitments, the Israelis did not.[2]

Even while the massacre was being committed at Sabra and Chatila the Israeli Cabinet issued a statement on 17

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1. Karsten, Law Soldiers and Combat, 1978, p. 33.
2. For a full account of the massacres at Sabra and Chatila, see Israel in Lebanon, Report of the International Commision, 1983, pp. 162-183.

September, 1982, in which it alledged that "about 2,000 'terrorists' equipped with modern and heavy weapons, remained in West Beirut, thus blatantly violating the departure agreement."[1]

The massacre of the Vietnamese civilians at My Lai, and the massacre of Palestinian civilians in the camps of Sabra and Chatila suggest the extent to which 'official lies' may go in the name of 'available information'. They further pose sharply the question of the dividing line between 'available information' and 'obsession with the image of the enemy'. The two are closely interrelated, and more often than not 'obsession with the image of the enemy' renders the legal protection of the civilian population largely illusory and 'the available information' a matter of mere convenience.

For example, the American obsession with the Vietcong in Vietnam had led many to see in every Vietnamese a member of the Vietcong. A passage from Lieutenant Calley's testimony may illustrate the point. He said:

> "... if those people weren't all VC then prove it to me. Show me that someone was for the American Forces there. Show me that someone helped us and fought the VC. Show me that someone wanted us: one example only! I didn't see any... Our task force commander - well, the Colonel's dead and I'd rather not say. His staff, though, said it's a VC area and everyone there was a VC or a VC sympathizer. "And that's because he just isn't young enough or old enough to do anything but

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1. Ibid., p. 167.

sympathize." I even heard a brigadier general say, "My God! There isn't a Vietnamese in this Godamn area! They are all VC." I believed it. And as soon as I understood it,I wasn't frustrated anymore."[1]

Another testimony comes from an American Pilot: he said in part:

"As far as the clearance to fire went, my first three months I never heard of the term 'clearance to fire'. If there was somebody we thought might be VC by his actions, by running or hiding, he was a dead man. ... We had pretty much our own show. We did not have to ask for clearance... An airforce forward controller, who co-ordinates air strikes from jets, told me another time, "If you have trouble obtaining clearance to fire, just holler out that your'e receiving fire and we'll send jets in to bomb the hell out of the place, whether or not you actually receive fire, or whether or not there are any weapons in the area at all."[2]

Among the hundreds of citations which Karsten collected for his excellent analysis of the 'Reasons Why' the laws of war are violated,[3] there is a wealth of evidence to suggest that one cannot realistically entrust the protection of the civilian popultation to assessment by "commanders or others responsible for planning, deciding upon or executing attacks", on'available information'. Where the leadership is lax and the decision making is largely decentralized 'available

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1. As quoted by Richard Falk, Methods and Means of Warfare, Ch.1, in Torboof (ed), Law and Responsibility in Warfare, 1975, p. 48.
2. Quoted from Karsten, Law, Soldiers and Combat, 1978, p.98.
3. Ibid., Ch. 2, pp. 32-123, esp. pp. 70-111.

information' becomes everyone's game and thus hardly distinguishable from mere convenience.

But even the centralized decision making in the case of the latest Israeli invasion of Lebanon produced a record of atrocities parallel to that of Vietnam.

As is well known, the Israeli invasion of Lebanon, to destroy the political and military structure of the Palestine Liberation Organization (PLO) in Lebanon, was commenced by two days of intensive air raids covering Beirut and most of Southern Lebanon, on what Israel alleged to be the PLO's military positions. A massive land invasion followed, on June 6th, 1982. By June 17th, estimates of invading forces were put at 9 armoured divisions. On the same day, June 17th, the PLO Chairman, Yasser Arafat, sent a letter to the U.N. Secretary General demanding that the United Nations send an International Commision to investigate the Israeli crimes. The letter claimed that more than 600,000 people were made homeless, 30,000 civilians killed or injured, 10,000 civilians missing, 14 Palestinian Refugee camps transformed into rubble and 3 Lebanese cities, Sidon, Tyre and Nabateyeh turned into ruins.[1]

For the remainder of the 79 days of fierce fighting against the PLO forces and the militias of their Lebanese allies, besieged West Beirut and its outskirts to the east and south were under constant bombardment from land, sea and air by Israeli forces, which used cluster and phosphorus bombs on a larger scale than ever before in the long Arab-Israeli

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1. As reported by Radio Moscow, 17.00 GMT, Radio Kuwait and the Radio of Saudi Arabia, on 17 June, 1982.

conflict. The fiercest attacks came on the 12th August, when Beirut and the Palestinian camps were subjected to indiscriminate 10 hour non-stop air raids.[1]

Indeed, indiscriminate bombardment was the normal pattern of conducting hostilities by Israeli forces. During the siege of West Beirut, electricity, water, food and medical supplies were cut off. Israel demanded the withdrawal from Lebanon of an estimated 6 to 7 thousand Palestinian fighters besieged in West Beirut as a condition for lifting the siege. The Israeli estimate of a maximum 6 to 7 thousand Palestinian combatants in Beirut was apparently taken by the media the world over as an uncontestable fact and was repeated with 'certainty and emphasis' in almost every news bulletin throughout the siege. Yet, when agreement was reached on the evacuation, the PLO in fact evacuated more than 11 thousand fighters.

Yet the Israeli Defence Minister, Ariel Sharon, and his Chief-of-Staff, General Eitan, in concerted propaganda with the Israeli Prime Minister Begin and Foreign Minister Shamir, and the whole Israeli Cabinet, alledged that the PLO had left behind, in the Palestinian camps of West Beirut, two thousand of its forces in civilian dress, 'terrorists' in official Israeli parlance. The 'two thousand terrorists' turned out to be the massacred Palestinian civilians of Sabra and Chatila.

It is not necessary to elaborate on the political purposes of the cover-up or of the massacre itself. Suffice it to ask: was it a coincidence that the same Zionist leadership responsible for the massacre of Palestinian civil-

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1. See The Times, 13 August, 1982.

ians at Deir Yassin on April 9th, 1948, was the same leadership responsible for the massacre of Sabra and Chatila? Was the conduct of hostilities by Israel based on any available information?

The legal qualifications of the crime at its lowest denomination, is the crime of attacking civilians as such, with terrorization as the primary purpose, while at its highest denomination it is the crime of genocide pure and simple.

At this juncture a word of caution seems necessary. What is mainly under discussion is the principle of 'available information' stated or restated by the Western delegations to the Diplomatic Conference, "that military commanders and others responsible for planning, initiating or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time." The principle is obviously open to abuse. But the reader should not on that account attribute to those delegations an intention of restating the principle of 'available information' for the purpose of abusing it or allowing others to abuse it.

This being said, the principle of'available information' should now be clarified because of the very statement of the principle, as made by Western delegations is open to different interpretations.

A classical statement of the principle may be found in that portion of the "Hostage Case" decided by Military Tribunal V at Nuremberg, on February 19, 1948. One of the defendents in this case, the German General Rendulic was charged with wanton destruction of private and public property

in the province of Finmark, Norway, during the retreat from Russian troops of the 20th Mountain Army under his command. General Rulic defended himself on the grounds of military necessity. In this case the Nurenburg Tribunal found that an examination of the facts in retrospect can well sustain the conclusion that there was no military necessity for the destruction and devastation. But it also found that the information obtained concerning the intentions of the Russians was limited. The extreme cold and the short days made air reconnaissance almost impossible.[1] Moreover in his case, as in other cases of general devastation committed by the German armies, "the Germans were in retreat under arduous conditions wherein their commands were in serious danger of being cut off."[2] It was with this situation confronting him that he (General Rendulic) carried out the 'scorched earth' policy which was the basis of the charge against him. The portion of the judgement which concerns us here reads as follows:

> "There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgement, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may be faulty, it cannot

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1. Whiteman, Digest of International Law, Vol. 10, p. 387.
2. For a survey of these cases, see McDougal and Feliciano, Law and Minimum Public Order, pp. 600-604.

> be said to be criminal. ... We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We were concerned with the question whether the defendant at the time of its occurance acted within the limits of honest judgement on the basis of the conditions prevailing at the time... It is our consisdered opinion that the conditions as they appeared to the defendent at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendent may have erred in the exercise of his judgement but he was guilty of no criminal act."[1]

It may be noted in passing that under the Geneva Conventions and Protocol I additional to the Geneva Conventions, General Rendulic would have still been guilty, but this is beside the point. The point which the Tribunal has emphasised is that it is not sufficient that the decision be taken according to available information. The available information must amount to facts not fantasies, and should be such as would create an urgent military necessity, and the decision taken should be within the limits of honest judgement after giving consideration to all factors and existing possibilities. If all this was taken into consideration, then, and only then, the defendant would not be guilty.

Under Protocol I, "those who plan or decide upon an attack," may be considered to have acted within the limits

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1. Whiteman, Digest of International Law, Vol. 10, pp. 387-88.

of honest judgement if they took the 'precautions in attack' enumerated in Article 57. Indeed, these precautions make it difficult for the technologically advanced states to invoke the 'available information' or the lack of it as an excuse for the commision of war crimes. Article 57 of Protocol I requires that in the conduct of military operation "constant care shall be taken to spare the civilian population, civilians and civilian objects." Those who plan or decide upon an attack, are under obligation to do everything feasible to verify that the objectives to be attacked are neither civilians not civilian objects and are not subject to special protection but are military objectives which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the ruling circumstances, offers a definite military advantage.

Article 57 of Protocol I, also requires those who plan or decide upon an attack to 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. Further, they are required to 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 to be gained from the attack.

. This is not a complete list of the precautions which those who plan, decide upon or conduct military operations

are bound to take, but they are among the most important ones, and all can be regarded as manifestations of the classical doctrine of available information laid down in the Nuremberg judgement in the Hostage Case quoted above. For the essence of that doctrine is that commanders, in reaching their decisions on the basis of available information, are required to act within the limits of honest judgement, an indispensable element of which is the giving of due consideration to all the factors and existing possibilities at the time of decision.

Nevertheless, the doctrine of available information remains open to abuse. Moreover, details of planning and decision-making are usually treated as guarded secrets, and therefore, those who plan or decide upon attack remain their own judges until the facts are made public. One cannot therefore entrust the protection of the civilian population against effects of military operation to the doctrine of available information. In this respect, the Chinese view seems to offer a better alternative.

> The Chinese delegation to the Diplomatic Conference: "considered that any person who was not a member of the armed forces or who did not participate directly in military poerations was a civilian and should receive full protection against attack, deportation to concentration camps and every form of persecution... People's militia and guerrilla fighters in wars of national liberation should be protected, since they were basically civilians who had been forced to take up arms in self-defence against imperialist repression in order to win independence and safeguard their right

to survival. When not participating directly in military operations, members of people's militia or guerrilla movements should have civilian status and benefit from the protection granted to civilians."[1]

In our view, these remarks do not exclude the principle of available information altogether, but they guard against the 'exploitation' of that principle by giving protection against attacks to members of peoples's militia or guerrilla movements when not participating directly in military operations, and by giving them the protection of prisoner-of-war status if captured, since they are members of the armed forces of the liberation movement concerned.

It might be thought that the Chinese view was ideologically motivated and that it favours liberation movements by giving them the protection of both civilian status and prisoner-of-war status. This is not the case, because Article 50 of Protocol I which defines'civilians and civilian population' specifically states in paragraph 3 that,

"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."

This paragraph applies equally to wars of national liberation as well as to interstate armed conflicts and even to civil wars, although there is no corresponding provision in Protocol II.[2] It is indeed one of the best provisions,

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1. CDDH/III/SR. 7, para. 52-54.
2. Actually, Article 25 of draft Protocol II did contain an identically worded provision and was adopted at Committee level in 1975, but the whole Article (25) was deleted in plenary.

if not also the best provision the Diplomatic Conference had adopted. The importance of this provision (i.e. Article 50, paragraph 3) to the protection of the civilian population against effects of military operations was forcefully expressed by the ICRC thus:

> "Unless the definition of the civilian population were to lose all substance and the protection to which it was entitled were to be invalidated, it must be recognized that the presence of single individuals not answering to the definition of civilian should not in any way modify the civilian character of a population."[1]

Paragraph 3 of Article 50 of Protocol I must therefore be regarded as an absolute rule and the attack in violation of this rule must be recognized as an attack against the civilian population as such, even if the attack was claimed to be directed only against the individuals who do not come within the definition of civilians and even if the attacker was in no doubt as to the presence of members of the armed forces of the adversary among the civilian population. Otherwise, the whole law regarding the conduct of hostilities would be reduced to a so-called proportionality rule[2] and a statement of understanding to the effect that "commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the

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1. ICRC, Commentary on Draft Additional Protocols to the Geneva Conventions, Geneva, 1973, p. 56.
2. The so-called 'propotionality' rule has been laid down in para. 5(b) of Aticle 51 of Protocol I, which considers as indiscriminate "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."

basis of their assessment of the information from all sources which is available to them at the relevant time."

Reverting now to the provision in paragraph 1 of Article 50 of Protocol I, that "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian", it may be noted that the joint amendment proposed by Belgium and the United Kingdom seems to bear out the meaning better. The joint amendment proposed to formulate as follows:

> "Unless there are reasonable grounds for supposing that he is about to commit a hostile act, a person who appears to be a civilian shall, for the purposes of this section, (i.e., Section I of Part IV of Protocol I), be treated as such."[1]

Subject to the clarification that such a person should, if arrested, be treated as a prisoner-of-war if he was a member of the armed forces within the meaning of Article 43 of Protocol I, it seems clear that the intention was to judge, at first sight, by appearance. Accordingly, the provision that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian", should be understood to mean that a person who appears to be a civilian shall not be made the object of attack, unless of course, that person himself was carrying out an attack, or was about to attack.

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1. Doc. CDDH/III/22, 13 March, 1974, Text in Levie, Vol. III, p. 109.

6. The Distinction between Civilian Objects and Military Objectives: The Concept of Military Objectives.

In order to ensure respect for and protection of the civilian population and civilian objects against effects of hostilities, the parties to the conflict are required at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives and consequently direct their operations only against military objectives. This requires a definition of civilian objects and military objectives.

Paragraph 1 of Article 52 of Protocol I defines civilian objects negatively: "Civilian objects are all objects which are not military objectives as defined in paragraph 2".

Paragraph 2 states that, in so far as objects are concerned, "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

The protection of civilian objects, however, is not left solely to this definition. The Protocol, like the Brussels Declaration of 1874 and the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949, singles out certain civilian objects for varying degrees of protection, provided they were not used for military purposes. Thus, for example, Articles 12, 13 and 14 of the Protocol protect medical units and specify the conditions under which the protection would cease; Article 53 protects cultural objects and places of worship; Article 54

objects indispensable to the survival of the civilian population; Article 55 protects the natural environment; and Article 56 protects works and installations containing dangerous forces. These, and other relevant rules are examined in the following chapter in the context of the general protection of the civilian population.

In this section we examine at length the relationship between the general protection of the civilian population and civilian objects, and the concept of military objectives. This will be done in historical order and will cover attempts at a definition from the Brussels Declaration of 1874 to Protocol I of 1977.

In the Brussels Declaration of 1874, in the Hague Regulations of 1899 and 1907 respecting the laws and customs of war on land, and in Hague Convention (IX) of 1907 concerning bombardment by naval forces, the concept of military objectives was circumscribed by a broad distinction between 'defended' and 'undefended' localities and by a broad reference to the requirements of 'imperative military necessity'. But neither 'defended' nor 'undefended' localities were defined. We consider first the concept of 'undefended' localities in these Conventions and, for convenience, in Protocol I as well.

Article 25 of the Brussels Declaration of 1874 laid down that:

> "Fortified places are alone liable to be seized. Towns agglomerations of houses or villages, which are <u>open and undefended</u>, cannot be attacked or bombarded."

Article 25 of the Hague Regulations of 1899, likewise, provided that:

"The attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited."

In Article 25 of the Hague Regulations of 1907 an important addition was made:

"The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."

Two remarks may be made at this juncture. First, while Article 25 of the Brussels Declaration referred to "open and undefended" localities (i.e., open for occupation and undefended) Article 25 of the Hague Regulations of 1899 and 1907 referred only to "not defended" or "undefended"; the word 'open' has been discarded. Second, the phrase "by whatever means" was deliberately added to cover attacks and bombardments from the air.[1]

In marked contrast was Hague Convention (IX) of 1907 concerning naval bombardment. While Article 1 of this Convention reiterated the prohibition for naval forces to bombard "ports, villages, habitations, or buildings which are not defended", Article 2 of the Convention excluded from this prohibition the following objects:

"Military works, military or naval establishments, depots of arms or material of war, shops and establishments suitable to be utilized for the needs of the enemy's army or navy, and vessels of war then in port."

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1. See Jennings, Open-Towns, British Year Book of International Law, vol. 22, 1945, p. 260; Oppenheim-Lauterpacht, International Law, Vol. 2, seventh edition, 1952, p. 517; Schwarzenberger, International Law, vol. 2, 1968, p. 146; Geoffrey Best Humanity in Warfare, 1980, p. 263.

According to Article 2, the commander of a naval force may, "after a demand and a reasonable delay", destroy these objects by artillary, if no other measures are possible, and if the local authorities have not proceeded to such destruction within the time fixed. The Article states that the commander incurs no responsibility in this case for the accidental damage which may be occasioned by the bombardment. Moreover, if military necessity, requiring immediate action, does not permit a delay to be accorded, the commander may still destroy these objects with artillary, but he must take "the necessary measures to relieve the city as much as possible of distress."

This exception or departure from the strict prohibition laid down in Article 25 of the Hague Regulations of 1899 and 1907, has been explained on the ground that:

> "Article 2 was designed to meet the special circumstances of naval warfare; for whereas the commander of an army can take possession of an undefended place and so deny to the enemy the use of its military resources, the naval commander usually can only deny such resources to the enemy by destroying them with shell fire."[1]

This explanation, however, is not as convincing as it might seem. First, if the alleged special considerations of naval warfare were the reason behind the exception made in Article 2 of Hague Convention (IX), why were these considerations which apply with even greater force to the circumstances of aerial warfare, not taken into consideration when Article 25 of the Hague Regulations of 1907 was adopted. Jennings himself, who

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1. Jennings, op. cit., p. 260.

made the above-quoted explanation admits that the phrase "by whatever means" was deliberately added to extend the prohibition of attacking or bombarding undefended localities to aerial attacks. Second, although as noted above, the Hague Regulations of 1899 and 1907 referred only to 'undefended' and not to 'open and undefended' localities, these terms continued to be used by some writers and some military manuals interchangeably. Thus, for example, Jennings insisted that "the equation between the 'undefended' town and the 'open' town still stands. It is impossible", he said, "to conceive of a truly undefended town which is not also open in every sense of the word."[1]

The British Military Manual of 1958 on land warefare adopted Jennings' view and, in fact, expressly referred its readers to Jennings' article on 'open towns'. The British Military Manual defined and undefended or 'open' town as follows:

> "290. An undefended or 'open' town is a town which is so completly undefended from within or without ... that the enemy may enter and take possession of it without fighting or incurring casualties."[2]

If this was also the definition of undefended localities for purposes of Hague Convention (IX) concerning bombardment by naval forces, it would be impossible to imagine the existence of a military necessity that would justify the bombardment of an undefended locality, by naval forces. It would also be impossible to justify the incidental injury to civilian and civilian objects which may be occasioned by such a bombardment. This is probably why Protocol I additional to the Geneva

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1. Jennings, op. cit., p. 261.
2. Whiteman, Digest of International Law, vol. 10, p. 415.

Conventions of 1949 made no exception with regard to undefended localities. Article 59(1) of the Protocol stated that:

"It is prohibited for the Parties to the conflict to attack, by whatever means, non-defended localities."

Since the Protocol's provisions with respect to attacks apply to all attacks from land, sea or air against objectives on land,[1] Article 59(1) of the Protocol, in due course, will supersede that of Article 2 of the Hague Convention (IX) concerning bombardment by naval forces of military objectives in undefended localities.

It is also important to note that at the Diplomatic Conference of Geneva (1974-1977), there was no opposition to the prohibition "to attack, by any means whatsoever, non-defended localities." But opinions differed on the application of the principle. On this matter there were five tendencies in the Conference: those who wished to see non-defended localities established by unilateral declaration; those who wished to see them established by aggreement; those who wished to limit them to an area in or near a contact zone; those who wished to permit them also in a hinterland; and those who wished to provide a mechanism for creating non-defended localities even where it would take some further time to remove all combatants from the locality.[2]

The result - Article 59 of the Protocol - permitted the establishment of undefended localities by a unilateral declaration if certain conditions were fulfilled, but it

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1. See Article 49 (3) of Protocol I.
2. Report to the Third Committee on the Work of the Working Group, Committee III, 13 March 1975, in Levie, Protection of War Victims, vol. 3, 1980, p. 363.

required agreement for the establishment of such localities in cases where the prescribed conditions were not fulfilled. The establishment of undefended localities by means of a unilateral declaration addressed to the adverse Party is regulated by paragraphs 2, 3 and 4 of Article 59. The key paragraph 2 of this Article provides:

> "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:
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> a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
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> b) no hostile use shall be made of fixed military installations or establishments;
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> c) no acts of hostility shall be committed by the authorities or by the population; and
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> d) no activities in support of military operations shall be undertaken."

Paragraph 3 of Article 59 explains that the presence in this locality, of persons specially protected under the Geneva Conventions and the 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. Accordingly, the presence of military medical personnel, civil defence personnel, civilian police forces, wounded and sick military personnel, as well as military chaplains, is not contrary to the conditions laid down in paragraph 2.[1]

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1. This enumeration was made in draft Article 52 of Protocol I as proposed by the ICRC.

According to paragraph 4 of Article 59, the declaration made under paragraph 2 has to be addressed to the adverse Party and has to define and describe, as precisely as possible, the limits of the undefended locality. The Party to the conflict to which the declaration is addressed has to acknowledge its receipt and consequently has to 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 has immediately to so inform the Party making the declaration. In such an eventuality, the locality continues to enjoy the protection provided by the other provisions of the Protocol and the other rules of international law applicable in armed conflict.

Paragraphs 5 and 6 of Article 59 of Protocol I deal with the establishment of non-defended localities by special agreement even if such localities do not fulfil the conditions laid down in paragraph 2. But agreement in such a case seems more hypothetical than real and therefore, like the Article on the establishment of demilitarized zones by special agreement, they are more likely to remain idle.

Finally, paragraph 7 states the obvious, that a locality looses 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 of the Article. But in such an eventuality, the locality continues to enjoy the protection provided by the other provisions of the Protocol and the other rules of international law applicable in armed conflict.

It should be noted that the declaration referred to in paragraph 2 is meant to facilitate the observance of the

prohibition to attack, by any means whatsoever, non-defended localities. In other words, the declaration is not a condition for the establishment of the status of non-defended localities; it merely declares the fact that a certain locality is undefended, and therefore attacks on the locality will be illegal. It should be emphasized that Article 59 of ProtocolI was not intended to depart from customary international law under which non-defended localities are protected regardless of any declarations to that effect.

In conclusion, it may be stated that the prohibition to attack or bombard undefended localities was absolute for land and air forces by virtue of Article 25 of the Hague Regulations of 1907. Article 2 of Hague Convention (IX) which allowed naval forces to bombard military objectives in undefended localities was an unjustified exception for the obvious reason that there is no military necessity for it. Analogies have sometimes been made on Article 2 of Hague Convention (IX) of 1907 with a view to extend the allowance to aerial attacks. But analogies, whatever may be their strength cannot overrule express provisions of law. There is no legalbasis for the extension of Article 2 of Hague Convention (IX) to aerial attacks. Article 59 of Protocol I has rightly withdrawn the licence given to naval forces to bombard military objectives in undefended locality. Consequently, the prohibition to attack undefended localities has become absolute, provided the conditions stipulated in Article 59 (2) have been fulfilled.

It may be noted that neither the concept of undefended localities, nor the concept of defended localities were defined in the Hague Conventions. Article 25 of the Declaration of

of Brussels of 1874 prohibited the attack or bombardment of 'open and undefended' localities. The Hague Regulations of 1899 and 1907 discarded the word 'open' which meant open for occupation. In 1907 it was probably immaterial whether one spoke of 'open and undefended' or spoke of 'undefended' pure and simple. It was so because available means of warfare at the time were not yet capable of attacking localities beyond the enemy's front line. And although the advent of the aircraft was then envisaged, the air force was apparently conceived as an auxilliary to land forces, not as an independent force. This may explain the exclusion of naval bombardment from the prohibition to attack or bombard undefended localities. Naval forces were apparently conceived not as auxilliaries to land forces, but as an independent force capable of creating its own zone of operations independently of land forces.

Be this as it may, the fact remains that the licence to naval forces to bombard military objectives in undefended localities was an exception. This licence was finally withdrawn by Article 59 of Protocol I.

It should also be noted that although the purpose of the prohibition to attack undefended localities was to extend absolute protection to such localities against direct and incidental dangers of military operations, the concept of undefended localities had its bite against the civilian population and civilian objects, as will be shown below.

We turn now to the protection of civilian objects in defended localities, and the first thing to be noted is the generality and laxity of legal restraints and the absence of a definition of 'defended' localities. All that one may find

in this respect is a general principle and a short list of objects that have to be spared, "as far as possible", provided they were not at the time used for military purposes. The general principle was laid down in Article 23(g) of the Brussels Declaration of 1874 and the Hague Regulations of 1899 and 1907. It states that the destruction or seizure of the enemy's property is especially prohibited "unless such destruction or seizure be imperatively demanded by the necessities of war."

In addition to this general principle, Article 27 of the Hague Regulations of 1899 and 1907, and the corresponding Article 5 of Hague Convention(IX) of 1907, provide that in siege and bombardments, "all necessary measures" 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 that these objects are not being used at the same time for military purposes. These Articles, however, make it the duty of the authorities in the attacked locality to indicate the presence of such buildings or places in the locality by distinctive and visible signs which have to be notified to the enemy beforehand.

Note that the obligation to take all necessary measures to spare, as far as possible, "other civilian objects" and the civilian population, is not expressly laid down. It seems that this was to be decided by the requirements of military necessity, as laid down in Article 23(´j) of the Hague Regulations. All that Article 26 of the Hague Regulations would add, is that the commander of the attacking forces, before commencing bombardment

except in the case of an assault, should do all he can to warn the authorities. In case of naval bombardment Article 5 of Hague Convention (IX) made this warning subject to the condition that the military situation permits.

The key question, however, is when a locality may be said to be defended?

Objectively speaking the concept of defended localties is undefinable; and no definition laid down in advance may reasonably claim to be objective. In concrete situations the 'defence' of the locality is the measure of 'legitimate military necessity'. In the loose words of the Nuremberg Tribunal in the Hostage Case, "there must be some reasonable connection between the destruction of the property and the overcoming of the enemy forces."[1] McDougal and Feliciano did better; in their view, the concept of military necessity authorizes "only such destruction, as is necessary, relevant and proportionate to the prompt realization of legitimate military objectives."[2]

Consequently, it is an abuse of terminology to infer from the concept of 'undefended localities' a definition of 'defended localities', since this would lead to a very wide definition that would practically render the protection of the civilian population and civilian objects nominal. The British Manual of Land Warfare (1958) may illustrate this point. Paragraphs 285 and 290 of this Manual provide as follows:

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1. Cited in Whiteman, Digest of International Law, Vol. 10, p. 301.
2. McDougal and Feliciano, Law and Minimum World Public Order, p. 72. On the principle of military necessity in general, see Whiteman, op. cit., pp. 300 - 316. See also, Gehring, Protection of Civilian Infrastructure, Law and Contemporary Problems, Vol. 42, (1978), pp. 96 - 101.

"258. To be defended a locality need not be fortified. It may be defended if a military force is in occupation of or marching through it. (In modern war the increased depth of battle area often makes it difficult to distinguish between defended and undefended localities, but see paragraph 290)

"290. An undefended or 'open' town is a town which is so completly undefended from within or without (if a town is covered by artillery fire from the flanks or rear areas or by air or naval cover (sic), or by minefields around it, even though there is no resistance from within, it is not an 'open town' and is liable to bombardment.) that the enemy may enter and take possession of it without fighting or incurring casualties. It follows that no town behind the immediate front line can be open or undefended for the attacker must fight his way to it. Any town behind the enemy front line is thus defended and is open to ground or other bombardment, subject to the limitation imposed on all bombardments, namely, that as far as possible, the latter must be limited to military objectives."[1]

This seems to be another way of saying that the attack or bombardment must be limited to military objectives in defended localities however these localities are defined. The problem, however, is that apart from the unexhaustive list of military objectives enumerated in Article 2 of the Hague Convention (IX)

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1. Cited in Whiteman, op. cit., p. 414 -415.

the Hague Conventions of 1899 and 1907 did not contain a definition of military objectives. Moreover, the British Military Manual (1958) provides in paragraph 289 that:

> "A town which is defended by detached posts, though they are at a distance from it, is liable to bombardment. The town and defended posts form an indivisable whole, inasmuch as the town may contain workshops and provide supplies which are invaluable to the defence, and may serve to shelter the troops holding the defence points when they are not on duty."[1]

It should be noted first that the British Military Manual does not cite any rule of law to support this view. Moreover, it seems to contradict paragraph 290 of the Military Manual which makes all bombardments subject to the limitation that they must be "limited to military objectives." Furthermore, it is not understood why the town and the detached defence points should constitute an indivisible whole, (i.e., one miltary objective), when these posts are detached and at a distance from the town and can be bombarded seperately. The fact that the town may serve to shelter the troops holding the defence points when they are not on duty, and the fact that it contains workshops and provides supplies which are invaluable to the defence ofthe town, are not sufficient to make the town a military objective. For however valuable such services may be, they can be neutralized by overcoming or destroying the defence points.

The inadequacy of the distinction between 'defended' and 'undefended' localities as a basis for the legal regulation of

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1. Ibid., p. 415.

hostilities has been realised as early as the First World War. Consequently, when in 1922/1923 a commision of jurista representing the United States of America, the United Kingdom, France, Italy, Japan and the Netherlands met in the Hague to draft rules for air warfare, the Commission abandoned the concept of defence on which the Hague Conventions were based and substituted it by the concept of 'military objectives', in the strict sense. Articles 22 and 24 of Air Warfare defined clearly what the Commission considered to be legitimate objects of attacks. Article 22 applied to aerial bombardment a well established rule of customary international law. It stated that:

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

Article 24 laid down the following definition of military objectives and rules of legitimate aerial bombardment:

> "1. Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.
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> "2. Such a bombardment is legitimate only when directed exclusively at the following objects: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, amunition; or distinctively military supplies; lines of communication used for military purposes.
>
> "3. The bombardment of cities, towns, villages, dwellings

or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated, that they cannot be bombed 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, towns, villages, dwellings, 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 property caused by the vioation by any of its officers of forces of the provisions of this Article."

Clearly, these provisions discarded the obsolete and unworkable test of liability to bombardment which rests on the distinction between 'defended' and 'undefended' places,[1] and were inspired mainly by the doctrine that bombardment should be confined to specific military objectives.[2] But the Hague Rules of Air Warfare were not adopted by any international conference. Consequently, opinions differed on their importance and binding

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1. Oppenheim-Lauterpacht, International Law, Vol. 2, seventh edition, 1952, p. 522; Jennings, Open Towns, British Year Book of International Law, Vol. 22 (1945), p. 260; Spaight, Legitimate Objectives in Air Warfare, British Year Book of International Law, Vol 21, (1944), p. 161.
2. Oppenheim-Lauterpacht, op. cit., pp. 522 - 23.

force. To Professor Schwarzenberger the Hague Rules of Air Warfare meant to attain a true compromise between the necessities of war and the postulates of the standards of civilization (i.e., the principle of humanity), and that, in case of doubt, they even gave preference to the considerations of humanity. This, in his view, "sufficed to condem these draft rules permanently to the limbo of lex ferenda." He notes that while states were prepared to pass "pious resolutions" on the topic of air warfare at sessions of the Assembly of the League of Nations and disarmament conferences[1] between the two World Wars, "they were unwilling to exchange the state of uncertainty of the law as it stood for one of more definite commitments, however realistic."[2]

To Lauterpacht, the Hague Rules of Air Warfare "are of importance as an authorative attempt to clarify and formulate rules of law governing the use of aircraft in war."[3]

Schindler and Toman,[4] and Roberts and Guelff,[5] reiterated Lauterpacht's view regarding the importance of the Hague Rules of Air Warfare, but they added the statement that these rules largely corresponded to the customary rules and general principles underlying the laws of war on land and at sea.

It is probably more appropriate to say that Articles 22 and 24 of the Hague Rules of Air Warfare were a reaffirmation

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1. For a review of the question of air warfare at disarmament conferences, see Watt, Restraints on War in the Air Before 1945, in Micheal Howard (ed.) Restraints on War, 1979, pp. 57 - 79.
2. Schwarzenberger, International Law, Vol. 2 - The Law of Armed Conflict, 1968, p. 154.
3. See Oppenheim-Lauterpacht, International Law Vol. 2, seventh edition (1952), p. 519.
4. Schindler and Toman, The Laws of Armed Conflict, 1973, p.139.
5. Roberts and Guelff, Documents on the Laws of War, 1982, p.121.

and clarification of customary rules of international law. Article 22 which prohibited attacks against the civilian population as such is a codification of an undoubted rule of customary international law.[1] Article 24 might be thought to have laid down new rules since it discarded the distinction between defended and undefended localities and limited attacks or bombardments to military objectives. This rule, however, was implicit in the principle that "the only legitimate object which States should endevour to accomplish during war is to weaken the military forces of the enemy"[2], and in Article 23(g) of the Hague Regulations of 1899 and 1907 which "especially prohibited" the destruction or seizure of the enemy's property, "unless such destruction or seizure be imperatively demanded by the necessities of war." Both these rules had implicitly prohibited indiscriminate attacks, and it is this prohibition which was made explicit in Article 24 of the Hague Rules of Air Warfare. Probably the only substantive difference between Article 24 of the Hague Rules Of Air Warfare and the corresponding rules of the Hague Regulations is that Article 24 of the Hague Rules of Air Warfare had proposed an exhaustive list of legitimate military objectives. Accordingly, the fact that the Hague Rules of Air Warfare had not been ratified (and it should be noted that they were never made open for ratification) seems immaterial.

Moeover, contrary to Schwarzenberger's view quoted above, the non-ratification of the Hague Rules of Air Warfare did not

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1. Oppenheim-Lauterpacht, op. cit., pp. 523-527, especially, pp. 523-524.
2. The Declaration of St Petersburg (1868).

condemn these rules permanently to the limbo of lex ferenda. There is much evidence to suggest that these rules, whatever might have been their legal status in 1923, had by 1939 been generally accepted, as far as bombardment from the air is concerned. Thus, in 1937, in the course of hostilities between Japan and China, Japan declared that it would act in accordance with the Hague Rules of Air Warfare.[1]

On September 22, 1937, the United States of America protested to the Japanese Government against an announcement made by Japan of its intention to resort to bombing in and around the Chinese city of Nanking. The United States said in its protest that it held "the view that any general bombing of an extensive area wherein there resides a large populace engaged in peaceful persuit is unwarranted and contrary to principles of law and humanity."[2]

The Italian War Regulations of 1938 provided in Articles 40 - 42 that bombardment of 'enemy objectives' is permitted only when their total or partial destruction may benefit military operations; that bombardment of centres of population is permitted only when there exists a 'reasonable' presumption that they conceal military preparations or supplies "such as to justify bombardment"; and that it no case may bombardment be resorted to for the sole purpose of penalising civil populations or of destroying or damaging property which is not of military character.[3] The Italian War Regulations thus paraphrased Articles 22, 23 and 24 of the Hague Rules of Air Warfare.

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1. Oppenheim - Lauterpacht, op. cit., p. 519, n.2.
2. Ibid., p. 523, n. 3.
3. Loc. cit.

On 21 June, 1938, the British Prime Minister, Neville Chamberlain, stated that three principles of international law as governing bombing from the air. In September of the same year the Assembly of the League of Nations adopted unanimously the following principles which have already been stated by the British Prime Minister:

"1. The intentional bombing of civilians is illegal;

2. Objectives aimed at from the air must be legitimate military objectives and must be identifiable;

3. Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence."[1]

At its Fortieth Conference held in Amsterdam from 29 August to 2 September 1938, 1938, the International Law Association adopted a "Draft Convention for the Protection of Civilian Populations against New Engines of War." This Draft Convention represents one of the notable instances in the inter-war period to define and improve the protection of the civilian population.[2] Article 2 of this Draft Convention reiterated the prohibition of the bombardment of undefended localities by whatever means and in all circumstances; Article 3 laid down the general principle that the bombardment "by whatever means" of towns, villages or bulidings which are defended is prohibited at any time (whether night or day) when objects of military character cannot be clearly recognized; and Articles 4 and 5 dealt specifically with aerial bombardment in the same manner as

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1. Text in Schindler and Toman, The Laws of Armed Conflict, 1973, pp. 153 - 54.
2. Ibid., p. 155.

Articles 22 and 24 of the Hague Rules of Air Warfare of 1923.[1]

The last but not the least to be mentioned in this survey are the declarations made in 1939 by the Governments of Great Britain and France. On September 1, 1939, President Roosevelt of the United States appealed to France, Great Britain, Germany, Italy and Poland to refrain from aerial bombardment of "civilian populations or unfortified cities" so long as their opponents so refrained.[2] In response to this appeal the Governments of the United Kingdom and France jointly declared that:

> "They had indeed some time ago sent explicit instructions to the commanders of their armed forces prohibiting the bombardment whether from the air, or the sea, or by artillery on land of any except strictly military objectives in the narrowest sense of the word."[3]

Professor Watt commented on this statement by saying that, in effect, it amounted to the unilateral acceptance of the Hague Rules of Air Warfare and had paved the way towards the tacit observance of these rules by all combatants in the West for the first nine months of the war.[4] It should be noted, however, that Germany also made a similar declaration, and as mentioned earlier, Italy had already included the Hague Rules of Air Warfare in its Military Regulations of 1938.

Thus, in the light of the preceeding evidence, it seems reasonable to conclude that whatever might have been the legal status of the Hague Rules of Air Warfare in 1923, the rules

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1. Text in ibid., pp. 155 et seq.
2. Whiteman, Digest of International Law, Vol. 10, p. 136.
3. Cited in Witeman, Digest of International Law, Vol. 10, p.137.
4. Watt, op. cit., p. 74.

pertaining to the protection of the civilian population and civilian objects, had, by 1939, been generally accepted, and had thus acquired the status of rules of customary international law, not only with regard to attacks from the air, but also with regard to attacks from sea and land against objects on land. Moreover, 1939, the old distinction between 'defended' and 'undefended' localities on which the Hague Regulations of 1899 and 1907 were based, was almost completely replaced by the criterion of 'military objectives'. But governments seemed reluctant to accept an exhaustive enumeration of military objectives. Without an exhaustive enumeration the definition of a military objective as "an object of which the destruction or injury would constitute a distinct military advantage to the belligerent", would be too subjective, as the Second World War was soon to prove. As the war progressed, the protection of the civilian population from aerial bombardment became largely nominal. "That result was not due merely to the reciprocal adoption of the practice of reprisals. It was due to the general acceptance of a notion of military objective capable of an eblargement so vast as to loose in fact any legally relevant content."[1] The concept of military objective in that war was tied with the concept of military effort. Any activity and any object that contributed directly or indirectly to the military effort of a Party to the conflict was regarded as a military objective. Even the morale of the civilian population was regarded as a military objective.

The Geneva Diplomatic Conference of 1949 did nothing to

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1. H. Lauterpacht, The Problem of the Revision of the Law of War, British Year Book of International Law, (1952), p. 365.

clarify the concept of military objective, nor did the Fourth Geneva Convention relative to the protection of civilians provide for the protection of the civilian population against the dangers of military operations. Indeed, anything tending to provide such protection was systematically removed from the Convention. Moreover, the Diplomatic Conference declared that a draft Resolution forbidding the use of weapons of mass destruction was not receivable.[1]

Occasionally, however, there was some talk about military objectives in the narrow sense. For example, during the war in Korea, the Government of the People's Republic of Korea (North Korea), on August 5, 1950, sent a letter to the President of the Security Council of the United Nations protesting against "the inhuman, barbarous bombing of the peaceful population and of peaceful towns and populated areas" by the United States Air Force in Korea.[2] During the discussion of this matter in the Security Council the representative of the United States of America, in his attempt to refute the charges, quoted the American Secretary of State (Acheson) as saying:

> "The air activity of the Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets are enemy troop concentrations, supply dumps, war plants and communications lines."[3]

The representative of the United States then quoted from one of a series of radio broadcasts to the North Korean population urging civilians "to leave any areas in North Korea

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1. Pictet (ed.), Commentary on the Fourth Geneva Convention of 1949, published by the ICRC, Geneva, 1958, p. 10.
2. Whiteman, Digest of International Law, Vol. 10, p. 138.
3. Ibib., p. 140.

where there are military targets." "Military targets are", said the broadcast, "railroads and railroad facilities, docks and harbours, bridges, power plants, factories helping the war, ships and boats, air fields and supply warehouses."[1]

The representative of the United States then 'unwittingly' quoted from a warning leaflet which he said was typical of the millions constantly dropped to warn the civilian population in the areas controlled by the North Korean forces. On the front of the leaflet, he said, there was a picture of a bomb burst, with a large slogan printed in contrasting blue and red in order to engage attention. The large caption in the Korean language read as follows: "Air raid warning. Act quickly. Move away from military targets." On the reverse side of the leaflet there was a United Nations flag in blue. In red letters, there was a heading: "act quickly. Move away from military targets." And underneath was the following: "The United Nations forces urge all civilians to leave cities containing military targets. The United Nations Forces wish to avoid bombing civilians."[2]

The usefulness of such a leaflet as a warning against air raids presupposes that the civilians know what military targets are. In the absence of a definition of military objectives supplemented by a comprehensive list of actual and potential military objectives, knowledge by the civilian population of what military objectives are, cannot be presumed. True, in this particular case the military objectives were enumerated in a series of radio broadcasts to the population of North Korea; but one cannot presume that the people were listening or were

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1. Loc. cit.
2. Ibid., p. 140 - 141.

allowed to listen. And even if they were actually listening, to urge "all civilians to leave cities containing military targets" and not simply to move away from military targets, suggests to the civilian population that such cities as a whole were military targets and consequently, the 'warning' would amount to an act of terrorization.

However, after the Second World War, attempts at defining military objectives by means of exhaustive enumerations seemed to have been abandoned, and the most that could be expected were definitions of a general nature, with or without exemplary enumerations. The Hague Convention of 1954 for the protection of Cultural Property provides an example of a non-exhaustive enumeration of military objectives without a general definition. According to Article 8, paragraph 1 (a) of this Convention, there may be placed under special protection a limited number of refugees intended to shelter movable cultural property in the event of armed conflict, and of centres containing monuments and other immovable property of great importance, provided that they are situated at an adequate distance from "any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication."[1]

The ICRC Draft Rules of 1956 "for the limitation of the dangers incurred by the civilian population in time of war"[2]

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1. Text in Schindler and Toman, The Laws of Armed Conflict, 1973, pp. 529 et seq.; Roberts and Guelff, Documents on the Laws of War, 1982, pp. 339 et seq.
2. Text in Schindler and Toman, op. cit., 179 et seq.

were the last in a series of abortive attempts to provide a general definition with a comprehensive list of military objectives. Article 7 of the proposed draft rules provided that:

> "In order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives.
>
> Only objectives belonging to the categories of objectives which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives. Those categories are listed in annex to the present rules.
>
> However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage."

The annex referred to in the second paragraph of this text has never been drafted. Apart from this, the text was an attempt to objectify the concept of military objectives by prescribing three cumulative guide lines. Firstly, the object must exhibit the essential characteristics of a military objective, that is to say, it must be military by nature, purpose or use. Secondly, it must be of generally recognized military importance. Thirdly, its total or partial destruction in the military circumstances ruling at the time must offer a military advantage. If all three conditions were fulfilled, the object would be a legitimate military objective; if any of these conditions was not fulfilled, the object should not be treated as a military objective.

The Draft Rules of 1956 had a cool reception by governments; they did not even care to comment on them although they were asked to do so by the ICRC. Those Draft Rules, however, were resurrected by the ICRC in one form or another in the draft Protocol I which served as a basis for discussions at the second session of the Conference of Government Experts (1972) and the Diplomatic Conference (1974-1977) for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

The ICRC proposed to the Diplomatic Conference the following definition of military objectives:

> "1. Attacks shall be strictly limited to military objectives, namely, to those objectives which are, by their nature, purpose of use, recognized to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage."
>
> "2. Consequently, objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made objects of attack, except if they are used mainly in support of the military effort."[1]

This seems to be a rather diluted version of the definition of military objectives contained in the resolution of the Institute of International Law which was adopted at the

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1. Article 47 of Draft Protocol I. See also the Commentary of the ICRC on this Article; ICRC, Draft Additional Protocols - Commentary, Geneva, 1973, pp. 60-61.

session of Edinburgh, 9 September, 1969. This resolution was intended to state the existing law.[1] It was adopted by 60 votes to one, with one abstention. It defines military objectives as follows:

> "There can be considered as military objectives only those which, by their nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them."[2]

The main difference between this definition and the one proposed by the ICRC quoted above, is that the elements of the ICRC's definition are cumulative, while those of the Institute of International Law are alternatives, as indicated by the word "or". Such a difference however, seems more apparent than real, since objects which by their very nature or purpose or use, make an effective contribution to military action usually exhibit a generally recognized military significance.

However, during the discussions of the Diplomatic Conference several amendments were submitted;[3] two of which may

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1. Schindler and Toman, The Laws of Armed Conflict, 1973, p. 193-194, at 193. Indeed, in the seventh preambular paragraph of this resolution the Institute of International Law notes that the rules embodied in the resolution "form part of the principles to be observed in armed conflicts by any de jure or de facto government, or by any other authority responsible for the conduct of hostilities."
2. Ibid., p. 193.
3. For the texts of these amendments, see Levie Protection of War Victims, Vol. 3, 1980, pp. 176-179.

be mentioned first as illustrations of two diametrically opposing points of view. On one extreme there was the amendment of the delegation of Romania which propsed to define civilian objects rather than military objectives. It reads as follows:

> "All objects which do not serve to produce weapons, military equipment or methods of combat, or which are not directly and immediatly used by the armed forces shall be deemed to be civilian objects even if some change in their use should later cause them to acquire a predominantly military nature."[1]

The first part of this definition seems reasonable enough, but the words "even if some change in their use should later cause them to acquire a predominantly military nature" seem unrealistic as a general condition. For the importance of the "military nature" acquired by a civilian object may vary from one object to another. For example, a school transformed into a military barracks acquires an undoubted military nature and thus becomes a legitimate military objective while so used. But a shoe factory or a textile factory acquiring a predominantly military nature should not be treated as military objectives if the armed conflict was expected to last only for a short time. In other words, the problem of so called 'mixed objectives' that is to say, objects which serve both civilian as well as military purposes cannot be solved by a hard and fast rule. They can only be judged contextually, whether on the level of military strategy or on the level of military tactics. The ICRC proposal, as well as the definition of military objectives which

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1. Document CDDH/III/10, dated 12 March, 1974, ibid., p. 176.

was finally adopted, as will be shown in due course, allow for a contextual appreciation of whether a civilian object which had acquired a predominantly military nature may, in the circumstances ruling at the time, be considered a military objective.

If the Romanian proposal reflected an unrealistic humanitarian zeal, the French proposal reflected an equally unrealistic military zeal. The French delegation proposed to introduce into the definition of military objective what it called "the military potential of the adversary."[1] It proposed to define military objectives as follows:

> "An object shall be considered a military objective if by its nature or use it contributes directly or indirectly to the maintenance or development of the military potential of the adverse Party."[2]

In effect, this definition seems to stop just short of the concept of total war. For if one goes down the scale of indirect contribution to the maintenance and development of the military potential of the adversary, the point might be reached where it would be difficult to exclude the tiller of the soil or even the morale of the civilian population. However, the French proposal does not seem to have been supported by any other delegation.

Between the Romanian and French proposals which seem to have represented two ends of a spectrum, there was a variety of

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1. See the remarks of the French delegate Mr. Girard introducing his delegation's amendment; CDDH/III/SR. 14, para. 21.
2. Doc. CDDH/III/63, dated 19 March, 1974, cited in Levie, ibid., p. 177.

proposals all of which stated that "attacks shall be strictly limited to military objectives", but differed in their conception of these objectives. On that spectrum, and next to the Romanian proposal, may be placed the proposal of a group of Arab States stating that:

> "Attacks shall be strictly limited to military objectives. Consequently objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack. These objects shall not be made the object of reprisals."[1]

The Arab States proposed to delete the definition of military objectives on the ground that any definition of the kind given in paragraph 1 of the ICRC proposal constituted a restriction which could be misused. For the same reason it was proposed to delete the phrase "except if they are used mainly in support of the military effort" in paragraph 2 of the ICRC proposal "because it could encourage unwarranted attacks." The inclusion of the prohibition of reprisals against civilian objects was considered by the group of Arab States as being a logical addition, in line with the prohibition of reprisals against the civilian population which, at that time, was already adopted by Committee III.[2]

While the proposals of Romania, the Arab States and the ICRC tended to restrict the concept of military objectives, the

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1. Doc. CDDH/III/63, dated 19 March, 1974, cited in Levie, ibid., p. 177.
2. See the remarks made by the Egyptian delegate Professor El-Ghonemy, introducing the Arab ammendment on behalf of the sponsors: CDDH/III/SR.14, para. 18.

proposals of Australia, Canada and the Netherlands tended to widen that concept.

The Australian delegation proposed to delete the phrase "recognized to be of military interest" in the first paragraph of the ICRC text, and the word 'mainly' in the second paragraph. Accordingly, the Australian proposal was as follows:

> "1. Attacks shall be strictly limited to military objectives, namely, those objectives the total or partial destruction of which, in the circumstances ruling at the time, offer a distinct and substantial military advantage.
>
> 2. Consequently, objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used in support of military effort."[1]

Canada proposed to delete the whole of the ICRC proposal and to replace it by the following:

> "Attacks shall be strictly limited to military objectives, namely to those objectives which are by their nature, purpose or use recognized to be of military interest or whose total or partial destruction, in the circumstances ruling at the time, offers a distinctive military advantage."[2]

This proposal was criticised on the ground that the notion

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1. Doc. CDDH/III/49, dated 18 March 1974, cited in Levie, ibid., p. 177.
2. Doc. CDDH/III/79, dated 25 March 1974, cited in Levie, ibid., p. 179.

of military interest was too vague,[1] and that the use of the word 'or' instead of 'and' would result in giving the parties to the conflict too much latitude.[2]

Another proposal which also would have given the Parties to the conflict too much latitude was that of the Netherlands. It proposed to replace the ICRC text by the following:

> "Attacks shall be strictly limited to military objectives, namely those which by their nature or use effectively contribute to the military effort of an adverse Party or whose complete or partial destruction, capture or neutralization in the circumstances ruling at the time offers a distinct military advantage."[3]

It appears from these proposals as well as from the summary records of the Diplomatic Conference that there was a universal agreement on the rule that attacks must be strictly limited to military objectives, but the opinions differed widely as to what those objectives were. The main difficulty of defining military objectives was the solution to be found to the so-called 'mixed objectives'. In the study prepared by the ICRC for the Conferences of Government Experts and the Diplomatic Conference, the term 'mixed objectives' has been used to denote two categories of objects. The first category is called 'mixed objectives in the strict sense', that is, objects which can be used for both civilian and military requirements, e.g., a factory producing both civilian and military equipments. The second category is called 'mixed objects', that is, objects

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1. E.G., by Australia, CDDH/III/SR.14, para. 16.
2. E.G., by Sweden, CDDH/III/SR.15, para. 38.
3. Doc. CDDH/III/SR.56, dated 19 March 1974, cited in Levie, ibid., p. 177.

which, according to their usual purpose are non-military objects but which, by means of a simple transformation, may easily be used directly in the military effort or operations, e. g., a school turned into a barracks.[1]

The solutions proposed for'mixed objectives' at the Diplomatic Conference may be summerized as follows: the delegation of Romania proposed that objects should be treated as civilian objects unconditionally, while the delegation of France proposed that they should be considered military objectives. The delegations of Australia, Canada and Netherlands, mutatis mutandis, proposed that these objects should, in principle be regarded as military objectives, while the Arab delegations as well as the ICRC, proposed that 'mixed objectives' should, in principle, be regarded as civilian objects.

In the end, the present text of Article 52 of Protocol I was adopted as a compromise solution. It is entitled "General Protection of Civilian Objects", and provides as follows:

> "1. Civilian objects shall not be the object of attack or reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
>
> "2. Attcks shall be strictly limited to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

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1. ICRC, Doc. CE/3b, Geneva, January, 1971, p. 59.

"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."

The Article was adopted by consensus in Committee III, and by 79 votes in favour, none against, and 7 abstentions in plenary.[1] The explanation of votes which followed the adoption of the Article and the Reports of the Rapporteur and of Committee III shed some light on certain aspects of this Article,[2] but they seem conspicuously silent on the hard core of the provision, namely the definition of military objectives in paragraph 2, and its application in practice.

Article 52 of Protocol I is particularly important for two main reasons: first, it brings into a full circle the prohibition of reprisals against the civilian population and civilian objects; secondly, it provides as a basis for other provisions dealing with the protection of civilian objects by laying down a definition of military objectives. The question of reprisals will be discussed in the following chapter with the prohibition of reprisals against the civilian population. Here, we deal with the definition of military objectives and

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1. CDDH/III/SR.59, para. 10, and CDDH/SR.41, para. 149. In Committee III, Article 52 was also adopted paragraph by paragraph. Paragraph 1 was adopted by 58 votes to 3 with 9 abstentions; paragraph 2 was adopted by consensus; and paragraph 3 was adopted by 64 votes to none with 6 abstentions. See CDDH/III/SR.24, para. 16, 17, 18.
2. The Summary records of the Diplomatic Conference regarding Article 52 may be found in Levie, Protection of War Victims, Vol. III, 1980, pp. 176 - 208.

and the presumption in favour of civilian status laid down in paragraph 3 of the Article.

The first question to be raised with regard to paragraph 2 is whether the statement that attacks shall be strictly limited to military objectives is intended to deal with the question of collateral damage caused by attacks directed against military objectives. The answer seems to be 'no'. Indeed, in their explanation of vote, the delegations of the United Kingdom[1], Canada[2], Federal Republic of Germany[3], Netherlands[4], and the United States of America[5], stated that the first sentence of Article 52, paragraph 2, prohibits only such attacks as may be directed against non-military objectives, and that it does not deal with the question of colateral damage caused by attacks directed against military objectives.

To be sure, the question of colateral damage is regulated only indirectly by the so-called 'proportionality rule' which appears in paragraph 5(b) of Article 51 of Protocol I. It considers as indiscriminate, and therefore prohibited, 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." This rule was met with strong opposition from Third World and Socialist countries, but it was as far as the major Western countries were prepared to go. Indeed, it was only after the

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1. CDDH/SR.41, para. 153.
2. CDDH/SR.41, Annex.
3. Ibid.
4. Ibid.
5. Ibid.

precautionary measures had been 'intensified' that it was possible to adopt the 'proportionality rule'. Nevertheless, this rule will continue to represent the Achilles heel in the body of law as far as the protection of the civilian population and civilian objects is concerned.[1]

The second question to be raised is whether the definition of military objectives applies to military objectives in general or only to civilian objects which may be considered as military objectives. In other words, does the definition of military objectives apply also to military objects, such as troops, their equipment and ground, or is it limited to civilian objects which, for the reasons specified in paragraph 2, may be treated as military objectives ? In view of the fact that the civilian population and civilian objects have often been attacked on the pretext of attacking military objectives or even military objects, and of the fact that even the most scrupulous and law-abiding attacker would still cause immense civilian losses in populated areas, the question seems to be of particular importance.

The Summary records of the Diplomatic Conference do not seem to give a conclusive answer to the question under discussion. The Report of Committee III states the obvious; that the definition of military objectives takes account of "the fact that military objectives include objects other than military objects - such as troops, their equipment, and ground ..."[2]

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1. The 'proportionality rule' is discussed in Chapter 6, Sec.8.
2. Report of Committee III, Second Session, 1975, Doc. CDDH/215/Rev.1, para. 64. reproduced in Levie, Protection of War Victms, Vol. 3, 1980, p. 201.

Strangely enough, Professor Karlshoven saw in this statement of fact a "restriction" which, in his view, "implies that the question of whether, and under what conditions, 'troops their equipment and ground' constitute military objectives is not governed by the specific definition of that concept given in Article 52."[1] Nevertheless, he did not go as far as to say that enemy troops, their equipment and ground constitute military objectives under all circumstances. He would only say that "generally speaking, it seems a reasonable assumption that enemy troops will represent a military objective no matter when and where they are found."[2] At the same time, he expresses awareness of the fact that, while this presumption may at first sight seem a truism, it becomes somewhat less so if it is realised how often the civilian population has sustained severe incidental losses.[3]

Professor Karlshoven was probably unaware that in making these remarks he was in effect arguing against his conclusion that whether, and under what conditions, enemy troops, their equipment and ground constitute military objectives is not governed by Article 52. The purpose of the definition of military objectives is not only to protect the civilian population and civilian objects against direct attacks, but also to avoid them incidental losses which may be caused by attacks directed against 'military objects' which their total or partial destruction, capture or neutralization, does not offer in the

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1. Kalshoven, Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflict - Part Two, in Netherlands Year Book of International Law, 1978, pp. 107 et seq., at p. 110.
2. Loc. cit.
3. Loc. cit.

circumstances ruling at the time a definite military advantage. Indeed such attacks would be contrary to sound military strategy and contrary to the military principle of economy in warfare.

In brief, contrary to Professor Kalshoven's suggestion, Article 52, paragraph 2, applies equally to military objects as well as to non-military objects which fulfil the criteria laid down in that paragraph.

The third and most important question to be raised is whether the definition of military objectives does really contribute to the protection of the civilain population and civilian objects. This requires a textual and contextual analysis of the definition given in Article 52, paragraph 2.

According to that définition, an object may lawfully be treated as a military objective only if:

a) it makes an effective contribution to miltary action and

b) its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

It should be emphasized that these conditions or criteria are cumulative.[1] With regard to the first condition the indicatives of effective contribution to military action are the nature, location, purpose or use of the object. This is indeed a broad list which, without further qualification, would have left to military commanders a wide measure of discretion in regarding objects as military objectives. The second

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1. Ibid., p. 110. Also, ICRC Draft Additional Protocols to the Geneva Conventions of 12 August, 1949 - Commentary, Geneva, 1973, p. 61.

condition purports to provide the needed qualification by requiring military commanders to determine in the light of the actual military situation whether military action to be taken against a given object 'offers a definite military advantage.'

But what does 'definite' miltary advantage mean? According to the Report of Committee III, extensive discussion took place before agreement was reached on the word 'definite' in the phrase 'definite military advantage'. Among the words considered and rejected were 'distinct', 'direct', 'clear', 'immediate', 'obvious', 'specific' and 'substantial'.[1] The Rapporteur of Committee III, Mr. Aldrich, commented by saying that he was "unable to draw any clear significance from this choice."[2] Similarly, Professor Kalshoven "is doubtful that another choice would have made any noticeable difference." Moreover, in his view, the term 'definite' leaves ample room for divergent interpretations.[3]

As a matter of fact the Diplomatic Conference was not consistent in the choice of words used to qualify 'military advantage'. In Article 52, paragraph 2, it speaks of 'definite military advantage', while in Articles 51 and 57 it speaks of 'concrete and direct military advantage.' It may be assumed, however, that these phrases are not different, and that 'definite' means 'concrete and direct'.

This becomes obvious from the term 'military action', which has been deliberately used instead of the indefinite term

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1. Report of Committee IIII, Second Session, Document CDDH/215/Rev.1, para. 64, cited in Levie, op. cit., p. 201.
2. Report to the Third Commission on the Work of the Working Group, Committee III, 24 February, 1975, (CDDH/III/224).
3. Kalshoven, op. cit., p. 111.

'military effort', as well as from the requirement that the 'definite military advantage' be present 'in the circumstances ruling at the time'. The term 'military action' can only mean 'military operations', and the term 'in the circumstances ruling at the time' refers to the actual military situation at a given time. The phrase 'in the circumstances ruling at the time', as Professor Kalshoven commented, effectively precludes military commanders from relying exclusively on abstract catergorizations in determining whether specific objects constitute military objectives (e.g., a bridge is a military objective; an object located in the zone of combat is a military objective, and so forth). Instead, they will have to determine whether, say, the destruction of a particular bridge, which would have been militarily important yesterday, does, in the circumstances ruling today, still offer a 'definite military advantage'. If not, the bridge has to be treated as a civilian object.[1]

Even so, or perhaps because of the 'contextual' nature of the definition of military objectives, doubt may exist in some concrete cases as to whether a civilan object is being used to make an effective contribution to military action, and, whether its destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. In such a case, the military are more likely to give themselves the benefit of the doubt and thus treat the object as a military objective. Inevitably, such a presumption in favour of the military is bound to result in an unwarranted denial of protection to the civilan population and civilian objects.

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1. Loc. cit.

Article 52, paragraph 3, of Protocol I, seeks to preclude such an unwarranted denial of protection by stating that, 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." In other words, the object should be treated as a civilan object and should not be attacked.

In the Working Group of Committee III much discussion was devoted to the question whether this presumption should apply without exceptions, or whether an exception should be made with regard to civilian objects located in 'contact zones'. Delegations in favour of such an exception proposed to add at the end of paragraph 3 of Article 52 the words: "except in contact zones where the security of the armed forces requires a derogation from this presumption."[1]

This proposal was defended on the ground that infantry soldiers could not be expected to place their lives at great risk because of such a presumption and that, in fact, civilian buildings which happen to be in the front lines usually are used as part of the defensive work. On the other hand, the proposal was criticised on the ground that it would unduly endanger civilian objects to permit any exception to the presumption.[2]

In the end, however, the proposed exception was rejected by Committee III by 36 votes to 12 with 23 abstentions, and

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1. Report to the Third Commission on the Work of the Working Group, Committee III, 24 February, 1975, (CDDH/III/224).
2. Ibid.

the present paragraph 3 of Article 52 of Protocol I was adopted by the Committee by 64 votes to none with 6 abstentions.[1]

Finally, we consider the important question of whether the definition of military objectives laid down in Article 52, paragraph 2, and the presumption in favour of civilian status laid down in paragraph 3, do really solve the problem of military objectives, and thus, contribute to the protection of the civilian population and civilian objects.

For this purpose it might be useful to compare Article 52, paragraph 2, of Protocol I with Article 23(g) of the Hague Regulations of 1899 and 1907, for the two seem to be indentical in substance, although they are different in form.

Reduced to its simplest form, the definition of military objectives contained in Article 52, paragraph 2, of Protocol I, seems to be saying that: an object which does not make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, does not offer a definite military advantage must not be made the object of attack.

Article 23 (g) of the Hague Regulations seems to be saying the same thing. It states that, in addition to the prohibitions provided by the special conventions, it is especially forbidden - "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

There seems to be no doubt that 'the necessities of war' were used here in a tactical sense and refer to the imperative

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1. CDDH/III/SR.24, para. 18.

demands of military action. In a tactical sense, the destruction or seizure of the enemy's property may only be imperatively demanded by the necessities of military action if it offers a concrete military advantage directly relevant to the military situation ruling at the time.

Thus, the phrase 'imperatively demanded by the necessities of war' seems to contain all the elements of the definition of military objectives contained in Article 52, paragraph 2. Does it necessarily follow that the whole fuss about the problem of the definition of military objectives was 'ado about nothing'?

To be sure, Article 23(g) of the Hague Regulations was not even mentioned during the debate on Article 52 of Protocol I. And although substantively, both Articles are concerned with the general protection of civilian objects, the law makers have actually acted on the assumption that the Hague Conventions did not contain a definition of military objectives and that one was needed.

But even if the definition of military objectives in Article 52, paragraph 2, was no more than a reaffirmation of Article 23(g) of the Hague Regulations, it certainly has the merit of being more elaborate. But like any contextual definition it is bound to give rise to many controversies in practice, particularly in the context of guerrilla warfare. The concept of 'effective contribution to military action' and the concept of 'definite military advantage in the circumstances ruling at the time' might be easy to apply in the context of conventional warfare, but it is not clear what they are supposed to mean in the context of guerrilla warfare.

As for the presumption contained in Article 52, paragraph

3, one may concede that it is an important addition to the law of armed conflict which, if faithfully respected, would contribute significantly to the protection of the civilian population and civilian objects. Its main weakness, however, is that it is unverifiable, and that, in all probability, those who plan or decide upon an attack in the light of the information available to them at the time would act contrary to what the law requires them to do.

On the whole, it seems fair to conclude that the question of whether the definition of military objectives would contribute to the protection of the civilian population and civilian objects is a matter that rests almost entirely with the conscience of the Parties to the conflict - a conscience which past experience shows is untrustworthy. In fact, the definition of military objectives has nothing new to offer; it is the same old notion of 'the imperative demands of the necessities of war' differently formulated. If this were to be hailed as a victory for humanity in warfare, or what passes for it in the official parlance of 'reaffirmation and development of humanitarian law applicable in armed conflict', let it not be forgotten that under the present definition of military objectives no object is immune from attack if it 'effectively contributes to military action' and if its destruction, capture or neutralization in the circumstances ruling at the time offers a definate military advantage. Even objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works may be attacked, destroyed, removed or rendered useless, if they were used 'in direct support of military

operations' such as shielding the enemy from attack or observation.[1] Similarly, the natural environment may be attacked provided that the attacks do not cause 'widespread, longterm and severe damage' to the natural environment as would 'prejudice the health or survival of the population.'[2] Even objects containing dangerous forces, namely, dams, dykes and nuclear electrical generating stations may be attacked if they were used in 'regular and significant and direct support of military operations' if such an attack is the only feasible way to terminate such support.[3]

On the whole, it seems fair to conclude that the actual scope of the concept of military objectives has in fact been widening eversince the advent of aircraft and that war technology has aggravated the problem of the protection of the civilian population and civilian objects. In the light of the definition of military objectives contained in Article 52, paragraph 2, of Protocol I, the extent of the protection of the civilian population and civilian objects will ultimately depend on how in practice the criteria of 'effective contribution to military action' and the 'definate military advantages in the circumstances ruling at the time' will be understood and applied. But it should be noted that the definition of military objectives and, for that matter, Article 52 of Protocol I as a whole, are parts of a package which includes, among other things, the prohibition of attacking or terrorizing the civilian population as such, the prohibition of reprisals against the

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1. For details, see the following Chapter, section 6.2.
2. For details, see the following Chapter, section 6.3.
3. For details, see the following Chapter, section 6.4.

civilian population, civilians and civilian objects, the prohibition of indiscriminate attacks, and the obligation for those who plan or decide upon attacks to take certain specified precautionary measures with a view to avoiding, and at any rate, minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects. These matters constitute the subject of the following chapter.

CHAPTER FIVE

FUNDAMENTALS OF THE GENERAL PROTECTION OF THE CIVILIAN POPULATION AND CIVILIAN OBJECTS: SUBSTANTIVE RULES

1. Introduction

So far, the discussion has been focused on the basic rule of distinction as such. This Chapter follows up by examining some of the detailed but fundemental specifications of the basic principle of distinction. That is to say, rules which afford basic protection to the civilian population and civilian objects on land, against attacks from land, sea or air.

It may be noted here that the provisions of Section I of Part IV of Protocol I affording protection to civilians and civilian objects against the dangers of military operations are additional to t e rules concerning humanitarian protection contained in the Fourth Geneva Convention of 1949, particularly in Part II thereof, and in other international agreements binding upon t e Hig 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.[1]

This indeed covers a vast area which, for reasons of space and time cannot be examined here or even summarized. The texts alone extend into volumes,[2] let apart commentaries. Of necessity therefore, the discussion is selective. The texts selected for this chapter are, in the main, Section I of Part IV of Protocol I, affording protection to civilians and and civilian objects on land, against the dangers of attacks

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1. Article 49, paragraph 4, of Protocol I.
2. See for example, Roberts and Guelff, Documents on the Laws of War. Oxford, 1982, (two volumes); Schindler and Toman, the Laws of Armed Conflict, 1973.

from land, sea or air. From the Fourth Geneva Convention it is in the main, Section I of Part III of the Convention which has been selected. Together, these two sections are believed to provide civilians and civilian objects with an irreducible minimum of protection below which the Parties to the conflict will inevitably relapse into pristine savagery.

By and large the rules in Section I of Part IV of Protocol I are either customary rules of international law or detailed elaboration of customary rules and principles.[1] Thus, unless one approaches them from the point of view of what is not expressly pro ibited is licit, it would be difficult to deny that t ey are already binding on the Parties to conflicts of international character, notwithstanding the fact that the final provisions of the Protocol require signature and ratification or accession.

But even if it is alleged that some of the rules of Section I of Part IV of Protocol I were new rules, this would actually matter very little. For according to the principle laid down in Article 18 of the Vienna Convention on the law of treaties: "A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty..., until it shall have made its intention clear not to become a Party to the treaty." Thus, according to this principle, even absolutely new rules contained in conventions which are signed but not yet ratified will not be without legal

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1. This is also the view of the International Commision which enquired into reported violations of International Law by Israel during its invasion of the Lebanon: Israel in Lebanon - The Report of the International Commision, Ithaca Press, London, 1983, p. 28.

validity. This, at any rate, is not the case with the provisions of Section I of Part IV of Protocol I which, as just noted are reaffirmation and development of existing rules of international law.

With regard to the provisions of Section I of Part III of the Fourth Geneva Convention, it is important to note that they are provisions common to the territories of the Parties to the conflict and to occupied territories. Moreover, they are now incorporated, by and large, in Protocol II relating to the protection of victims of armed conflicts of non-international character, particularly in Articles 4, 5, and 6 thereof.

Fin lly it should be noted that most of the provisions of Section I of Part IV of Protocol I, have corresponding provisions in Protocol II, either in form, or in substance. However, care will be taken not to confuse Protocol I with Protocol II. This chapter therefore, has the double purpose of comparing the provisions of the Protocols when dealing with the same subject matter, and of avoiding repetion when the provisions in the two Protocols are identical.

2. The Principle of General Protection

Article 51 of Protocol I entitled "protection of the civilian population" starts by laying down a general principle with regard to "dangers arising from military operations." it states that:

> "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."

During the discussion of this paragraph in the Working Group of the Third committee of the Diplomatic Conference several delegates questioned the phrase, "To give effect to this protection." It was pointed out that there were also other rules in Protocol I and in other instruments which helped give effect to the protection and that the phrase might conceivably import a limitation of the protection from military operations.[1]

The text itself is sufficiently clear on this point and Report of Committee III made it even clearer; it explains that while the provisions of Article 51 give effect to the principle of general protection against dangers arising from military operations, "they are not intended to be limitative in effect. It is for this reason that express reference is made to the fact that these paragraphs (of Article 51) are

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1. Report to the Third Commission on the Work of the Working Group. Committee III, 24 February 1975 (CDDH/III/224), text in Levie, Vol. 3, pp. 148-151.

"in addition to other applicable rules of international law", which may be found both in (draft) Protocol I and in other treaties and rules of customary international law. The rules of Article 51, as well as other rules of international law, apply to all types of operations, by regular and irregular forces alike, during the course of an armed conflict".[1]

The statement that "The rules of Article 51, ... apply to all types of operations", is of particular importance to the interpretation of Article 51. The term "operations" is wider than the term "military operations" and the latter term is wider than the term"attacks."

Failure to take sufficient notice of this statement and terminology, or probably, the 'exploitation of terminology' seem to have lead one writer, Bierzanek, to assert that the prohibition of reprisals in Article 51, paragraph 6, does not cover 'all' the provisions of Article 51, and further,to argue that reprisals against civilians and civilian objects are still permissible under Protocol I. Most of Bierzanek's[2] findings, however, are wrong, and he might well disclaim them once he realises that they were based on a serious oversight of the prohibition of reprisals against civilian objects. Article 52, paragraph 1, clearly states that: "Civilian objects shall not be the object of attacks or of reprisals." On the other hand, Article 51, paragraph 6, states that:

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1. Report of Committee III, Second Session, 1975, (CDDH/215/Rev. 1), para. 50 Emphasis added.
2. See Remigiusz Bierzanek, Reprisals as a means of enforcing the Laws of Warfare, pp. 232-257, in Cassese (ed.), The New Humanitarian Law of Armed Conflict, 1979, pp, 251-254.

"Attacks against the civilian population or civilians by way of reprisals are prohibited." These two provisions are complementary to each other, and together with other prohibitions of reprisals incorporated in the four Geneva Conventions of 1949, as well as other specific prohibition incorporated in Protocol I itself, the prohibition of reprisals may be said to have become total.[1]

The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations in all circumstances (Art. 51, para. 1).

"General protection" should be distinguished from "special protection." As Kalshoven explains, the term "special protection" is used to indicate the fullest protection, verging on immunity, while the term "gneral protection" implies that only a certain measure of protection is provided without there being an attempt to remove all the risks to which the category of persons or objects concerned is exposed. Thus, general protection of the civilian population and civilian objects basically implies two things: a prohibition on making them the object of direct attack, and a requirement to avoid unacceptable collateral loss or damage as a result of attacks on military objectives.[2]

Another fundamental difference between "general" and "special" protection is that the latter may only be conferred on certain "localities and zones" by means of a special

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1. See below, this Chapter, Section 7.
2. Frits Kalshoven, Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: The Diplomatic Conference, Geneva, 1974- 1977, NYIL, 1978, p. 113. (For brevity, this will be referred to as Humanitarian Law, Part II).

agreement between the parties to the conflict. Such Localities and zones, as may be put under special protection, shall fulfil certain conditions specified by law; (in Article 14 of the fourth Geneva Convention with respect to hospital and safety zones and localities; Article 15 with respect to neutralized zones; in Article 59 of Protocol I with respect to non-defended localities; and in Article 60 with respect to demilitarized zones).[1]

In these cases, the special protection conferred by special agreement ceases if the locality or the zone ceases to fulfil the required conditions, but it continues to benefit from the "general protection" afforded by international Law to civilians and civilian objects.[2]

Special protection by means of a special agreement is rare in practice. Indeed, no such agreements have been made since the end of the Second World War,[3] except in one case; that was during the conflict in Palestine in 1948, where two, and at one time three, neutralized zones, directed and administered entirely by the International Committee of the Red Cross, were set up in Jerusalem.[4] But there seem to be no other instances since then despite the great importance of such "places of refuge" (as the ICRC likes to describe them) to the protection of the civilian population.

However, special agreement is not the only means of conferring special protection; some rules of international

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1. On Articles 14 and 15 of the Fourth Geneva Convention, see the ICRC Commentary, 1958, pp. 119-133, Pictet (ed.)
2. Art. 59 (7) and Art. 60 (7), of Protocol (I).
3. On the practice during the Second World War, see R.Y. Jennings, "Open Towns", BYIL, 1945, pp. 258-264; and Whiteman, Digest, Vol. 10, pp. 423-437.
4. ICRC Commentary, Ibid, p. 129.

law confer such protection without special agreement. Thus, Article 25 of the Hague Regulations on land warfare, 1907, provides a classical example: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."

If military objectives are situated in these localities, they may be attacked but subject to the general protection of the civilian population and civilian objects. As Article 2 of Hague Convention IX concerning Bombardment by Naval Forces, 1907, put it, "the commander shall take all due measures in order that the town may suffer as little harm as possible."

The clearest example of "special protection" without the necessity of "special agreement" in Protocol I is Article 56 entitled "Protection of works and installations containing dangerous forces", namely dams, dykes and nuclear electrical generating stations. Some writers discuss this Article under the rubric: "General protection: special objects",[1] although the article itself speaks of "special protection."[2] However, immunity of these objects from attack is not absolute but conditional, as is generally the case with special protection.

It may be useful to note that despite what has been said above, the classification of the protection of civilians and civilian objects into "general" and "special" protection seems to be a misnomer. For, to the extent that "general

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1. e.g. Kalshoven, Humanitarian Law, Part II, NYIL, 1978,pp. 131-136. Kalshoven, however is not oblivious or averse to the special protection in Art. 56.
2. Art. 56 (2).

protection" may imply that civilians and civilian objects may be attacked, albeit indirectly, it deviates from the basic rule (Art. 48 of Protocol I) which requires the parties to the conflict to "direct their military operations only against military objectives." The psychological impact of the term "general protection" may induce those who plan or decide upon an attack to take the protection of civilians and civilian objects less seriously, or to take for granted that civilians and civilian objects are not legally immune from attack.

Even more serious is the psychological impact of the term "special protection" which, although it indicates the fullest possible protection, nevertheless seems to over-emphasize the importance of declarations, special agreements and the fulfilment of certain conditions.

It was probably to guard against such impact and other inferences as well, that Article 57 of Protocol I, after enumerating the precautionary measures that "shall be taken" by "those who plan or decide upon an attack", went on to state unequivocally in paragraph 5 that: "No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."

3. Attacks against the Civilian Population 'as Such'

The first sentence of paragraph 2 of Article 51 of Protocol I, lays down that: "The civilian population as such, as well as individual civilians, shall not be the object of attack."

This is a firmly established rule of customary international law notwithstanding its violation in the Second World War and the wars that followed. Article 25 of the regulations annexed to the Fourth Hague Convention and Article 2 of the Hague Convention No. IX, of 1907, have already been mentioned. In 1938, the Assembly of the League of Nations, on the initiative of the Spanish Government, discussed at length the question of the protection of the civilian population against bombing from the air. Raging at the time were two armed conflicts; one was interstate (the Sino-Japenese war), and the other was civil war (the Spanish Civil war). At the conclusion of the debate the Assembly adopted a resolution stating that "the intentional bombing of civilian populations is illegal." This, however, does not mean that bombing by negligence is permissible. The same resolution of the Assembly of the League of Nations states as a recognized principle that: "Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." Immediatly before this the resolution states the principle that "Objectives aimed at from the air must be legitimate military objectives and must be

identifiable."[1]

These three principles were regarded as already in force, although they needed to be developed and specified.[2] Indeed even before this famous resolution was adopted on 30 September, 1938, the three principles were already declared by the British Prime Minister Mr, Chamberlain, in the House of Commons, as being principles of existing international law.[3] Moreover, in the same year, 1938, after an intensified aerial bombardment of Barcelona by the insurgent forces of General Franco during the Spanish Civil war, the British and French Governments sent representations to General Franco's administration drawing its attention to the fact "that direct and deliberate attacks on civilian population are contrary to the principles of international law as based on the established practises of civilised nations, to the laws of humanity and to dictates of public opinion."[4]

The prohibition of attacks against the civilian population was thus firmly established when the Second World War broke out and with regard to all types of armed conflict. Accordingly, when on the first of September, 1939, President Roosevelt of the United States appealed to the United Kingdom, France, Italy, Germany and Poland to affirm that their armed forces shall "in no event and under no circumstances undertake bombardment from the air of civilian populations or

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1. For the complete text of this resolution, adopted on 30th September, 1938, see Schindler and Toman, The Laws of Armed Conflict, pp. 153-154.
2. See Antonio Cassese, The Spanish Civil War and Customary International Law, in Cassese (ed.), Current Problems of International Law, pp. 298-311.
3. Ibid, p. 300, n. 19.
4. As quoted by Cassese, ibid, p. 300.

unfortified cities, upon the understanding that the same rules of warfare shall be scrupulously observed by all their opponents"[1], he was asking these States not to resort to a practice which they themselves had just condemned as illegal.

The United Kingdom and France, as it is well known, welcomed the appeal and replied in a joint declaration that:

> "They had indeed some time ago sent explicit instructions to the commanders of their armed forces prohibiting the bombardment whether from the air, or the sea, or by artillery on land of any except strictly military objectives in the narrowest sense of the word. Bombardment by artillery on land will exclude objectives which have no strictly defined military importance, in particular large urban ares situated outside the battle zone."[2]

This bears out three principles already recognized in the resolution of the Assembly of the League of Nations. Hitler also replied that the German Airforce had received the command to confine itself to military objectives.

There is evidence to suggest that these pledges were honoured for some time. Historian Geoffrey Best gives the winter of 1940-1941 as the time when 'strategic bombing' began, but he seems to suggest that it began as early as the 25th of August 1940, when Churchill's government ordered "the bombing of 'military' targets in Berlin on a succession of nights following 25 August." The avowed pretext for this, says Best, "was the accidental dropping on the night of 24th

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1. Quoted from Blix, Area Bombardment, BYIL, 1978, p.36.
2. For complete text, see the (British) House of Lords Debates, Vol. 114, fifth series, cols. 1048-49, Sept. 13th 1939.

(of August) of some bombs on London (which the Luftwaffe had been under strict and irritating instructions to avoid)."[1]

Geoffrey Best seems to doubt that the bombing of Berlin was merely retalitory and expresses 'some puzzle' as to why Churchill's government triggered the indiscriminate bombardment of cities at a time when the RAF was not 'yet' ready for a'bombing match' with the German Air Force and at a time when Britain had already "for many months suffered much worse than Germany."[2] Geoffrey Best offers some political explanations which, however, do not concern us here. For the purposes of this section it is sufficient to note that indiscriminate attacks, when judged by the principle of distinction between non-combatants and civilian objects on the one hand, and combatants and military objectives on the other hand, appear in their true nature as attacks against the civilian population 'as such' but in disguise.

This, in particular, may be the case when the expression 'as such' is taken to mean 'exclusively', or taken to mean an attack 'unrelated to a military objective'. Such qualifications have in the past rendered the protection of the civilian population largely illusory. For illustration, the United States Navy Manual of July, 1959, may be quoted. Under Section 221 of this Manual we read the following:

> "It should be emphasized that despite recent developments in the conduct of warfare, the prohibitions against subjecting non-combatants to direct attack unrelated to a military objective or of attacking them for the

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1. Geoffrey Best, Humanity in Warfare, 1980, p. 276.
2. Loc. cit.

purpose of terrorization remains valid."[1]

At the Second Session of the Conference of Government Experts, 1972, the ICRC presented the Conference with a draft rule stating that: "Attacks which, by their nature, are launched against civilians and military objectives indiscriminately, shall be prohibited."[2]

With respect to this proposal the experts from the USA expressed the following understanding which they requested should be included in the report of Commission III: "Indiscriminate attacks are those attacks which have no specific military objectives."[3]

The inference seems to be that in the view of the experts from the USA the slightest presence of a 'specific' military objective would suffice to lift from an attack the qualification of being an attack against the civilian population as such, as well as the qualification of being an indiscriminate attack. But then the attack would become without any legal identity, and the distinction between attacks against the civilian population as such and indiscriminate attacks would become blurred, since in practice it is extremely unlikely that a party to the conflict would admit that he attacked any but military objectives.

However, the fact that the rule protecting the civilian population as such, although recognized as a customary rule of international law, has been formulated in some military manuals restrictively, and has been interpreted by some

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1. Cited in Whiteman, Digest, Vol. 10, p. 136.
2. ICRC, Report on the work of Government Experts, Geneva, 1972, Vol.2, p 7, (draft Art. 45, para. 3)
3. Ibid, P. 83, Doc. CE/COM III/PC 110.

writers in such a way as to make the illegality of indiscriminate attacks look like a rather naive proposition.

Thus, for instance, the U.S Army Field Manual on land warfare (FM 27-10), 1956, and the British Manual of Military Law, 1958, provide in identical words that "it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them."[1]

Some writers, e.g., Robert E. Jordan III, Hamilton DeSaussure, and H. Lauterpacht, individually, seem to have over-emphasized and over-stretched a controversial 'interpretation a contrario' of this rule in order to endow with legality any attack not directed exclusively against the civilian population or individual civilians.

Robert E. Jordan III advocated the 'legality' of the widely condemned 'free-fire zones' practices in Vietnam (renamed 'Specified Strike Zones' to avoid adverse publicity), on the ground that:

> "So long as a reasonable belief in the enemy's presence was the basis for making a specified strike zone the target of military operations, and so long as undefended towns were not attacked, the doctrine of military necessity clearly justified the use of firepower."[2]

Expressions like 'a reasonable belief in the enemy's presence', 'undefended towns', and 'specified strike zones'

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1. Cited in Whiteman, Digest, Vol. 10, p. 136. Emphasis added.
2. Robert E. Jordan III, Methods and Means of Warfare, Ch. 2, p. 61, in Trooboff (ed.), Law and responsibility in Warfare, 1975.

had a chameleon character in Vietnam, and so had the term military necessity. According to Petrowski, in some American officers' eyes "it would be considered a matter of 'military necessity' to burn down an entire village to kill one sniper."[1] And according to Meyrowitz, the concept of defended localities was taken to mean any real or assumed presence of Vietcong or of arms hidden in homes by the National Liberation Front.[2] Evan Jordan himself admits that the term "free-fire zones" was "loosely understood to mean 'anything goes' so far as the use of firepower was concerned." Yet he was not prepared to admit the illegality of the 'free-fire zones' practice. All that he seems to admit as illegal appears from the following sentence: "Certainly there is some evidence that such zones were used for target practice without regard to the limitations of the Hague Regulations." Only such 'target practice' where individual noncombatants "may indeed have been shot without justification"[3] seemed to him illegal.

Thus, it seems clear that Jordan reduced the protection of the civilian population to the prohibition of attacks directed exclusively against the civilian population or individual civilians. Conversely, when the attacks were not directed exclusively against the civilian population or individual civilians, military necessity, in his view, would justify the attacks.

Hamilton DeSaussure expressed similar views to those of Robert Jordan, but he claimed that the civilians in the

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1. Lawrence C. Petrowski, Law and the Conduct of the Vietnam War, in Falk (ed.), The Vietnam War and International Law, Vol. 2, p. 496.
2. Henri Meyrowitz, The Law of War in Vietnam, in Falk's, ibid, p. 555.
3. Robert E. Jordan III, Op Cit, p. 60-61.

preplanned free-fire zones were given the opportunity to evacuate except in cases where prior warning would jeopardize the success of the mission. Moreover, in his view, the free-fire zones and area bombing, "all can be considered as counterbalancing the enemy's policies of concealment, surprise, and treachery."[1]

Capitalizing on guerrilla tactics of concealment, surprise, the use of civilians as a shield, and urban guerrilla operations was fashionable in the past three decades as if the legal requirement of distinction meant segregation. Like economic warfare in the Second World War, 'counterbalancing' guerrilla tactics has been taken as a pretext for the destruction of the civilian population and the social fabric of the people struggling for its liberation and its invaluable right of self-determination.

Concealment and surprise are classical elements of military strategy and are recognized as such the world over. They are not the invention of guerrilla movements. Further, there is no rule of law that prohibits the siting of military objectives among the civilian population, however desirable such a prohibition may be, political and military spokesmen, of whom we hear and see much on radio and television screens, who blame excessive civilian losses on guerrilla movements failing to 'segregate' themselves from the civilian population, either display their ignorance of international law or tend to play on the feelings of soft-hearted but largely ignorant public opinion.

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1. See Hamilton DeSaussure, Methods and Means of Warfare, "Comments", Ch. 4, in Trooboff (ed.), Op. Cit. pp. 66-74.

In brief, indiscriminate attacks have always had the dual character of being attacks against the civilian population as such, and of being attacks against military objectives. It is unconvincing to argue that such attacks were not intended to strike at civilians or that they were not directed exclusively against them. There is no magic power in the words 'intended' and 'exclusively' that would make a crime 'no crime'. The express prohibition of indiscriminate attacks in two detailed paragraphs of Article 51 of Protocol I bear out this fact.

Perhaps the most repugnant form of attacking the civilian population as such is by way of reprisals. The bitter fact about reprisals is that under customary international law they are described as sanctions, and as such they will continue to be until the conventional illegality of reprisals enshrined in Article 51(6) of Protocol I supersedes their customary legality.

The rule that the civilian population as such, as well as individual civilians, shall not be the object of attack must be read in conjunction with a definition of who is a 'civilian'.[1] Under the definition adopted in Article 50 of Protocol I only persons belonging to the armed forces of the Parties to the conflict are excluded from falling under the concept of 'civilians'. This point has already been discussed at some length. Suffice it here to state or restate that under the definition of civilians in Protocol I there is no longer a place for the discussion often heard after the Second World War, as a result of the practices in that war, that the

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1. See Blix, Area Bombardment, BYIL, 1978, pp. 42-43.

distinction between civilians and combatants has been blurred,[1] or that there is a category of civilians, notably those who work in munition or armament factories, that ought to be regarded as 'quasi-combatants'[2] and hence constitute a legitimate object of attacks. Under Protocol I, attacks against the so-called 'quasi-combatants' must be regarded as attacks against the civilian population and individual civilians 'as such' and therefore prohibited.

However, the presence of these workers in legitimate military objectives does not, by itself, render these objectives immune from attack, but the workers, even in this case, would still remain under the so-called protection of the 'proportionality rule', as in any other attack on military objectives, as will be shown in due course.

Finally it seems worth recalling that 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.[3] In other words, the attack in such a case would still be regarded as an attack against the civilian population 'as such'. Indeed, the attack in this case may easily qualify as being indiscriminate, a violation of the rule of proportionality, as well as a violation of the rules about precautions in attacks. Yet, the importance of expressly reserving civilian character to

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1. Such a claim found expression in Military Manuals of the USA and Britain, see Whiteman, Digest, Vol. 10, 134-136. See also, Lauterpacht, The Revision of the Law of War, BYIL, 1952, p. 364.
2. J.M. Spaight, Legitimate Objects in Air Warfare, BYIL, 1944, pp. 162-3; and Stone, Legal Controls of International Conflict, 1959, p. 629.
3. Protocol I, Art. 50, para. 3.

the whole collectivity in question can hardly be exaggerated, especially in armed conflicts characterized by the guerrilla type of warfare, which is generally the case in non-interstate armed conflicts.

In summary, the following points may be stated:

1. Although the rule that "the civilian population as such, as well as individual civilians, shall not be the object of attack", is a recognized rule of customary international law, its content has not always been clear. Some writers have interpreted the rule so narrowly and thus confined the prohibition to attacks directed exclusively against the civilian population or individual civilians, that is, attacks not related to a recognized military objective. Beyond this, one writer argued, " it is controversial, at least practice has made it controversial, whether the civilian population as such is entitled to protection."[1] It seems doubtful whether such arguments were made in good faith.

2. The rule under discussion should now be read in conjunction with other rules such as the definition of civilians and civilian objects, the definition of the civilian population, the prohibition of idiscriminate attacks, the prohibition of reprisals, and the precautionary measures to be taken in attacks.

3. The prohibition of making civilians the object of attack is not confined to 'direct attacks'; nowhere in the Protocol has the term 'attack' or 'attacks' been qualified by the word 'direct'. Thus, indiscriminate attacks may also be attacks against the civilian population as such although in fact

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1. Lauterpacht, Op. cit., p 365.

military objectives may have been hit. The question therefore is not one of semantics but one of facts. In non-interstate armed conflicts characterized by the guerrilla type of warfare, attacks against guerrillas in centres of civilian population have usually and predominantly been attacks against the civilian populations as such, despite allegations to the contrary.

4. Civilian Morale as a Target

An air of paradox surrounds the attitude of governments towards the morale of the civilian population of the enemy. In practice, they regard the morale of the civilian population a strategic objective. In law it is quite the contrary; the morale of the civilian population is regarded as legally inviolable. For example, at the Allies' Casablanca Conference of January, 1943, the primary purpose of air war against Germany was defined as:

> "the progressive destruction and dislocation of the German military, industrial, and economic system, and the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened."[1]

In marked contrast, on February 15, 1940, British Prime Minister Chamberlain stated in the House of Commons:

> "... Whatever be the length to which others may go, His

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1. Cited in McDougal and Feliciano, Law and Minimum World Public Order, 1967, p. 654.

Majesty's Government will never resort to the deliberate attack on women, children, and other civilians for purposes of mere terrorism."[1]

This statement should not be read deviously as implying that deliberate attacks on the civilian population for puposes other than "mere terrorism" were excluded. It should be read in the light of the declaration made in response to President Roosevelt's appeal to France, Germany, Great Britain, Italy, and Poland to refrain from aerial bombardment of "civilian populations or unfortified cities" so long as their opponents so refrained.[2] In response to this appeal, the Governments of the United Kingdom and France, in a joint declaration made on September 3, 1939, 'solemnly and publicly' affirmed their intention "to conduct hostilities with a firm desire to spare the civilian population." Further, they said that they had indeed some time ago sent explicit instructions to the commanders of their armed forces "prohibiting the bombardment whether from the air, or the sea, or by artillery on land of any except strictly military objectives in the narrowest sense of the word."[3] Moreover, there is historical evidence that this policy was maintained by Chamberlain's Government until Churchill took over as Prime Minister.[4]

However, the situation after the Second World War seems not only paradoxical, but also hypocritical. Belligerents

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1. Cited in Whiteman, Digest of International Law, Vol. 10, p.137. But see also, 357 House of Commons Debates, (5th ser.), col. 954, (Feb. 15, 1940).
2. See Witeman, Digest of International Law, Vol. 10, p.136.
3. Ibid., pp. 136-137.
4. The British story regarding aerial bombardment is well discussed by D.H.N.Johnson, Rights in Air Space, Manchester, 1965, pp.42 et seq. as well as by Geoffrey Best, Humanity in Warfare, 1980, pp. 262 et seq.

during the Second World War, although they were proved strategically to be wrong, they at least were honest to declare that one of their primary objectives was to break the morale of the enemy's civilian population. But since the Second World War, the emphasis in law has been on the prohibition of making the morale of the civilian population the object of attack whether for strategic or for tactical purposes.

Thus, Article 33 of the Fourth Geneva Convention prohibited "all measures of intimidation or of terrorism", and paragraph 2 of Article 51 provides: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts of violence the primary purpose of which is to spread terror among t e civilian population are prohibited."

Yet, with reference to post World War armed conflicts one may speak without exaggeration, of incidental military losses incidental to attacks against the civilian population rather than of civilian losses incidental to attacks against legitimate military objectives. Why this hypocrisy? If the morale of the civilian population in every armed conflict does really constitute a strategic military or political objective, does it not make sense to continue to assert that all measures of intimidation or of terrorism are prohibited and that acts of violence the purpose of which is to spread terror among the civilian population is prohibited. If on the other hand there is no military case for the terrorisation of the civilian population sound reason requires that those who commit such acts to desist from committing them. The rest of this section will consider these two points, namely, why governments will continue to insist that the morale of the

civilian population is legally inviolate, and secondly, whether there is a military case for terror attacks.

The first point has been ably explained by H. Lauterpacht and his argument merits quotation at length. He wrote:

> "... it is in that prohibition, which is a clear rule of law, of international terrorization - 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 legally be 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 organized 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 the territory which he threatens to occupy. Nor is there any reason why an isolated hamlet or peaceful township should not be harassed, attacked, and obliterated - for that is clearly calculated to put the entire population of the adversary in a state of disorganizing fear. 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' 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."[1]

Governments are of course in no mood to bring the law of armed conflict to a 'formal' end although in practice they do bring it to an actual end. However, the general legal conviction remains that terrorization of the civilian population as a method of warfare is prohibited. Stone summed up that legal conviction in the following words:

"Governments as well as publicists generally deny the legality of bombardment aimed at civilian morale, using 'civilian' in an indiscriminate sense wide enough to include the quasi-combatant workforce."[2]

Professor Stone himself did discriminate. In his view, the human impulse to declare civilian morale inviolate from direct attack rises from refusal to accept consistently the distinction between the quasi-combatant and genuine civilians. Once this is accepted, he argued;

"the hard fact that belligerents do regard the morale of the enemy's quasi-combatant workforce as a military objective can be faced, while yet guarding the physical and psychological immunity of other civilians."[3]

Professor Stone has been frequently criticized for making this distinction. McDougal and Feliciano regarded the distinction as being "most difficult of application" and perhaps apt to be enumerated among the "escapes into verbal illusion" which the learned writer himself so forcefully

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1. Lauterpacht, op. cit., p. 369.
2. Stone, Legal Controls in International Conflict, p. 629.
3. Ibid., p. 631.

'deplored'.[1]

Another point of criticism was that, contrary to Stone's auggestion, belligerents in the Second World War did not act upon such a distinction between the 'quasi-combatant workforce' and 'genuine civilians'; belligerents in practice considered the morale, not of the 'quasi-combatant workforce' merely or as such, but of the population generally, as a military objective. The extent to which the Allied Powers regarded enemy civilian morale as an appropriate target of aerial attack is indicated by the fact that of the total bomb tonnage dropped in the European theatre of operations (2.697.473 tons), 23.7 percent (or 639.301 tons) was devoted to urban "area raids."[2] According to U.S Strategic Bombing Survey 1945, the term 'area raids' denoted attacks having certain distinctive characteristics:

> "They were made generally at night; they were directed against large cities; they were designed to spread destruction over a large area rather than to knock out any specific plant or installation; and they were intended primarily to destroy morale, particularly that of the industrial worker."[3]

The U.S. Survey also states that the urban area incendiary attacks carried out by 'superfortresses' had for their 'preponderant purpose' "to secure the heaviest possible moral and shock effect by widespread attack upon the Japanese civilian population."[4]

The area bombing of World War II was used to attack the

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1. McDougal and Feliciano, Op. Cit. 657.
2. Ibid, p. 658 and p. 654.
3. Ibid, p. 654.
4. Ibid, p. 654, n. 405

collective will to fight, perhaps even more so than it was used to hit military and industrial complexes.[1] This may explain why the problem of the morale of the civilian population as an object of attack has been habitually discussed in the context of 'indiscriminate attacks' and air warfare in particular. The morale of the civilian population seems to have loomed large in strategic thinking before and during World War II, and the advent of the warplane made it loom even larger and more attractive, as an object of attack.

The basic assumptions of that strategic thought seemed attractively simple. The elements of military power, it was assumed, were twofold - the material fighting resources both potential and in esse, and the psychological-ideological factors comprising the collective predisposition or will to fight and loosely summed up as 'morale'. The enemy might be disarmed, the assumption continued, by destroying one or the other element, for one avails little or nothing without the other. Air power made it technologically possible swiftly and decisively to shatter the enemy's will to fight.[2]

'Morale' is thus a catchy phrase; it is not simply a state of mind - fear or terrorization, as it is generally assumed, but it is the equivalent of 'the cause' for which the war is fought, that is to say, the political object. This seems to be what Clausewitz understood by subduing "the will of the enemy"; that is, "its Government and its allies must

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1. Gerald J. Adler, Targets in War: Legal Considerations, pp. 281-326, at p. 320, in Falk (ed), The Vietnam War and International Law, Vol. 3, 1972.
2. McDougal and Feliciano, Op. Cit. p. 652-53.

be forced into signing a peace, or the people into submission."

Yet, it seems doubtful whether Clausewitz had ever considered the civilian population as such, or its morale, or even the exertion of pressure on the civilian population whether physical or moral, as a means of pressurising the military or political leadership to yield to the attacker's military or political demands.[1]

It should not be forgotten that Clausewitz found in the nation-in-arms theory the essence of war and on that account he glorified it, and yet he detested the devastation of towns and countries and described such acts as "rude acts or mere instinct." He wrote:

> "If we find civilized nations do not put their prisoners to death, do not devastate towns and countries, this is because their intelligence exercised greater influence on their mode of carrying on war, and has taught them more effectual means of applying force than these rude acts of mere instinct."[2]

It seems gravely doubtful whether 20th century war cabinets have ever learnt the lesson, or whether if they learned it, they ever practised it. As noted on the previous page, the civilian population and their morale became an attractive military target, apparently more attractive than military targets in the proper sense. Douhet, the Italian General, assumed the effectiveness of airpower in breaking the morale of the enemy. He wrote:

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1. See Clausewitz' chapter on "Ends and Means in War", pp. 122-138, in Rapoport (ed.), Clausewitz On War, 1968, Pelican Classics.
2. Ibid., p. 103.

> "Tragic, too, to think that the decision in this kind of war must depend upon smashing the material and moral resources of a people caught in a frightful cataclysm which haunts them everywhere without cease until the final collapse of all social organization. Mercifully, the decision will be quick in this kind of war, since the decisive blow will be directed at civilians, that element of the countries at war least able to sustain."[1]

The First World War, commentators observed, had seen some partial and tentative anticipation of Douhet's thesis. It was in the Second World War, however, that the above conception of strategic air warfare was put to deliberate and sustained application.[2]

According to Mcdougal and Feliciano, Douhet's thesis was prevalent in current doctrine on strategic air power before and during World War II.[3] If so, that doctrine must have been at variance with the legal conviction expressed in the resolution adopted by the Assembly of the League of Nations on 30 September, 1938, that the bombing of civilian populations is a practice "for which there is no military necessity and which, as experience shows, only causes needless suffering", and therefore, "is condemned under the recognized principles of international law."[4]

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1. As quoted by McDougan and Feliciano, Op. Cit. p. 653.
2. Ibid, p. 653. See also, Geoffrey Best, Humanity In Warfare, 1980, pp. 269-70.
3. Op. Cit. p.652. On the development of the doctrine 'within' the British RAF, see Geoffrey Best, Op. Cit. pp. 271-285; and David Johnson, Rights In Air Space, 1965, pp. 44-57.
4. Text in Schindler and Toman, The Laws of Armed Conflicts, pp. 153-154.

Evidence on the correctness of this legal conviction is probably best when it comes from all quarters concerned - operational analysts, politicians, historians and international lawyers.

Since indiscriminate attacks are all-embracing activities, whether in terms of form or in terms of objectives, and since one of the main purposes of such attacks (area bombardment, carpet bombing, blanket bombing, etc.) was the undermining of the'morale' of the civilian population (which simultaneously, although not necessarily invariably, includes attacks against the 'physical' being of the civilian population), it is no wonder that most of the evidence comes up in the context of indiscriminate attacks. On the other hand, emphasis on the impotence or ineffectiveness in military terms of any but precision attacks on objects of generally recognized military value, is, in itself, evidence of the lack of military necessity for (or at least the needlessness of) attacks against the civilian population as such or against their morale.

This being said, it remains to quote some of the most persuasive evidence.

Authorities, aided by operational analysts, seem to agree that 'terror attacks' are at best of uncertain military value.[1] Professor Adler, himself an ex-air officer, wrote:

> "... if the will could be broken by terror attacks on non-military elements of the nation, if rapid capitulation by the decision makers would follow, one could argue that such strategy is more merciful than a longer

1. McDougal and Feliciano, op. cit., pp. 655-656.

war. However, not only is this not provable, it is probable that wars are lengthened and made more inhumane by brutalizing tactics."[1]

With reference to the Second World War, Professor Adler wrote:

"the impermissable line is reached in terror bombing of the civilian community with the aim of pressuring the political elite to accept the attacker's political demands. It is impermissable because it is inhumane and ineffective."[2]

Historian Peter Karsten concludes a long historical survey that begins with ancient Rome and ends with American terrorism in Vietnam,by saying:

"Terrorism and brutality served more often to weaken than to provide an advantage for the military force that used them. And this appears to have been true despite the politics, ideology, and relative strengths of the contending forces."[3]

Historian Geoffrey Best, a staunch critic of area bombardment in general, and of the British RAF Bomber Command in particular, wrote with reference to the Second World War:

"By the second half of 1944, the opportunity was there for those with eyes to see and minds to understand. Area bombing, always morally repugnant and legally dubious, had not even worked. Costly and painful to the (British) bomber force, it had been seen to be of no exceptional

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1. Gerald J.Adler, Targets in War, pp.321-22, in Falk (ed.), The Vietnam War and International Law, Vol.3,(1972).
2. Ibid., p. 322.
3. Peter Karsten, Law, Soldiers,and Combat, pp.161-64, at 164.

value towards winning the war. The money, said some, might have been better spent, the men and machines better employed."[1]

Professor Gordon Wright, an American historian, wrote: "Mass bombing, then undoubtedly hampered the German War effort in much more than a marginal way. What it failed to do was to destroy civilian morale - to break the German people's will to work and endure."[2]

On this, Professor Geoffrey Best commented:

"Even so fine and discriminating historian as Professor Wright here puts a foot in the undiscriminating mud which is the normal medium of so many writers on this matter. When he says 'mass bombing', he means all strategic bombing, both 'precision' and 'area'. He has no doubt which sort in fact did the more good."[3]

Professor Best himself is in no doubt that, of the two kinds of bombing, 'precision'bombing did the more vital damage, as was discovered soon after the war by the United States Strategic Bombing Survey.[4]

Winston Churchill, the former Prime Minister of *Britain*, who ordered the onslaught on the German cities, has been quoted as saying:

"The destruction of Dresden remains a serious query against the conduct of allied bombing. I am of the opinion that military objectives must henceforth be more

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1. Geoffrey Best, Humanity in Warfare, 1980, p. 280
2. Gordon Wright, Ordeal of Total War, New York, 1968, p. 181.
3. Geoffrey Best, op. cit., p.366, n. 113.
4. Ibid., p. 283.

strictly studied in our own interest 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 battle-zone, rather than on mere acts of terror and wanton destruction, however impressive."[1]

The importance of careful selection of targets for air attacks is emphasized by the German experience, according to the U.S. Strategic Bombing Survey (1945). The Germans, says the Survey, were far more concerned over attacks on one or more of their basic industries and services - their oil, chemical, or steel industries, or their power, or transportation networks - than they were over attacks on their armament industry and city areas.[2]

As noted above, some writers tended to make a big issue of the 'morale' of the workforce in armament and war-related industries (generally described as'quasi-combatants','war workers', or 'civilian warriors'), and accordingly, contended that the distinction between combatants and non-combatants has become increasingly blurred as a result of the practice (a term which they use to gloss over the issue of 'opinio juris') which made the workforce and or their morale a legitimate object of attack.

On this issue, the U.S. Strategic Bombing Survey, Over-all Report, European War, 1945, had the following to say:

"War production is the critical measuring rod of the

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1. As quoted by Blix, Area Bombardment, BYIL, 1978, p. 60.
2. Loc. cit.

> effects of lowered morale in the German war effort... As has been seen, armament production continued to mount till mid-1944, in spite of declining civilian morale, but from that point on, arms production began to decline and dropped every month thereafter at an increasing rate. A minor, but not negligible, portion of this drop was the result of the cumulative effects of lowered morale."[1]

In commenting on this citation, it should be noted first that it is not our intention to deny the effect of morale on the productivity of the workforce. On the other hand, it does not need an expert in production management to tell us that the morale of the workforce (assuming that it can be measured), remains, under all circumstances, just one single factor among the many factors that constitute the process of production, all of which are variables.

Accordingly, it seems absolutely unrealistic to consider war production 'the critical measuring rod' of the effects of lowered morale in the German war effort. For to assume that this was the case, is to assume that morale was the decisive element in war production and that it was the only variable in the process of production, which is absurd.

War production may be the critical measuring rod of 'war effort' itself, but it is not, and cannot be, the critical measuring rod of the effects of morale except in a purely hypothetical situation in which all other elements of

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1. Loc. cit.

production are treated as constant, actually and potentially, while the effects of morale are treated as the only variable.

Moreover, to assume that the war production 'was' or 'is' the critical measuring rod of the effects of 'lowered morale' is to assume that the workforce in the war industry is motivated only by patriotic reasons, which is untrue. Were this the case, it would have followed that the war effort should increase in direct proportion to an increased sense of national danger - assuming of course that it is possible materially to do so.

In view of these remarks, the statement made by the U.S. Survey that "a minor but not negligible portion" of the drop in German war production "was the result of the cumulative effects of lowered morale", seems to be general, and so vague, and therefore carries no more evidential value than it might in time of peace. In other words, it is no more than a general statement of principle, valid at all times, that the morale of the workforce is an element in the process of production. Many things can lower the morale of the workforce, in war or in peace. But that tends to confirm (rather than disprove) the argument that bombing is an effective way of lowering the morale of enemy workers. At any rate , it is probably obvious that no more than a "minor but not negligible" portion of the drop in war production has been attributed to 'lowered morale'. Given the fact that the United States itself had joined in bombing the civilian population (including the workforce) in order to produce a moral effect, even that 'minor' portion may be seen as an exaggeration, more in the nature of a face-saving formula than a statement of fact. If this view is

correct, it follows that the whole subject of the morale of the workforce should be dropped altogether from legal discussions, except perhaps as a historical reminder to those ready to learn from past experience.

It is probably worth noting in this context that those who suffered most from the alleged legitimacy of attacks on the so-called 'quasi-combatants' are the industrialized societies. Yet, paradoxically, the advocates of such legitimacy, and hence of the claim that the distinction between combatants and non-combatants has become increasingly blurred, come mainly from countries that were and still are the main centres of the war industry. With due respect, those who may continue to hold such a thesis may well be advised to consider what impact their thesis may have if civil war erupted at home. However, as noted above, the definition of civilians and civilian population, as laid down in Article 50 of Protocol I, should terminate the discussion of this miserable and illogical theory about the so-called 'quasi-combatants', which brought the protection of the civilian population to a vanishing point.

The views quoted above to the effect that attacks against the civilian population with a view to undermining their morale are in military terms ineffective and counter-productive are in the majority. In her report, "The Law of Armed Conflicts", 1971, Madame Binshedler-Robert, an ICRC expert, states:

> "Military experts today admit that the results of Allied bombing in Germany fell very much short of expectations, that they did not become effective until they concentrated on sources of energy and transport, and that the brutality

> of that form of warfare, far from shattering the enemy's morale, may even have encouraged a spirit of resistance which prolonged the war."[1]

To this, it may be added that the oppressive and savage policies applied by Germany and Japan in territories under their occupation during the Second World War did not succeed in suppressing the fighting will of the peoples of occupied territories; on the contrary, the fighting will of the peoples stiffened, their determination to emancipate themselves increased and gathered momentum day after day, and soon the occupying powers found themselves engaged in a war more dangerous to them than the war at the battle fronts.

At this juncture, it should be noted that the evidence adduced so far came up in the context of interstate armed conflicts, but it is equally (or even more) relevant in the context of wars of national liberation and of civil war. A study based on the Pentagon papers, and prepared for the United States Senate Committee on Foreign Relations, entitled "Bombing as Policy Tool in Vietnam: Effectiveness",

> "calls into serious question the efficacy of strategic and interdiction bombing against a highly motivated guerrilla enemy in an underdeveloped country."[2]

This was the critical assessment of the results achieved through the discharge of bomb quantities in Vietnam that were several times those dropped during the whole of the Second World War.[3]

There is thus a wealth of evidence to justify the

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1. As quoted by Blix, op. cit., p. 61.
2. Study No. 5 (Washington, 1972), quoted by Blix, op. cit.,p.61
3. Loc. cit.

conclusion that terrorism and brutality served more often to weaken than to provide an advantage for the military force that used them, and that this appears to have been true despite the politics, ideology, and relative strengths of the contending forces.[1]

Further the evidence is overwhelming that terrorization of the civilian population as a method of warfare is illegal and that this illegality is based not only on the inhumanity of such practices, but also on the rationale that there is no military necessity for them and that they might even be counter-productive for the purpose of subduing an enemy.[2]

Nevertheless, it seems advisable not to confuse the rule with its rationale. The fact that a Party to the conflict may find an advantage in violating the law does not justify that violation; otherwise the rules of law would deteriorate into rules of convenience, which would practically mean the abrogation of the law of armed conflict.

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1. Karsten, Law, Soldiers and Combat, 1978, p. 164.
2. See Blix, op. cit., pp. 44-46.

5. Forfeiture of Protection

The conditions under which civilians forfeit the protection afforded them by Section 1 of Protocol I entitled "General Protection Against Effects of Hostilities (Articles 48-67), are stated in Article 51, paragraph 3:

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

Stated rather differently, civilians loose the protection of the Section only during such time as they take a direct part in hostilities.[1] But what are these underlined words supposed to mean ?

It should be noted, first, that the provisions of Article 51, paragraph 1,2, and 3 of Protocol I are the same as paragraphs 1,2, and 3 of Article 13 of Protocol II relating to the protection of victims of non-international armed conflicts. Therefore, forfeiture of civilian protection is the same under both Protocols, notwithstanding the 'threshold' problem of Protocol II.

Secondly, it should be noted that the term 'hostilities' was not defined in any of the Protocols, nor in Article 3 common to the four Geneva Conventions of 1949 where the words "taking no active part in the hostilities" were used. However, there is no evidence to suggest that the hostile acts wherby civilians forfeit their protection under Protocol II were

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1. See Report of Committee III, Second Session, Doc. CDDH/215/Rev. 1, in Levie, Protection of War Victims, Vol. 3, pp. 158-160, at 159.

intended to be wider than those same acts whereby civilians forfeit their protection under Protocol I. Therefore, it seems fair to conclude that the 'parallelism' achieved in the two Protocols with regard to the 'forfeiture' of civilian protection should also be extended to Article 3 common to the four Geneva Conventions of 1949.

Thirdly, it should be noted that a broad definition of taking an'active' or 'direct' part in 'hostilities' could obviously draw in a great number of civilians as direct participants, and thus might render any talk about the protection of the civilians against effects of hostilities rather nonsensical as the experience of the Second World War had shown beyond doubt.

So, what does "take a direct part in hostilities" mean? There is strong evidence that the intention of the Diplomatic Conference was that civilians forfeit their protection under Section I of Protocol I only during such time as they actually take a direct part in 'attacks' or in 'military operations'.

Evidence in support of this'narrow' interpretation may be drawn from several sources.

First, the content of Articles 48 to 67 of Protocol I indicates that 'hostilities' in the titles of those Articles (i.e. the title of Section I of Part IV of Protocol I) is synonymous with the conduct of attacks or military operations.[1] The basic rule of protection, Article 48, enacts that:

> "the parties to the conflict shall at all times distinguish between the civilian population and

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1. See Gehring, Protection of Civilian Infrastructures, Law and Contemporary Problems, Vol. 42, 1978, pp. 130-31.

combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

This indicates that unless civilians become'combatants' they remain protected. Article 51, paragraph 1, prescribes that the civilian population and individual civilians shall enjoy general protection "against dangers arising from military operations." Indeed, throughout the Section one finds 'hostilities' tied to military operations and the more restrictive term 'attack'. 'Attacks' are defined in Article 49 as "acts of violence against the adversary, whether in offence or defence." All this indicates that the hostilities in which direct participation by civilians results in the forfeiture of civilian protection are either attacks or military operations.

It should be noted that international law does not recognize a half-way house between combatants and non-combatants; it does not recognize the so-called 'quasi-combatant' status which found its way into legal literature after the Second World War, or more specifically, during the war itself.[1] It may be interesting to note in this respect that a proposal by the ICRC to the effect that "civilians who are within a military objective run the risks consequent upon any attack launched against this objective", seems to have been rejected as a statement of law although it was no more than a statement of fact.[2]

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1. E.g. Spaight, Legitimate Objectives in Air Warfare, BYIL, Vol. 21, 1944, pp. 158-164.
2. ICRC, Report on the Work of the Conference of Government Experts, 1972, Vol. 1, p.148, and p. 149, para. 3. 162.

This indicates that the 'workforce' of a Party to the conflict, also described as quasi-combatants, do not forfeit their protection (in law). In other words, their activities do not constitute a direct participation in hostilities.

Another example is the activities of civilian civil defence organizations regulated by Articles 61 to 67 of Protocol I.

According to Article 61 of Protocol I, 'civil defence' means the performance of some or all of the following tasks intended to protect the civilian population against the dangers, and to help it recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are: warning; evacuation; management of shelters; management of blackout measures; rescue; medical services, including first aid, and religious assistance; fire-fighting; detection and marking of danger areas; decontamination and similar protective measures; provision of emergency accommodation and supplies; emergency assistance in the restoration and maintenance of order in distressed areas; emergency repair of indispensable public utilities; emergency disposal of the dead; assistance in the preservation of objects essential for survival; and complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization.[1]

Writing in 1944, Spaight argued that "the huge army of passive defence, mainly civilian, must also be regarded as

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1. Article 61, para. (a).

quasi-combatant." In his view, "it is obviously illogical to drop incendiary bombs on your enemy's military objectives, (which in Spaight's view may comprise a whole city) and then to spare the firebrigade which tries to extinguish the conflagration or the demolition squad which tries to prevent it from spreading."[1]

It is not necessary to comment on this logic. For by the same token it would also be illogical to wound a soldier and then spare the medical personnel and the ambulances which would take him to hospital. Since hospitals are the places where wounded soldiers are treated, it would be also illogical to spare hospitals. If the fire-brigades and demolition squads may be regarded as'quasi-combatants', why not also consider the farmers as 'quasi-combatants'? Killing or maiming them is the most assured way of starving the armed forces!

Surely such a logic is the logic of total war, and total war does not need laws of war. To talk of military objectives in total war is mere nonsense.

Fortunately, there is no evidence to suggest that the idea of a quasi-combatant status has ever been sanctioned in international law, whether by custom or by convention. It seems only natural therefore that 'civilian civil defence' organizations and their personnel, as well as their buildings, shelters and 'materiel' are entitled to be respected and protected, subject to the provisions of the Protocol, particularly the provisions of Section I of Part IV, thereof.[2]

This protection shall also apply to civilians who,

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1. Spaight, op. cit., p. 162.
2. See Article 62.

although not members of civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control.[1]

According to Article 65 of Protocol I, the protection to which civilian civil defence organizations, their personnel, buildings, shelters and materiel are entitled shall not cease "unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy." Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time limit, and after such warning has remained unheeded.[2]

Article 65, paragraph 2, provides that, "The following shall not be considered as acts harmful to the enemy:

(a) that civil defence tasks are carried out under the direction or control of military authorities;

(b) that civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organization;

(c) that the performance of civil defence tasks may incidentally benefit military victims, particularly those who are hors de combat."

Paragraph 3 and 4 of Article 65 mention other acts and state as follows:

"3. It shall also not be considered as an act harmful to the enemy that civilian civil defence personnel bear light individual weapons for the purpose of maintaining order

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1. Article 62 (2).
2. Article 65 (1).

or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as pistols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be protected and respected as soon as they have been recognized as such."

"4. The formation of civilian civil defence organizations along military lines, and compulsory service in them, shall also not deprive them of the protection conferred by this chapter."

As to identification, paragraph 3 of Article 66 requires that, in occupied territories and in areas where fighting is taking place or is likely to take place, civilian civil defence should be recognizable by the international distinctive sign of civil defence and by an identity card certifying their status. Paragraph 4 of the same Article describes the international distinctive sign of civil defence as an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and materiel and for civilian shelter.

Now, if, as maintained above, civilians linked to the military effort must not be considered to have forfeited their protection, there remains only the problem of civilians' participation in attacks or in military operations. If, nevertheless a shadow of doubt remains it may be safe to conclude at this stage that, at least, performance of civil

defence tasks is not a direct participation in hostilities, even when such tasks are carried out on the civilians' own initiative. This is so, because it would be utterly ridiculous to proclaim that members of the armed forces and military units assigned to civil defence organizations shall be protected and respected as provided by Article 67 of the Protocol on the one hand, and deny the same protection to civilians against effects of hostilities, on the other hand.

Further, the fact that members of the armed forces and military units assigned to civil defence are expressly prohibited from taking a direct part in hostilities and from committing acts harmful to the adversary, which otherwise would have been their right under Article 41, paragraph 2, of Protocol I, again ties the taking of "a direct part in hostilities" within the meaning of Article 51, paragraph 3, to military operations or attacks.

If the above evidence still leaves some doubt as to the meaning of the phrase "take a direct part in hostilities", the ordinary meaning of the words 'direct' and 'hostilities', and further evidence from the preparatory work, should remove it.

The word 'direct' is probably too clear to need an explanation. Nevertheless, it serves the purpose here to have it explained. The Concise Oxford Dictionary explains that as an adjective and an adverb, 'direct' means straight not crooked(ly) or oblique(ly) or round about, lineal(ly), not collateral(ly), following uninterrupted chain of cause and effect etc. without intermediaries. Other meanings are: straightforward, frank(ly), going straight to the point, not

ambiguous(ly); immediate(ly), personal(ly), not by proxy.

In its dictionary meaning the word 'hostilities' means 'acts of warfare'.

There is no evidence to suggest that the general intention of the Diplomatic Conference was to give a special meaning either to the word 'direct' or to the word 'hostilities'. On the contrary, the ICRC commentary and the Report of the Rapporteur of Committee III support the 'ordinary meaning'.

The ICRC Commentary is straightforward; it explains that the immunity of civilians is subject to a very strict condition:

> "they must not take a direct part in hostilities, which means they must not become combatants."[1]

The Commentary then goes on to ask and answer:

> "What should be understood by direct part in hostilities? The expression covers acts of war intended by their nature or purpose to strike at the personnel and materiel of enemy armed forces. Thus a civilian taking part in fighting, whether singly or in a group, become ipso facto a lawful target for such time as he takes a direct part in hostilities."[2]

Thus, by'direct part in hostilities' the ICRC understands "taking part in fighting", or in other words, the commision of "acts of war intended by their nature or purpose to strike (directly) at the personnel or materiel of armed

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1. ICRC, Commentary on Draft Additional Protocols to the Geneva Conventions of 1949, Geneva, 1973, p. 58.
2. Loc. cit.

forces." This is actually what the ICRC has already described as the relationship of 'adequate causality' between the act of participation and its immediate result in military operations.[1]

The Report of the Working Group of Committee III seems to support this interpretation although "several delegations expressed a wish to have it noted in the record that they understand the word 'hostilities' in paragraph 3 as including preparations for combat and return from combat."[2] As Major Gehring (United States Marine Corps) observed:

> "Such an expression for the record would be totally unnecessary unless a very narrow definition of 'hostilities' were assumed."[3]

In military usuage, combat is the real warlike activity, it means fighting,[4] and in this the destruction or conquest of the enemy is the object, and the enemy, in the particular combat, is the armed force. So wrote Clausewitz.[5]

The equivalent of 'combat' or 'fighting' in the terminology of Protocol I is 'attacks'. It seems reasonable therefore to conclude that, in the interest of consistency in usuage and clarity in meaning, Article 51, paragraph 3, ought to have stated : Civilians shall enjoy the protection afforded by this Section unless and for such time as they

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1. ICRC, Doc. CE/3b, Geneva, 1971, p. 28.
2. Report to the Third Commision on the Work of the Working Group, Committee III, 24 Feb., 1975, (CDDH/III/224.
3. Robert Wayne Gehring, Protection of Civilian Infrastructures, - Law and Contemporary Problems, Vol. XLII, 1978, No. 2, p. 131.
4. Rapoport (ed.,), Clausewitz On War, Pelican Classics, 1968, p. 303.
5. Loc. cit.

take a direct part in attacks.

The extension of the idea of direct participation so as to include "preparation for combat and return from combat" is logical, but it is also open to abuse. However, even according to this'extended' view, the direct participation in hostilities may not go beyond the direct "preparation for attack, participation in attack, and return from attack." The kind of participation and its duration are thus synonymous with 'military engagement' and 'military deployment' - terms already used in Article 44 of Protocol I entitled "Combatants and Prisoners of War." This Article may be called in aid to explain what "preparation for combat and return from combat" in the sense of 'military deployment' is supposed to mean. 'Military engagement' needs no explanation since by definition it involves the use of weapons. It goes without saying that civilians forfeit their protection against effects of hostilities during each military engagement in which they participate. But the matter is far from clear in the case of 'military deployment which usually does not involve the use of weapons.

As a general rule, it may be said that 'military deployment', as far as civilian participation is concerned, should not be different from that of members of the armed forces, who do not have to distinguish themselves at all times from the civilian population, but nevertheless will have to distinguish themselves during a certain time or else forfeit their right to be prisoners of war.

The idea and duration of taking a direct part in hostilities for such members of the armed forces seem to be

embodied in the conditions laid down for them in Article 44 (3), in order to retain their right to be prisoners of war.

Article 44, paragraph 3, lays down as a general rule that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in attack or in a military operation preparatory to an attack."

Recognizing, however, that there are situations in armed conflict where, owing to the nature of the hostilities an armed combatant cannot distinguish himself, he shall retain his status as combatant, according to Article 44, paragraph 3, of Protocol I, 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."

If this is the idea and duration of 'military engagement' and 'military deployment' for a member of the armed forces who, otherwise, would appear to be a civilian and thus entitled to civilian protection, no wider idea of participation should be applied to civilians and, hence, no longer duration for the forfeiture of civilian protection.

6. General Protection: Special Objects

In addition to Article 52 of Protocol I which affords general protection to civilian objects, the Protocol contains a number of Articles dealing with the protection of specific

categories of objects. Thus Article 53 deals with the protection of cultural objects and places of worship "which constitute the cultural or spiritual heritage of peoples"; Article 54 deals with the protection of objects indispensable to the survival of the civilian population; Article 55 deals with the protection of the natural environment; and Article 56 deals with the protection of works and installations containing dangerous forces. The relationship between the protection of these objects and the protection of the civilian population can hardly be exaggerated. This is particularly true of Articles 54, 55 and 56. Yet, those Articles have been the most difficult to negotiate and draft. Each Article will be discussed here in a seperate sub-section.

6.1. Protection of Cultural Objects and Places of Worship

Article 53 of Protocol I provides that, 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,[1] it is prohibited:

"a) to commit any acts or hostility directed against the historic monuments, works of art or places of worship

1. Those "other relevant international instruments" may include: Article 27 of the Hague Regulations of 1899 and 1907; Article 5 of the Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War 1907; and the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, (Roerich Pact) of 1935, concluded between American States. Text in Schindler and Toman, The Laws of Armed Conflict, 1973, pp. 521 - 523.

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."

Since Article 53 is without prejudice to rules of existing international law on the subject, it may be useful to compare it with those other rules in order to see whether it has anything more to offer.

First of all mention should be made of the rules of customary international law on the subject, particularly Article 27 of the Hague Regulations of 1907. This Article provides that in siege and bombardments all necessary steps must be taken to spare, "as far as possible", inter alia, "buildings dedicated to religion, art, science, or ... historic monuments."

Article 53 of Protocol I seems to differ from Article 27 of the Hague Regulations of 1907 in two ways: in the first place it lays down a more stringent obligation in the sense that it prohibits "any acts of hostilities" against the enumerated objects, while Article 27 lays down only an "as far as possible" obligation. On the other hand, Article 53 is more limited in scope since it protects only historic monuments, works of art or places of worship "which constitute the cultural or spiritual heritage of the peoples", while Article 27 protects all such objects whether or not they constituted the cultural or spiritual heritage of the peoples. This explains why it was necessary to make Article 53 "without prejudice (to) other relevant international instruments."

More importantly, however, is the fact that Article 53 is

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.[1] According to Article 1 of this Convention, the term 'cultural property' covers, irrespective of origin or ownership:

> "a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
>
> b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositaries of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
>
> c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments."

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1. Text in Schindler and Toman, The Laws of Armed Conflict, 1973, pp. 529 et seq.; and in Roberts and Guelff, Documents on the Laws of War, 1982, pp. 339 et seq.

Cultural property thus defined enjoys 'general protection' under the Convention. But the Convention also provides for a regime of 'special protection'. It would be necessary therefore to examine these two levels of protection in order to determine whether Article 53 has anything new to offer.

Without pretending to exhaust the provisions of the Hague Convention of 14 May, 1954, it may be noted first that, for the purposes of the Convention, the protection of cultural property comprises "the safeguarding of and respect for such property."[1]

The obligation to 'safeguard' cultural property means that the High Contracting Parties "undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate."[2] But the failure to take such measures does not absolve the other Party to the conflict from the obligations incumbent upon it under Article 4 of the Convention regarding the "respect for cultural property."[3]

The obligation to respect cultural property entails, for the Party in posession of such property, an undertaking to refrain from "any use of the property and its immediate surroundings or of appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of an armed conflict."[4] For the other Party to the conflict, the obligation is to refrain from "any act of hostility directed against such property."[5] These obligations, however,

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1. Article 2.
2. Article 3.
3. Article 5(5).
4. Article 4(1).
5. Article 4(1).

"may be waived only in cases where military necessity imperatively requires such a waiver."[1]

Further, the High Contracting Parties "undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property." They also undertake to refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.[2]

Furthermore, the High Contracting Parties undertake to "refrain from any act directed by way of reprisals against cultural property."[3]

These are the main components of the principle of 'general protection' of cultural property.

Beside this system of 'general protection', the Hague Convention of 1954 establishes a system of 'special protection'.[4] Thus, according to Article 8, paragraph 1, there may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

"a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence,

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1. Article 4(2).
2. Article 4(3).
3. Article 4(4).
4. Article 8 to 11.

a port or railway station of relative importance or a main line of communication;

b) are not used for military purposes."

Article 8 of the Convention goes on to state that a refuge for movable cultural property, "whatever its location", may also be placed under special protection, "if it is so constructed that, in all probability, it will not be damaged by bombs."[1] It also states that a cultural property situated near an important military objective as defined in paragraph 8(1) may nevertheless be placed under special protection "if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom. In that event, such diversion shall be prepared in time of peace."

At any rate, special protection is granted to cultural property by its entry in the "International Register of Cultural Property under Special Protection." This entry has to be made in accordance with the provisions of the Convention and under the conditions provided for in the Regulations for the execution of the Convention - which is not necessary for the purposes of our discussion to dwell on. The important point for our discussion is whether Article 53 of Protocol I has anything new to offer.

As noted above, Article 53 establishes protection for a special class of cultural objects, namely, historic monuments, works of art or places of worship which constitute the cultural

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1. Article 8(2).

or spiritual heritage of peoples." But it does not specify whether the protection is 'general' or 'special' protection. The difference, however, despite the formalities involved in the establishing of special protection, seem to be singularly thin. In either case, the Parties to the conflict are under obligation to refrain from committing any acts of hostility directed against cultural property; from using such objects or their surroundings for military purposes; and from making them the object of reprisals.

But their seems to be a slight difference in the conditions under which protection may be withdrawn. A general condition for withdrawing the protection is the use of the cultural property "for military purposes", according to the Hague Convention, or "in support of the military effort", according to Article 53(b) of Protocol I. According to Article 8, paragraph 3, of the Hague Convention:

> "A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the centre."

Such a use is a violation of the Hague Convention, as well as of Article 53(b) of Protocol I. Consequently, in the words of Article 11 of the Hague Conventions, "the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned. Nevertheless, whenever possible, the latter Party shall first

request the cessation of such violation within a reasonable time." This is of course if the property was placed under special protection, but there seem to be no reason why it should not also apply to the withdrawal of protection from cultural property in general.

The use for military purposes, however, is not the only case where the protection of cultural property may be withdrawn. Article 4, paragraph 2, of the Hague Convention indicates that, apart from the use of cultural property for military purposes, the obligation to refrain from any act of hostility directed against cultural property "may be waived", albeit "only in cases where military necessity imperatively requires such a waiver."

The disturbing fact about such a waiver is that it is not confined to cultural property under general protection. Even the immunity of cultural property under special protection may be withdrawn, albeit "only in exceptional cases of unavoidable military necessity, and only for such time as the necessity continues." In such a case, however, the "necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Moreover, "whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity", and the Party withdrawing the immunity, has, as soon as possible, to so inform the Commissioner-General for cultural property provided for in the Regulations for the execution of the Convention, in writing, stating the reasons.[1]

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1. See Article 11 of the Hague Conventions of 1954.

These formalities of decision-making and notification seem to bear all the distinguishing marks of 'special protection'.

In conclusion, it may be stated that Article 53 of Protocol I is actually redundant. It is no more than a restatement of a principle already established in the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict, and that, in no way does it improve the already unsatisfactory protection provided by the Convention.

6.2. Protection of Objects Indispensable to the Survival of the Civilian Population

"Starvation of the civilian population as a method of warfare is prohibited," proclaims the first paragraph of Protocol I. This paragraph, according to the Report of Committee III was accepted after considerable discussion as a useful statement of the basic principle from which the rest of the Article flows and "as an important addition to the law protecting civilians."[1] The scope of this principle is defined by the remainder of Article 54 and by other relevant Articles in the Protocol, particularly those dealing with relief actions.[2] But the prohibition of starvation of civilians as a method of warfare was not intended to change the law of naval blockade. This fact is made clear by Article 49, paragraph 3, which states

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1. Report of Committee III, Second Session, 1975, (CDDH/215/Rev.1), para. 73.
2. See Articles 68 to 71 of Protocol I.

that the provisions of Section I of Part IV of Protocol I (i.e. Articles 48 to 67) "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."[1]

Paragraph 2 of Article 54 provides as follows:

> "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."

In commenting on this paragraph, it may be noted first that the list of objects indispensable to the survival of the civilian population is illustrative, not exhaustive, as the words 'such as' clearly indicate. This was done as a matter of caution because it is doubtful that all contingencies could be foreseen. The list, however, includes every item that could always be identified as being indispensable to the survival of the civilian population.[2]

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1. See further, Section 9 of Chapter 7 of this thesis.
2. See Aldrich, New Life for the Laws of War, American Journal of International Law, Vol. 75, 1981, p. 779.

Apart from this, the paragraph makes a mockery of the protection of objects indispensable to the survival of the civilian population. For the attack, destruction, removing or rendering useless, of objects indispensable to the survival of the civilian population which is prohibited, is that which is done "for the specific purpose of denying them for their sustenance value to the civilian population of the enemy."[1] This phrase, according to the Report of Committee III:

> "was designed to cover both the denial of food and drink as sustenance and the denial of food-producing areas and irrigation works for their contribution to the production of sustenance. On the other hand, it was not intended to cover their denial to the enemy for other purposes, including the general purpose of preventing the enemy from advancing. Thus, bombarding an area to prevent the advance through it of an enemy is permissable, whether or not the area produces food, but the deliberate destruction of food-producing areas in order to prevent the enemy from growing food on them is forbidden. Similarly, destroying a field of crops in order to clear a field for fire or to prevent the enemy from using it for cover is permissable, but destroying it to prevent the enemy from consuming the crops is forbidden."[3]

Interpretation a contrario has always been a precarious method of interpretation, and it is suprising indeed that the

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1. This was considered a clearer form of words than the phrase "for the purpose of denying them as such to the civilian population or to the adverse Party", which was initially proposed by the Working Group of Committee III, but the meaning is the same.
2. Reort of Committee III, op. cit., para. 74.

Report of Committee III had chosen this method of interpretation for such a sensitive topic as is the protection of objects indispensable to the survival of the civilian population. As a matter of fact, the Report of Committee III was initially no more than the personal comments of the Rapporteur on the work of the Working Group of Committee III, and it is not clear how these comments came to be part of the Report of Committee III. However, one thing seems to be clear - the strong inclination of the Rapporteur, Mr. Aldrich of the U.S.A. delegation, to read too much 'a contrario' in the text of Article 54. Thus, in an article published in the American Journal of International Law, Mr. Aldrich concluded his discussion of Article 54 of Protocol I by saying:

> "In sum, the prohibition of starvation is really a prohibition of certain acts intended to result in starvation, not a prohibition of acts that may produce starvation but are done and are justifiable on other grounds, ..."[1]

Such a conclusion, to say the least, is incompatible with the express proviso in paragraph 3(b), of Article 54. This paragraph states that:

> "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

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1. Aldrich, op. cit., p. 779.

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."

Paragraph 3(a) should raise no problem; for as the Report of Committee III explains, "it was intended to apply only to those objects which clearly are assigned solely for the sustenance of the armed forces."[1]

Paragraph 3(b) bears some elaboration. First, the term 'civilian population' in this paragraph "was not intended to mean the civilian population of a country as a whole, but rather of an immediate area, although the size of the area was not defined." Second, it is not clear under what circumstances the objects indispensable to the survival of the civilian population may be considered to be used in direct support of military action. In the proposals of the United States of America[2], Belgium and the United Kingdom[3], the use of the

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1. Report of Committee III, op, cit., para. 74.
2. The proposal of the U.S.A. was as follows: "In order to avoid the deliberate starvation of civilians and without prejudice to the rights of the High Contracting Parties in own territory, it is forbidden to attack, destroy, remove or render useless, crops, drinking water supplies, irrigation works, livestock, foodstuff or food producing areas for the purpose of denying them to the enemy or to the civilian population unless they serve a direct military purpose, such as shielding the enemy observation or attack." Doc. CDDH/III/50, dated March 1974.
3. The joint proposal of Belgium and the United Kingdom was identical to that of the U.S.A except that, before the words "without prejudice ... etc., it stated; 1. Starvation of civilians as a method of warfare is prohibited. 2. Consequently, without prejudice ... etc." Doc. CDDH/III/67, dated 19 March 1974. The various proposals and the summary records of the discussion on the protection of objects indispensable to the survival of the civilian population may be found in Levie, Protection of War Victims, Vol. 3, 1980, pp. 227-258.

objects as a cover was given as an example of use in direct support of military action, but this was criticised by a number of delegates. The representative of Vietnam drew attention to the seriousness of such an example by recalling the experience of his country.[1] And the representative of Sweden objected by saying that "his delegation would understand an amendment which would permit the destruction of vegetation in areas around military bases, but it could not accept that case as merely an example of permitted destruction."[2]

However, one thing seems to be clear; that the destruction of objects indispensable to the survival of the civilian population is prohibited, even when such objects are used in direct support of military action, if the actions taken against these objects " may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement."

Accordingly, one may conclude, contary to Mr. Aldrich, that the prohibition of starvation is not only a prohibition of certain acts 'intended' to produce starvation, but also a prohibition of acts that in the ruling circumstances may 'cause' starvation, or force the movement of the civilian population as a result of the inadequacy of food or water. Put rather differently, the fact that the objects indispensable to the survival of the civilian population are used in direct support of military action does not legally justify the actions to be taken against these objects, if actions may be expected in the ruling circumstances to 'cause' the starvation of the

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1. See CDDH/III/SR. 17, para. 9-10.
2. CDDH/III/SR.17, para. 19.

local civilian population or force its movement as a result of genuine fear of starvation. To this extent, but only to this extent, it may be said that the objects indispensable to the survival of the civilian population are legally protected. In a world where many countries are plagued with famine, and many millions die every year as a result of starvation, the protection afforded by Article 54 is hardly adequate.

Finally, 'the straw which broke the camel's back' - paragraph 5 of Article 54 which states:

> "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."

If by 'invasion' in this provision it was meant the classical across the boundary invasion by the army of one state to another state this provision would at best be a harmless jingoism. Only twice in the history of war, 'scorched earth' policy was resorted to in defence of the national territory against invasion. The first was when France invaded Russia during the Napoleonic wars, and the other when Germany invaded Russia (USSR) during the Second World War. In both cases it was the fierce resistance in the form of guerrilla warfare, not the scorched earth policy, which proved to be vital for the defence of national territory against invasion. Ironically, the Germans applied a scorched earth policy to Russian territory in order to secure their withdrawal from that territory.

However, in both cases, the right of Russia to do so, and the right of any state to do so, has never been questioned as a matter of law. And as a matter of military strategy, one does not need to be a military expert to challenge safely all military experts to prove the viability of scorched earth policy as a vital requirement of defence against invasion in any concrete situation of the present day world. Indeed, ifthe past history of war from the French Revolution in the 18th century to the present day teaches any lesson in the defence of national territory against invasion, it is the absolute requirement that objects indispensable to the survival of the civilian population in invaded territories should be left intact in the interest of national defence against invasion. For only then the local population would be able to provide food and shelter to members of resistance movements.

Granted, however, that all governments are prone to jingoism, the fact remains that the express reservation of the right to derogate from the protection of objects indispensable to the survival of the civilian population "in recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion" had been pressed and demanded, not by states which might be invaded or even by states which are actually invaded and have parts of their territory under foreign occupation, but by states which are the least likely to be invaded, namely, the major Western Powers.[1]

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1. Witness the express reservation "without prejudice to the rights of High Contracting Parties in their own territory" in the proposals of the U.S.A., Belgium and the United Kingdom quoted in the preceding footnotes.

In view of these facts, it is surmised that behind the facade of the apparently harmless jingoistic patriotism lies the stench of the 'free-fire zone tactics' and 'drying up the sea to catch the fish' policies practiced on a large scale by the United States during its involvement in the Vietnam war. Indeed, all the derogations in Article 54 of Protocol I seem to have been made with a view to countering insurgency in general and guerrilla warfare in particular. In fact, as the Swedish representative, Mr. Blix, pointed out:

> "It had been argued in connexion with guerrilla warfare that food should be denied to the civilian population, thereby denying it indirectly to the guerrillas."[1]

The fact that Protocol I is formally inapplicable to armed conflicts of non-international character seems immaterial in this respect. What matters is whether the derogations from the protection of objects indispensable to the survival of the civilian population are also operative in the context of armed conflicts of non-international character. In this respect, it should be noted first that Article 14 of Protocol II does not contain any provisions like those of Article 54, paragraphs 2, 3, and 5. Accordingly, it is arguable that objects indispensable to the survival of the civilian population enjoy full protection under Article 14 of Protocol II. Such an argument, however, will carry very little weight in view of the fact that a rule prohibiting indiscriminate attacks in armed conflicts of non-international character had failed to muster the necessary majority for its adoption in the plenary meeting of

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1. CDDH/III/SR. 17, para. 18.

the Diplomatic Conference. Thus, in effect, governments have actually retained their freedom of action in case of armed conflicts of non-international character, as far as the conduct of military operations is concerned.

If, on the other hand, the armed conflict was of international character, that would actually make little difference. For the express derogations in Article 54 will then become applicable.

In conclusion, it cannot be said that international law provides adequate protection to objects indispensable to the survival of the civilian population. The poor protection afforded to such objects makes a mockery of the prohibition of starvation as a method of warfare.

6.3. Protection of the Environment

Until fairly recently, protection of the natural environment has not attracted the attention of the lawmakers in the field of international humanitarian law applicable in armed conflict. Undoubtedly the war in Vietnam has contributed significantly to arousing an interest in this matter, as well as in the protection of objects indispensable to the survival of the civilian population and the protection of dams and dykes.[1]

At the Conference of Government Experts which preceded the Diplomatic Conference on the Reaffirmation and Development

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1. See Kalshoven, Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: The Geneva Diplomatic Conference, in Netherlands Year Book of International Law, 1978, pp. 128-130, at p. 128.

of Humanitarian Law Applicable in Armed Conflicts, interest in the protection of the natural environment was displayed by only a few East European delegations during the discussion of methods and means of combat.[1] The Polish experts, for instance, proposed the forbidding of methods and means which destroy "natural human environment."[2] The experts of Czechoslovakia, the German Democratic Republic and Hungary proposed the forbidding of weapons, projectiles or other means and methods which "upset the balance of the natural living and environmental conditions."[3] Later, the experts of Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary and Poland submitted a joint proposal forbidding the use of means and methods which destroy "the natural human environmental conditions."[4]

By contrast, Western experts remained completly silent on the subject. This was probably why the ICRC Draft Protocols did not contain any proposals on the protection of the natural environment, according to Professor Kalshoven.[5] But that was not the end of the matter.

At the first session (1974) of the Diplomatic Conference, in the course of the general debate in Plenary, the matter was taken up by several speakers, among them the Head of the Australian delegation, Mr. Mahoney, whose country was the first among the group of 'Western and other countries' to take the matter of the environment seriously. Mr. Mahoney even announced

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1. See ICRC, Report on the Conference of Government Experts, Second Session, Geneva, 1972, Vol. 1, para. 3.19, p. 128.
2. Doc. CE/COMIII/C2, para. 3. Text in ibid, Vol. 2, p. 51.
3. Doc. CE/COM III/C 6, para. 4. Text in ibid., Vol. 2, p. 52.
4. Doc. CE/COM III/C 68-69, para. 4. Text in ibid., p. 63.
5. See Kalshoven, op. cit., p. 129.

his delegation's plan to "suggest the insertion in the Protocols of a new article seeking to prohibit ecological damage as a technique of war."[1]

However, by the second session (1975) of the Diplomatic Conference, "there was no disagreement in principle that efforts should be made to protect the natural environment and there was wide support for a provision setting out specific requirements or prohibitions to be included in Protocol I."[2] But as this was the first occasion on which an attempt had been made to provide in express terms for the protection of the natural environment in time of armed conflict, and as important theoretical questions about the relation of man and nature lay below the surface of the attempt to draft suitable language for what was generally regarded to be a highly desirable objective, it was not surprising that the question had given a great deal of difficulty to the Working Group of Committee III.[3]

Some delegations had in fact proposed to postpone the action on proposals to adopt provisions on protection of the natural environment until the Third Session of the Conference so that the proposals could be studied more fully, but for no obvious reason it was decided to complete Committee action at the second session.

However the Working Group of Committee III was assisted in its work by the report of the 'Group Biotope' - an unofficial working group formed in response to the request of

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1. Kalshoven, op. cit., p. 129.
2. Report of Committee III, Second Session, Doc. CDDH/215/Rev. 1, para. 79.
3. See Report to the Third Committee on the work of the Working Group, Committee III, 3 April, 1975, (CDDH/III/275), in Levie, Protection of War Victims, Vol. 3, 1980, pp. 268-270.

the Rapporteur of Committee III.[1] Delegates from ten countries (Australia, Finland, Czechoslovakia, German Democratic Republic, Hungary, Ireland, Spain, Sweden, Netherlands, Yugoslavia) and representatives from the ICRC and the United Nations Environment Programme participated in the work of the Group Biotope. This Group recommended the following text to Committee III:

> "1. The natural environment shall be protected in all circumstances. Consequently, damage to the natural environment as a technique of warfare is prohibited.
>
> 2. In particular, it is prohibited to perform any act which may be expected to harm the natural environment by disturbing the stability of the ecosystem so as to prejudice (to the prejudice of) the health and (of) the survival of the civilian population.
>
> 3. Attacks against the natural environment by way of reprisals are prohibited."[2]

The Report of the 'Group Biotope' explains that this provision was directed to the protection of the natural environment as distinct from the human environment. The natural environment relates to external conditions and influences which affect the life, development and survival of the civilian population. The human environment may be understood to relate only to the immediate surroundings in which the civilian population lives. The natural environment is wider in scope than the human environment and is essential to the existance of the civilian population. It is for this reason that the

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1. For the text of the Report of the Chairman of the 'Group Biotope', see Levie, ibid., pp. 266-268.
2. Ibid., p. 268. This was proposed as a new draft Article 48 bis.

provision seeks to protect the natural environment and to prohibit disturbance of it to the prejudice of the health and survival of the civilian population.[1]

The Report of the Group Biotope went on to explain that acts of warfare which cause short-term damage to the natural environment, such as artillery bombardment, were not intended to be prohibited by the proposed provision. "Disturbance of the stability of the ecosystem as contemplated by the provision will have an effect for a significant period of time, perhaps for ten years or more. However, it was impossible to say with certainty what period of time might be involved and for this reason, no time was specified in the proposed text."[2]

Having left the question of time open, the Group left no doubt that what it intended to prohibit is "the disturbance of the stability of the ecosystem", because "living organisms and their non-living environment are inseparably interrelated" and that "damage or even alteration to any part of the ecosystem may have severe repercussions for the civilian population."[3]

Finally, the Report of the Group Biotope concludes by saying:

> "The view was taken that the consequence of disturbing the stability of the ecosystem may be so disastrous that the very survival of the civilian population may be threatened. Accordingly, the standard of protection provided by Article 48 bis relates not only to the

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1. Ibid., p. 267, para. 5.
2. Ibid., p. 267, para. 6.
3. Ibid., p. 267, para. 8.

health but also to the survival of the civilian population."[1]

In view of the close relationship between the protection of the environment and the protection of objects indispensable to the survival of the civilian population, such a standard seems reasonable.

However, neither the proposal of the Group Biotope, nor a proposal by the Rapporteur essentially reflecting the same idea were adopted. Rather, the present provisions of Article 35, paragraph 3, and Article 55 of Protocol I were adopted. Article 35, paragraph 3, provides as follows:

> "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

This paragraph was again incorporated in Article 55 which provides:

> "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."

These provisions call for several remarks. First, it might be thought that the provision of Article 35, paragraph 3, is redundant since it is incorporated in paragraph 1 of Article 55. Indeed, the delegations of the United Kingdom and

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1. Ibid., p. 267, para. 8.

the Federal Republic of Germany thought so, and consequently voted against paragraph 3 of Article 35.[1] Actually, the existance of paragraph 3 is explicable by the fact that, in the Working Group, there were two views about the basic reason for the protection of the environment. Some delegates were of the view that the protection of the environment in time of armed conflict is an end in itself, while others considered that the protection of the environment has as its purpose the continued survival or health of the civilian population. The provision of paragraph 3 of Article 35 was in response to the first view, while that of Article 55 responded to the second view.[2] Another reason was the conclusion reached by the Group Biotope that "the two Articles should remain seperate for the reason that whereas Article 55 relates to the protection of the civilian population, Article 35 relates to the prohibition of unnecessary injury."[3]

Second, as the Report of Committee III explains:

> "Because Article 55 was inserted in the context of protection of the civilian population, the particular prohibition is linked to the survival of that population The word 'population' was used without the usual adjective 'civilian' because it was thought that the future survival is that of the population in general, without regard to combatant status. The term 'health' was used in a broad sense in connection with survival to indicate

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1. See CDDH/III/SR.38, para. 46 with regard to the United Kingdom, and para. 61 with regard to the Federal Reuplic of Germany.
2. See Report to the Third Committee on the work of the Working Group, Doc. CDDH/III/275; in Levie, op. cit. p. 269.
3. Levie, op. cit., p. 268.

actions which could be expected to cause such severe effects that, even if the population survived, it would have serious health problems, such as congenital defects which produced deformed or degenerate persons. Temporary or short-term effects were not contemplated within the prohibitions of this Article."[1]

But the Report does not say whether the term 'population' referred to the population of a country as a whole or only to the population of the affected area. In this writer's view both are protected by Article 55 although the terms 'widespread, long-term and severe damage to the environment' were not defined in the Protocol.

It should also be noted that Article 55 prohibits methods or means of warfare which "are intended or may be expected" to cause widespread long-term and severe damage to the environment and therebye prejudice the health or survival of the population. As the Rapporteur of Committee III notes:

"Both the expressions 'may be expected' and 'are intended' are included out of an abundance of caution. The term 'are intended' refers to deliberate harm directed at the natural environment as a method or means of warfare, such as the destruction of natural resources. 'May be expected' imports an objective standard of what the state or the individual does realize or ought to realize would have the effect described - (i.e., widespread, long-term and severe damage)."[2]

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1. Report of Committee III, Second Session, Doc. CDDH/215/Rev. 1, para. 82; Levie, op. cit., p. 273.
2. Report to the Third Committee on the Work of the Working Group, 3·4·75, CDDH/III/275, p. 4; See Levie, op.cit., p.270.

On the other hand, it should be noted that the obligation of 'care' to protect the environment against widespread, long-term and severe damage is operative even if the health or survival of the civilian population is not prejudiced. An instance would be environmental damage which is widespread, long-term and severe but in an unpopulated area.[1]

Third, what is to be understood by 'widespread, long-term, and severe damage to the natural environment' is difficult to say with any certainty. Some interpretation of these terms has been made in an 'understanding' relating to Article 1 of the United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, signed on 18 May, 1977.[2] But that interpretation, which will be quoted below, has been made exclusively for the purposes of the said Convention. For brevity this Convention will be referred to here as the Convention on Environmental Modification Techniques. Article 1, paragraph 1, of this Convention uses virtually the same terms as those of Articles 35 and 55 of Protocol I, and provides as follows:

> "Each State Party to this Convention undertakes not to engage in military or any other use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State."

As used in this Article, the term 'environmental

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1. Loc. cit.
2. Text in Roberts and Guelff, Documents on the Laws of War, 1982, pp. 379 et seq. For a brief history and general remarks on this Convention, see ibid., pp. 377-78. The Convention entered into force on 5 October, 1978, and as of 28 October, 1980, it was ratified or acceded to by 31 States.

modification techniques' refers to "any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."[1] A non-exhaustive list of phenomena which could be caused by environmental modification techniques and therefore are prohibited includes the following:

> "earthquakes; tsunamis; an upset of the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types, and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere."[2]

The Conference of the Committee on Disarmament which drafted the Convention on Environmental Modification Techniques made the following understanding in relation to Article 1 of the Convention:

> "It is the understanding of the Committee that, for the purposes of this Convention, the terms, 'widespread', 'long-lasting' and 'severe' shall be interpreted as follows:
>
> (a) 'widespread': encompassing an area on the scale of several hundred square kilometres;
>
> (b) 'long-lasting': lasting for a period of months, or approximately a season;

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1. Article 2 of the Convention.
2. The 'understanding' of the Conference of the Committee on Disarmament relating to Article 2 of the Convention on Environmental Modification Techniques, cited in Roberts and Guelff, ibid., p. 378.

(c) 'severe': involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

It is further understood that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion with any other international agreement."[1]

Clearly, this reservation excludes a similar interpretation of the terms 'widespread', 'long-term' and 'severe' damage of the natural environment as used in Articles 35, paragraph 3, and 55 of Protocol I. More importantly, it suggests that a similar interpretation would be prejudicial, as indeed it would be. For instance, a similar interpretation of these terms in Article 35, paragraph 3, and the first sentence of Article 55 of Protocol I would make possible the arguement that the destruction of vegetation in an area of two hundred square kilometres would not violate these Articles, if such an area was unpopulated, because such destruction would not qualify as being 'widespread'.

It is certainly for good reasons that the above quoted interpretation was reserved exclusively for the purposes of the Convention on on Environmental Modification Techniques although the prohibited use of such techniques as methods or means of warfare is certainly covered by the Protocol's provisions, for these provisions prohibit any method or means

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1. Ibid., pp. 377-78.

of warfare, whether conventional or unconventional[1], which may be intended or may be expected to cause widespread, long-term or severe damage to the natural environment.

In brief, the provisions of Protocol I on the protection of the environment should not be interpreted in isolation; they should be interpreted in the context of other provisions relating to the protection of the civilian population and civilian objects. Indeed, one may venture to suggest that under no circumstances would the military advantage anticipated from an attack justify the widespread, long-term and severe damage to the natural environment or the consequential threat to the health or survival of the civilian population, however the terms 'widespread, long-term and severe damage' were interpreted. If so, it would be unnecessary to speculate on the meaning of these terms.

On the other hand, as the Report of Committee III notes, "it appeared to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by Article 55."[2] The significance of this remark is that, as long as the Parties to the conflict confine themselves to the use of 'conventional' methods and means of warfare, they are not likely to violate the rules on the protection of the environment, provided of course, that they do not violate other rules of international law.

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1. But care for the statements of understanding made by the United States of America and the United Kingdom at the time of signing Protocol I to the effect that "the rules established by the Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons."
2. Report of Committee III, Second Session, Doc. (CDDH/215/Rev. 1), para. 27.

The fourth and last remark to be made here is that Protocol II relating to armed conflicts of non-international character does not contain provisions on the protection of the environment. Does it follow that the rules of Protcol I in this regard are inapplicable to civil wars ? The answer must be in the negative. It is significant in this respect that the Australian delegation had initially proposed to make the protection of the environment "without prejudice to the rights of a High Contracting Party in its own territory."[1] Such a reservation was widely criticized and even the Australian delegation itself had to abandon it. In fact, not a single delegate came out in favour of such a reservation.

6.4. Protection of Objects Containing Dangerous Forces

Article 56 of Protocol I regulates the protection of objects containing dangerous forces, "namely, dams dykes and nuclear elecrical generating stations." Attempts to include other objects by making a list of exemplary rather than exhaustive were not successful at the Diplomatic Conference. Indeed, as the Report of Committee III notes, it was only when a decision was taken to limit the special protection to dams, dykes, nuclear power stations, and other military objectives in the vicinity of these objects that it was possible to produce a generally acceptable text. That limitation made it possible to be more specific in describing circumstances under which the special protection ceases, which had been the most

1. Doc. CDDH/III/60, 19 March, 1974.

difficult part of the drafting task.[1]

The special protection of dams, dykes, nuclear electrical generating stations, and other military objectives in the vicinity of these objects is laid down in paragraph 1 of Article 56, and provides as follows:

> "Works or installations containing dangerous forces, namely dams, dykes and nuclear elecrical 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."

According to the Report of Committee III, the Committee decided to retain the qualifying phrase "if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population" in order to avoid granting immunity from attacks of a kind not likely to release the dangerous forces.[2]

According to paragraph 2 of Article 56, the special protection provided by paragraph 1 shall cease:

> "(a) for a dam or dyke only if it is used for other than its normal function and in regular, significant and

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1. Report of Committee III, Second Session, 1975, Doc. (CDDH/215/Rev.1), para. 85.
2. Ibid., para. 87.

direct support of military operations and if such attack is the only feasible way to terminate such support;

(b) for a nuclear elecrical 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."

An obvious remark common to all three types of objects is that the special protection may be lost only if the object is used "in regular, significant and direct support of military operations and if attack is the only feasible way to terminate such support." Another obvious remark which nevertheless should be emphasized is that these conditions *are cumulative*. Moreover, it should be noted that the standard used in paragraph 2, that is, "regular, significant, and direct support of military operations," is a higher standard than that of Article 52 of Protocol I which only requires "effective contribution to military action."[1] As the Report of Committee III notes:

> "Without trying to define the phrase ("in regular, significant and direct support of military operations") in Article 56, it seems clear that production of arms,

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1. Ibid., para. 91.

amunition and military equipment would qualify as direct support of military action, but the production of civilian goods which may also be used by the armed forces would not qualify in the absence of most unusual circumstances."[1]

But even such use in "direct support of military operations" does not seem sufficient to render the objects under discussion military objectives; it is necessary also that such use be 'regular' and 'significant'. Accordingly, if the use in direct support of military operations, i.e., production of arms, amunition and military equipment, was only occasional, or that the production was 'insignificant' in comparison to other centres of production or to the needs of the armed forces, the dam, dyke, or nuclear electrical generating station would not qualify as a military objective.

It should be noted that the Report of Committee III says nothing about the terms 'regular' and 'significant', and that the interpretation made here reflects this writer's personal view.

However, if in the particular case of a dam, dyke, nuclear elecrical generating station, or other military objectives located at or in the vicinity of any of these works or installations, the condition of use "in regular, significant and direct support of military operations" were fulfilled, the particular object becomes a military objective. But the special protection does not cease ipso facto; it is another prerequisite for the loss of protection that attack be "the only feasible way to terminate such support." This latter prerequisite

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1. Ibid., para. 91.

virtually makes the loss of special protection very difficult, because there will always be methods and means for terminating the direct military support other than by direct attacks.

If, nevertheless, these conditions were fulfilled in any particular case, the protection which would be lost is only the special protection. And the moment that special protection ceases the objects mentioned in paragraph 1 become subject to the 'general protection' accorded by international law to the civilian population and civilian objects against effects of military operations, as provided by paragraph 3 of Article 56 which states:

> "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 provived for in Article 57. If the (special) 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."

Thus the Report of Committee III commented, even when attack on one of these objects is justified under all the applicable rules, the second sentence of paragraph 3 requires the combatants to take "all practical precautions" to avoid releasing the dangerous forces. Given the array of arms available to modern armies, this requirement should provide real protection against the catastrophic release of these forces.[1]

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1. Ibid., para. 92.

So far we have examined the conditions under which the special protection ceases, and which are common to all three types of objects as specified in paragraph 2. But in addition, a dam or a dyke may loose the special protection against attacks provided by paragraph 1 "if it is used for other than its normal function ... ." Is this really a special case for the loss of special protection? The answer is probably in the negative, and one may venture to suggest that the text of the Article could do without it. But the phrase 'normal function' seems to have provided an occasion for clarifying the protection of dams and dykes, and therefore, to some extent, it was not idle.

According to the Report of Committee III, the phrase 'normal function' as used in the text means "the function of holding back, or being ready to hold back, water."[1] Thus the Report went on, "if a dam or dyke is used for no purpose other than holding back water or being ready to hold back water, e.g., it is not made part of a fortified line or used as a road, the immunity from attack provided in paragraph 1 cannot be lost. Even if it is used for a function in addition to its normal function, the immunity is not lost unless it is used in regular, significant, and direct support of military operation and if the only feasible way to terminate the support is by attack on the dam or dyke."[2] But this is not all. The Report of Committee III goes on to state that "in addition, it must always be recognized that an attack is not justified unless the military reasons for destruction in a particular case of such

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1. Ibid., para. 88.
2. Ibid., para. 88.

extraordinary and vital interest as to outweigh the severe losses which may be anticipated."[1] Nevertheless, the Report notes that some representatives remained concerned about the problems that may arise from the use of dykes for roadways.[2]

The notion of 'normal function' also provided an occasion for discussing the notion of 'additional function' in the case of the usage of the water stored by a dam for hydro-electric generating facilities. In such a case, the Report of Committee III states in uncompromising language that the use of water stored by a dam for hydro-electric generating facilities cannot justify making the dam itself an object of attack, but the generating facilities could become "other military objectives located at or in the vicinity of these installations." If such a generating facility does become a military objective, it may not be attacked unless it is "used in regular, significant, and direct support of military operations" and, even then, only if "such attack is the only feasible way to terminate such support." Certainly, the greater the distance between hydro-electric generating facilities and the dam, the less risk there would be of collateral damage to the dam, in the event the hydro-electric generating facilities were used for military purposes, in such a way as to become a legitimate military objective.[3]

Thus, although the notion of the 'normal function' of a dam or a dyke does not really add to what is said by the other conditions for the loss of special protection, it has provided

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1. Ibid., para. 89.
2. Loc. cit.
3. ibid., para. 90.

a useful occasion for clarifying the protection accorded to dams and dykes. With regard to the notion of 'other military objectives' located at or in the vicinity of dams, dykes and nuclear elecrical generating stations, it seems that it includes civilian objects which may become military objectives in the narrow sense of the term, if attacks on them may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population. But it should be noted that paragraph 5 of Article 56 enjoins the Parties to the conflict to 'endeavour' to avoid locating any military objectives in the vicinity of these objects. Nevertheless, "installations erected for the sole purpose of defending the protected works or installations from attack" are permissible according to paragraph 5, "and shall not themselves be made the object of attack, provided 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."

According to the Report of Committee III, there was considerable discussion about the question of the types of armament to be permitted to the defensive installations. Ultimately, it was thought impractical to include any limitation other than that implied by the phrase "weapons capable only of repelling hostile action against the protected works or installations." This phrase implies, according to the Report, that "the use of weapons capable of attacking enemy forces passing at some distance from the protected work or

installation is prohibited."[1]

The rest of Article 56 may now be mentioned briefly. Paragraph 4 of the Article prohibits reprisals against any of the objects protected by the Article. Paragraph 6 urges the Parties to the conflict to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces. And paragraph 7 provides that in order to facilitate the identification of the objects protected by Article 56, 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 Protocol I. But the absence of such marking in no way relieves any Party to the conflict of its obligations under Article 56.

7. The Prohibition of Reprisals

It should be noted from the outset that this section is basically concerned with the prohibition of reprisals in humanitarian law applicable in armed conflict, and that neither claims, nor is it intended to be a discussion of the institution of reprisals in international law and international relations.[2]

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1. Ibid., para. 93.
2. See generally, Whiteman, Digest, Vol. 10, pp. 317-348; Oppenheim - Lauterpacht, International Law, Vol. 2, 7th edition, 1952, pp. 135-144, 561-565. For more recent studies, see Kalshoven, Belligerent Reprisals, Lyden, 1971; Remigiusz Bierzanek, Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law, in Cassese (ed.), The New Humanitarian Law of Armed Conflict, 1979, pp. 232-257.

Generally speaking, reprisals have often been referred to as sanctions of international law or a means of law enforcement. Thus, for instance, Kelsen states that "there is nothing to prevent us from calling reprisals sanctions of international law; for reprisals are reactions against violations of international law."[1] "Reprisals", says Dr. Akehurst, "are one of the means of forcing states to obey the laws of war - and indeed of forcing them to obey international law in general."[2] Kalshoven points out that the purpose of reprisals "is to coerce the addressee to change its policy and bring it in line with the requirements of international law, be it in respect of the past, the present or the future" and that "this function of law enforcement qualifies the act as a sanction in international law."[3]

At the same time, however, modern international lawyers, particularly since the end of the 19th century, have been more and more critical in their evaluation of the function of reprisals as a means of enforcing international law in general and the rules of the laws of war in particular. It has been observed that the institution of reprisals, "though designed to ensure the observance of the laws of war, has systematically been used as a convenient cloak for disregarding the laws of war."[4] Draper says that it is the "primitive and fatal lex tallionis - one illegality justifies another ... that lies

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1. Kelsen, Principles of International Law, New York, 1952, p. 23.
2. Akehurst, A Modern Introduction to International Law, 4th edition, 1982, p. 236.
3. Kalshoven, op. cit., p. 33.
4. History of the UN War Crimes Commission and the Development of the Laws of War, 1948, p. 29, cited in Bierzanek, op. cit. p. 237.

behind the rules governing reprisals." He notes that "experience has shown that, hitherto, reprisal action frequently taken in circumstances that provided no justification has done much to undermine the effective operation of recognized rules of the law of war" and that "in fact reprisals which were designed as a method of enforcing the law of war have become a wholesale and cynical disregard of the law."[1] The right to exercise reprisals has been criticized on the ground that it "carries with it great danger of arbitrariness, for often the alleged facts which make belligerents resort to them are not sufficiently verified; sometimes the rules of war which they consider the enemy to have violated are not generally recognized; often the act of reprisal performed is excessive compared with the precedent act of illegitimate warfare."[2] The advisability of resorting to reprisals has also been questioned; in view of the chain reaction of negative reciprocity which reprisals are likely to initiate, to take reprisals, it has been said, "can rarely, if ever, be advisable."[3] On top of all this, the moral argument against reprisals was particularly strong; they almost invariably strike at the innocent.

In the 19th century, formal as well as informal attempts were made to regulate reprisals. Thus, at the Brussels Conference of 1874, the Russian delegation proposed three rules to govern the exercise of reprisals: first, that reprisals should be admitted only in extreme cases of absolutely certain

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1. Draper, The Red Cross Conventions, 1958, p. 98.
2. Oppenheim - Lauterpacht, op. cit., p. 563.
3. Schwarzenberger, International Law, Vol. 2 - Armed Conflict - 1968, p. 106.

violations of the rules of legitimate warfare; second, the acts performed by way of reprisals should not be excessive, but in proportion to the violation; third, that reprisals should be ordered by commanders-in-chief only.[1] The Brussels Conference apparently did not discuss these rules, but Bierzanek notes, without giving any evidence, that the Conference could not reach agreement on the question of reprisals, and that failure discouraged the reopening of the subject at the Hague Conferences of 1899 and 1907.[2]

Had these rules been accepted and faithfully respected in practice they would have lent some credibility to the claim that reprisals constitute a means of law enforcement or a sanction of international law. They would also contribute to the clarification of existing rules of international law, and possibly to the formation of 'new' rules. But instead of performing these functions, reprisals have become, as noted above, "a convenient cloak for violations of international law" and "an excuse for the wholesale and cynical disregard of the law."

It should be noted, that international lawyers, generally speaking, have accepted reprisals only as a last resort and have made their use subject to certain restrictions. Lieber's Code, promulgated by President Lincoln on 24 April, 1863, probably reflected the general view of the time when it stated in Article 27 that "civilized nations acknowledge retaliation as the sternest feature of war", and elaborated in Article 28 by saying:

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1. Oppenheim - Lauterpacht, op. cit., p. 564.
2. Bierzanek, op. cit., p. 242.

"Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages."[1]

The 'Oxford Manual', adopted in 1880 by the Institute of International Law and recommended for use by governments, was even more explicit. It noted first that reprisals are an exception to the general rule of equity which requires that an innocent person ought not to suffer for the guilty, and that they are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy. The Institute however, considered reprisals as being "necessary rigour" which, however, is modified to some extent by the following rules laid down in the Oxford Manual:

"Article 85. Reprisals are formally prohibited in case the injury complained of has been repaired."

"Article 86. In grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy.

They can only be resorted to with the authorization of

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1. Text in Schindler and Toman, The Laws of Armed Conflict, 1973, pp. 3 et seq.

the commander-in-chief.

They must conform in all cases to the laws of humanity and morality."[1]

The Military Manuals of the United States of America, from Lieber's code to the present day, have always contained a comprehensive regulation of reprisals. For example, the United States Army Pamphlet no. 27 - 161 - 2, October 23, 1962, states:

"An act to be considered a lawful reprisal must have the following characteristics:

"1. It Must Be an Unlawful Act ...

"2. It Must Be Done for the Purpose of Compelling the Other Belligerent To Observe the Laws of War.

"3. It Must Not Be Done Before Other Means Have Been Exhausted.

"4. It Must Be Done Only Under the Orders of a Commander and After Consultation With the Highest Available Military Authority Which Time Permits ...

"5. It Must Be Committed Against Enemy Personnel or Property.

"6. It Must Be Proportional to the Original Wrong.

"This rule of proportionality is not one of strict proportionality because the reprisal will usually be somewhat greater than the initial violation that gave rise to it. However, care must be taken that the extent of the reprisal be measured by some degree of proportionality and not by effectiveness. Disproportionality cannot be justified on the ground that only disproportionality

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1. Text in *ibid.*, *pp.* 25 et seq.

could stop the violations of the other belligerent.

"7. Not All Enemy Personnel and Property Are Legitimate Objects of Reprisal.

The 1949 Geneva Conventions prohibit reprisal action against the person or property of prisoners of war, sick wounded and shipwrecked members of the enemy armed forces, and enemy civilians either in occupied territory or in the domestic territory of the enemy belligerent. These conventions have restricted the application of reprisal actions to the conduct of military operations and exempted as victims, helpless enemy military and civilian personnel who happen to be in the hands of the opposing side."[1]

It is probably on this understanding that international lawyers continued to regard reprisals as a sanction for violations of the laws of war or a means of law enforcement. But even such a 'tit for tat' law cannot realistically be expected to work as a sanction because every 'tit' calls for a bigger 'tat' and sooner or later the chain of negative reciprocity will run its full course. It was therefore a wise decision to impose a complete ban on reprisals, which is the case under Protocol I additional to the Geneva Conventions of 1949. But let us see first what was the situation with regard to reprisals under the Hague and Geneva Conventions.

As noted above, the Brussels Declaration of 1874 and the Hague Regulations of 1899 and 1907 had actually failed to regulate reprisals. All that one can find in these Conventions

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1. See Whiteman, Digest of International Law, Vol. 10, pp. 319-21.

is Article 50 of the Hague Regulations which provides that:

> "No general penalty, pecuniary or other wise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

Inasmuch as reprisals constitute collective penalties, it is arguable that they were prohibited by this Article, at least with regard to the population of occupied territory. Yet, Professor Lauterpacht went so far as to suggest that this Article "does not prevent the burning by way of reprisals, of villages or even towns, for a treacherous attack committed there on enemy soldiers by unknown individuals, and, this being so, a brutal belligerent has his opportunity."[1] This illustrates the need for express and clear prohibitions of reprisals.

In any event, Article 50 of the Hague Regulations of 1899 and 1907 has been superseded by Article 33 of the Fourth Geneva Convention of 1949, which expressly states that:

> "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.
>
> Pillage is prohibited.
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> Reprisals against protected persons and their property are prohibited."

It is worth recalling here that according to Article 4, paragraph 1 of the Fourth Geneva Convention relative to the

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1. 1. Oppenheim - Lauterpacht, op. cit., p. 565.

protection of civilians, "persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The words "in case of a conflict or occupation" must be taken as referring to a conflict or occupation as defined in Article 2 common to the Geneva Conventions[1] which, according to Article 1 of Protocol I, includes 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. It should also be noted that the words "in the hands of" need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question.[2]

In addition to Article 33 of the Fourth Geneva Convention mention should be made of Article 53 which provides that:

> "Any destruction by the occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorites, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

This being the only exception to the prohibition, it necessarily follows that the demolition of houses of persons accused ofacts of resistance to the occupant whether convicted

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1. ICRC - Commentary on the Fourth Geneva Convention of 1949, Pictet (ed.) 1958, p. 47.
2. Loc. cit.

or not has no justification under international law. The municipal laws of the Occupying Power which allow such a destruction do not absolve that Power from the responsibility for such destruction under international law. Indeed, inso far as such destruction is conducted with a view to prevent further acts of resistance it easily qualifies as an act of intimidation, and terrorism and a collective penalty, all of which, in addition to reprisals, are prohibited by Article 33 of the Fourth Geneva Convention.

It should be noted also that Article 13, paragraph 3, of the Third Geneva Convention of 1949 prohibits measures of reprisal against prisoners of war, and Articles 46 and 47 of the First and Second Geneva Conventions, respectively, prohibit reprisals against the wounded, the sick and shipwrecked.

Nevertheless, the prohibition of reprisals under the Geneva Conventions of 1949 does not cover all situations which may arise in practice. For instance, the civilian population and civilian objects in territories which are not under the control of an Occupying Power in case of interstate armed conflicts, and liberated territories in wars of national liberation are not protected by Article 33 of the Fourth Geneva Conventions. It was left to Protocol I which is additional to the Geneva Conventions of 1949 to bring the prohibition of reprisals to a full circle, not of course without some opposition from some Western States. It is therefore still to be seen whether any reservations to the prohibitions of reprisals will be made under Protocol I and what will be the attitudes of other states towards such reservations, if and when made. In the meantime, in view of the dark history of reprisals, one can only hope

that no reservations will be made in this respect, and that more effective sanctions and means of law enforcement will be found other than the reservation of the right to reprisals however restricted. Much of course will continue to be said for and against the prohibition of reprisals. But it is significant that as early as 1929 states have accepted a prohibition of reprisals against prisoners of war, and, this being so, it is absolutely illogical and inhumane to retain a right to exercise reprisals against the civilian population, civilians and civilian objects. The provisions of Protocol I which prohibit reprisals must therefore be welcomed as being steps in the right direction.

In addition to the prohibition of reprisals under the Geneva Conventions of 1949, Protocol I contains seven provisions prohibiting reprisals which may be summarized as follows:

Article 20 prohibits reprisals against persons and objects protected by Part II of the Protocol, that is to say, wounded, sick and shipwrecked, medical personnel and medical units, as defined in Article 8 of the Protocol. Article 20 provides: "Reprisals against the persons and objects protected by this Part are prohibited."

Article 51, paragraph 6 provides that: "Attacks against the civilian population or civilians by way of reprisals are prohibited."

Article 52, paragraph 1, provides that : "Civilian objects shall not be made the object of attack or of reprisals."

In addition to these general prohibitions of reprisals against the civilian population, civilians and civilian objects,

Articles 53, 54, 55 and 56 provide for the prohibition of reprisals against certain categories of objects. Thus, according to paragraph (c) of Article 53, it is prohibited to make historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples the object of reprisals.

According to Article 54, paragraph 4, objects indispensible 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 "shall not be made the object of reprisals."

Article 55, paragraph 2, provides that "attacks against the natural environment by way of reprisals are prohibited." And according to Article 56, paragraph 4, "it is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals." These objects are: dams, dykes, nuclear electrical generating stations, and "other military objectives located at or in the vicinity of these works or installations."

In view of these prohibitions, Mr. Aldrich, in a recent article published in the American Journal of International Law concluded by saying:

> "In general, it seems fair to say that the Protocol, coupled with all the other specific prohibited acts of reprisals set forth in other conventions (such as the 1949 Geneva Conventions' prohibitions of reprisals against prisoners of war, the wounded, sick and ship-wrecked, medical and religious personnel, and civilians in occupied territory), leaves only acts against enemy

armed forces, including the use of prohibited weapons, as permissible measures of reprisals."[1]

One would have liked Mr. Aldrich to have stated this view at the Diplomatic Conference in his capacity as head of the American delegation as this would have given the Conference an opportunity to look into the alleged permissibility of the use of prohibited weapons as measures of reprisals against enemy armed forces. In this writer's view, the alleged permissibility of the use of prohibited weapons as measures of reprisals opens a pandora's box, and it is unlikely that the Diplomatic Conference had intended such a result. Apart from this point, Aldrich's conclusion seems well justified and probably reflects the intention of the Diplomatic Conference.

Finally, it should be noted that neither Protocol II relative to the protection of victims of armed conflicts of non-international character nor Article 3 common to the Geneva Conventions of 1949 contain any provisions regarding the prohibition of reprisals against the civilian population, civilians and civilian objects. Does this mean that reprisals are not prohibited in such armed conflicts? The answer must be in the negative, that is to say, reprisals are prohibited under Article 3 although they were not expressly mentioned. This becomes clear from the text of paragraph 1 of Article 3 which lays down absolute prohibitions:

"Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness,

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1. Aldrich, New Life for the Laws of War, American Journal of International Law, Vol. 75, 1981, p. 782, n. 51.

wounds, detention, or any other cause, shall be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensible by civilized peoples."

Obviously, the acts referred to in items (a) to (d) are prohibited absolutely and permanently "at any time and in any place whatsoever." The prohibition allows of no exceptions or excuses. Consequently, any reprisal which entails any of these acts is prohibited, and so, generally speaking, is any reprisal incompatible with the "humane treatment" demanded unconditionally in the first sentence of paragraph 1 of Article 3.[1]

With regard to Protocol II, which is more comprehensive than Article 3 common to the Geneva Conventions of 1949, it should be noted that the Diplomatic Conference, at Committee

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1. See ICRC, Commentary of the Fourth Geneva Convention, 1958, pp. 39-40.

level, adopted draft Article 10 bis which provided that "The provisions of Parts II, III, and V of the Protocol shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol."[1] In brief, this provision constituted an express all out prohibition of reprisals, but alas, it was deleted in Plenary by 41 votes to 20, with 22 abstentions[2], apparently because, as the representative of the United States, Mr. Aldrich, put it, "the whole concept of reprisals had no place in Protocol II."[3]

One hopes that this actually was the reason, for this would still mean that all reprisals are prohibited under Protocol II. But better still would have been an express provision to this effect in order to remove all doubts regarding the prohibition of reprisals.

8. The Prohibition of Indiscriminate Attcks

Much has been said in the preceding sections of this Chapter about indiscriminate attacks[4], and it is probably obvious from what has been said that, while there seems to be a general agreement, in principle, on the prohibition of indiscriminate attacks, there was no agreement on what is actually prohibited.

In principle, any attack by whatsoever means which strikes

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1. ICRC, Draft Protocol II Following the Third Session of the Diplomatic Conference, Doc. (D 1388/1 b*), p. 5, n. 1.
2. CDDH/SR.51, para. 16.
3. CDDH/SR.51, para. 7, (USA), and para. 8 (India).
4. See in particular, Sections 3 and 4 of this Chapter.

military objectives and civilians or civilian objects without distinction may be said to be indiscriminate. On the other hand, unfortunately, international law still alows the Parties to the conflict, 'free of charge', an unquantified and probably unquantifiable measure of incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, said to be "unavoidable". So where is the dividing line between the avoidable and hence impermissible, and the unavoidable and hence permissible, incidental civiliian losses? To claim that something is unavoidable naturally presupposes that all feasible precautionary measures have been taken in planning and deciding upon attack on a legitimate military objective to avoid, and in any case, to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. Such precautionary measures are now laid down expressly in Article 57 of Protocol I and are part and parcel of the regulation of indiscriminate attacks and, indeed, of the concept of respect for and protection of the civilian population, civilians and civilian objects. These precautionary measures are the subject of the following section, but some reference to them may be unavoidable in this section, which is mainly concerned with the definition of indiscriminate attacks as laid down in paragraph 4 and 5 of Protocol I. These paragraphs provide as follows:

> "4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
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> (b) Those which employ a method or means of combat which cannot be directed at a specific military objective;

(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 treat as a single military objective a number of clearly seperated 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."

The multitude of methods and means of combat which form indiscriminate attack and therefore are prohibited should hardly be suprising; it is simply an illustration of various ways of causing losses among the civilian population and damage to civilian objects even when attacks are directed 'exclusively' at legitimate military objectives. All of these forms of attack were in the past controversial. It is hardly surprising therefore that the formulation of paragraphs 4 and 5 quoted above was one of the most difficult issues at the Diplomatic

conference.[1] Yet, these paragraphs are far from being self-evident and therefore bear some elaboration, which will be done in the rest of this section. For the sake of clarity and convenience reference is made below to the paragraph and sub-paragraph concerned.

4.(a). Attacks which are not directed at a specific military objective are indiscriminate attacks. In such attacks, the attacker does not take aim, but fires wildly.[2] Writers have already condemned such attacks as being unlawful. "Bombardment at randon is, however, unlawful", wrote Professor Castren.[3] Indeed, such attacks may qualify as attacks against civilian population as such, or even as acts of violence the primary purpose of which is to spread terror among the civilian population, which are equally prohibited.[4] It should also be noted in this respect that the distinction between "inaccurate bombardment" and "bombardment at random" may at times be difficult to make. Inaccurate attacks are, by definition, attacks which miss their target, but the more the inaccuracy, the more the attack is likely to be classified as not being directed at a specific military objective. But while as a rule, inaccurate attacks may not be prohibited under sub-paragraph 4(a), they would still be regarded as indiscriminate attacks under sub-paragraph 5(b), if the attack was expected to cause incidental loss of civilian life, injury to civilians, damage

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1. For the summary records of the discussions on Article 51 of Protocol I, see Levie, Protection of War Victims, Vol. 3, 1980, pp. 123-176.
2. Aldrich, New Life for the Laws of War, American Journal of International Law, Vol. 75, 1981, p. 780.
3. Castren, The Present Law of War and Neutrality, Helsinki, 1954, p. 200.
4. See Article 51(2) of Protocol I.

to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated from the attack. At any rate, as Castren had noted, "battering of small and insignificant military targets lying in inhabited areas would (like random attacks) be an obvious abuse of the right of bombardment, and the freedom of action for the party carrying out the bombardment is not extended by the fact that the enemy begins to interfere with operations aimed at the destruction of military targets. Nor may bad weather be pleaded as an excuse. The further a target is situated from the fighting zone, the greater must be the care which is observed in carrying out bombardment of that target."[1]

4(b). Attacks which employ a method or means of combat which cannot be directed at specific military objectives, and consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction are indiscriminate attacks. It seems difficult to see what exactly this was supposed to mean. Aldrich acidly remarked that this sub-paragraph refers to "an unguidable or controllable weapon, a weapon that may not exist."[2] It is a fact that all weapons can be directed at a specific military objective; the real issue is whether the effects can be limited to military objectives as required by the Protocol. If so, the provision of sub-paragraph 4(b) would be redundant since sub-paragraph 4(c) deals with this matter.

4(c) Attacks which employ methods or means of combat the

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1. Castren, op. cit., p. 200.
2. Aldrich, op. cit., p. 780.

effects of which cannot be limited as required by Protocol I and consequently are of a nature to strike at military objectives and civilian objects without distinction are indiscriminate attacks par excellence. But the question which is not easy to answer is what is meant by "limited as required by this Protocol"? The first such limitation that comes to mind is the requirement laid down in Article 52, that attacks be limited strictly to military objectives. But as we have seen, this Article was not intended to regulate collateral damage to civilian objects, loss of civilian life or injury to civilians. A less rigid limitation is the obligation to 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."[1] Even more lax is the limitation imposed by the so-called 'propotionality rule' laid down in paragraph 5(b) quoted above, which treats as indiscriminate and therefore prohibited, 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." This rule obviously favours the attacker, while the rule that "attacks shall be strictly limited to military objectives" clearly favours the attacked. Thus, it is more likely that the parties to the conflict will invoke different 'limitations' and judge each other accordingly.

Finally, it should be noted with regard to paragraph 4 (b)

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1. Article 57, (2)(a)(ii).

and (c) that, in the view of some delegations, "the definition of indiscriminate attacks (in that paragraph) was not intended to mean that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather, it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack."[1]

5(a). According to this sub-paragraph, "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly seperated and distinct military objectives located in a city, town village or other area containing a similar concentration of civilians or civilian objects" is to be considered as indiscriminate and therefore prohibited. This is actually the prototype of indiscriminate attacks which is sometimes referred to in legal literature as 'massive' bombardment, 'target area' bombardment, or 'carpet bombing'. After much deliberation, the Working Group of Committee III considered it unnecessary to use such terms since all are covered by the prohibition, and since the use of such expressions might be construed to restrict the protection of civilians from other types of bombardment.[2]

According to the Report of Committee III, "bombardment by

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1. Report of Committee III, Second Session, Doc. CDDH/215/Rev.1, para. 55. See also the explanation of votes by the delegations of the United Kingdom CDDH/SR. 41, para. 119; Italy, CDDH/SR. 41, para. 122; Canada, CDDH/SR.41 (Annex); Federal Republic of Germany, CDDH/SR.41 (Annex).
2. Report of Committee III, op. cit., para. 56.

any methods or means" refers to all attacks by fire, and the use of any type of projectiles except for direct fire by small arms.[1] But while "direct fire by small arms" does not qualify as bombardment, it does not follow that indiscriminate attacks by small arms are not prohibited.

Sub-paragraph 5(a) prohibits all types of bombardment "which treat 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."

The term 'clearly separated and distinct military objectives' does not seem to be sufficiently clear. The representative of the United States of America said that "his delegation took the words 'clearly separated' to refer not only to a separation of two or more military objectives, which could be observed or were usually separated, but to include the element of a significant distance. Moreover, the distance should be at least sufficiently large to permit the individual military objective to be attacked separately."[2] The representatives of Egypt and Canada said that their delegations supported the comments made by the representative of the United States,[3] and there seems to be no evidence to suggest that other delegations had dissented from this view, or had given different interpretations.

As to the phrase "similar concentration of civilians or or civilian objects" it should be noted that the adjective 'similar' has been deliberately added so that the term will

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1. Loc. cit.
2. CDDH/III/SR.31, para. 50.
3. CDDH/III/SR.31, para. 56 Egypt; and CDDH/SR.31, para. 58 Canada.

not be misunderstood, for example, as implying ordinary rural areas. Thus, a refugee camp or column of refugees moving along a road would be examples of such similar concentration.[1]

On the whole it may be stated that sub-paragraph 5(a) is satisfactory. In prohibiting any attack 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, it lays a general rule to the effect that military objectives should be attacked individually, and that, only in exceptional cases where the military objectives are so close to each other as to make it impossible for them to be attacked individually, it would be allowed to treat them as a single military objective. It should be noted that the criterion in sub-paragraph 5(a) is an objective one; the fact that the military objectives are "clearly separated" is a conclusive evidence that they can be attacked separately. In other words, the question is not whether the attacker could see that the military objectives *were clearly* separated, but whether the military objectives were clearly separated in fact. If they were clearly separated in fact, then treating them as a single miltary objective would be illegal.

Nor does it seem to be an excuse that the city, town, village, or the similar concentration of civilians and civilian objects was situated in a combat zone, or that the military objectives were heavily defended against air attacks. As noted above, the only legal excuse which may be inferred from the

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1. See Report of the Third Committee on the Work of the Working Group, Doc. CDDH/III/319, 9 May, 1977.

provision of sub-paragraph 5(a) is that military objectives in question are not sufficiently separated to be attacked separately.

Finally it should be noted that an attack would still be illegal if it violates the prohibition of sub-paragraph 5(a) although, arguably, it might be said that it did not violate the so-called 'proportionality rule' laid down in sub-paragraph 5(b). Indeed, it has been observed that "it may be easier for a commander to determine whether he can feasibly attack several objectives separately than to determine whether an attack would violate the proportionality rule."[1] This indeed implies an admission that the so-called proportionality rule is too vague, impractical, and ought not to have been introduced into Protocol I.

5(b). This is the by now famous or infamous 'proportionality rule' according to which "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" from the attack is to be considered indiscriminate and is prohibited.

It should be noted from the outset that this rule was the subject of much discussion and criticism at the Diplomatic Conference, and was adopted only after Article 57 of the Protocol dealing with "precautions in attack" had been settled. It goes without saying that in the case of this rule, as indeed in the case of any other attack which may be expected to affect the civilian population and civilian objects, all the

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1. Aldrich, New Life for the Laws of War, American Journal of International Law, Vol. 75, 1981, p. 780.

precautionary measures in attack listed in Article 57 should be taken before any claim to incidental civilian losses can legitimately be made. Even then, one may wonder whether it was necessary at all to introduce such a vague and subjective rule into the field of the protection of the civilan population and civilian objects against the effects of military operations. It may be useful therefore to quote some of the statements made in favour and against this rule.

In the Draft Protocol prepared by the ICRC the so-called proportionality rule was formed as follows:

> "In particular it is forbidden ... to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated."[1]

Introducing this rule at the Diplomatic Conference the ICRC representative said that "the Red Cross was concious of the fact that the rule of prooortionality contained a subjective element, and was thus liable to abuse. The aim was, however, to avoid or in any case restrict the incidental effects of attacks directed against military objectives."[2] But he did not explain how the proposed rule would help to achieve this aim.

However, it appears from the summary records of the Diplomatic Conference that the so-called proportionality rule had a mixed reception. Some delegations rejected the very idea of proportionality between civilian losses and the military

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1. ICRC Draft Article 46, para. 3(b).
2. CDDH/III/SR.5, para. 12.

advantage anticipated from an attack, and consequently proposed to delete the paragraph of the ICRC proposal embodying the idea[1], or at least delete the words "to an extent disproportionate to the direct and substantial military advantage anticipated"[2]; while other delegations considered it a necessary means of regulating the conduct of warfare and of protecting the civilian population.[3]

The delegations which rejected the very idea of a proportionality between civilian losses and military advantage anticipated argued that the rule of proportionality called for a comparison between things not comparable, and thus precluded objective judgement; civilian suffering and military advantage were two values that could not conceivably be compared.[4] It was also argued that the proportionality rule as expressed in the ICRC text would give military commanders the practically unlimited right to decide to launch an attack if they considered that there would be military advantage[5], and that it would be impossible to prove that the military advantage anticipated was in fact disproportionate.[6]

In this writer's view, these criticisms are still valid and in fact have remained unanswered by the proponents of the proportionality rule.

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1. This was proposed by Czechoslovakia, German Democratic Republic, Hungary and Poland, Doc. CDDH/III/8, March, 1974.
2. This was proposed by Egypt, Algeria, Democratic Yemen, Iraq, Kuwait, Libya, Mauritania, Morroco, Sudan, Syria and United Arab Emirates, Doc. CDDH/III/48, dated 18 March, 1974.
3. See Report of Committee III, First Session, Doc. CDDH/50/Rev. 1, para. 48.
4. See CDDH/III/SR.6, para. 38, (Syria); CDDH/III/SR.6, para. 42 (Hungary); CDDH/III/SR.8, para. 13 (Poland).
5. Poland, CDDH/III/SR.8, para. 13; Syria, CDDH/III/SR.6, para. 38.
6. Iraq, CDDH/III/SR.7, para. 25.

On the other hand, proponents of the proportionality rule adduced one valid argument: if one considered examples like attacks against isolated soldiers or guerrilla fighters among a crowd of civilians, it was said, the deletion of the proportionality rule would create a lacuna, since no other provision in the Protocol would provide a sufficient basis for the prohibition of such attacks.[1]

Other arguments, however, were either unconvincing or controversial. For instance, the representative of the United States of America, Mr. Aldrich, contended that:

> "The rule of proportionality ... was based on existing international law and it was important to record and interpret that rule in Article 51. Collateral damage to civilians and civilian objects was often unavoidable and it was unrealistic to attempt to make all such damage unlawful: the rule of proportionality was as far as the law could reasonably go."[2]

The claim that the proportionality rule was based on existing international law was contested by the representative of the Democratic Republic of Vietnam who said that he would like to know what documents in positive international law had provided any foundation for such an assertion.[3] The representative of Hungary made the following analysis in reply to the claim made by the representative of the United States. He said that in his own view, "a rule well established in international law should be reflected in practice and should produce the intended effects. Yet the number of civilian victims had

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1. Federal Republic of Germany, CDDH/III/SR.7, para. 4.
2. CDDH/III/SR.8, para. 69.
3. CDDH/III/SR.21, para. 81.

increased alarmingly over the past few years: accordingly, either the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it existed and was applied, but the results of its application provided the best argument against it."[1]

As a matter of fact no delegation other than that of the United States had claimed that the proportionality rule was based on existing international law; all delegations who spoke in favour of the rule seem to have spoken of the desirability of having the rule. The delegation of the United Kingdom, for instance, would only say that the principle of proportionality proposed by the ICRC "ought to form part of international law."[2]

But whatever might have been the legal status of the proportionality rule prior to Protocol I, the fact remains that it does now constitute a part of positive international law. It is still to be seen whether it would be a valuable protection to the civilian population, as some delegations had contended, or whether it would be a rule of convenience, as some delegations had feared. The rule is certainly vague, and there is no indication as to what may be considered 'excessive' incidental losses in relation to the concrete and direct military advantage anticipated from an attack. It has rightly been pointed out that civilian losses and military advantage are two values that could not conceivably be compared. Moreover, incidental losses are by definition 'excessive' in relation to the concrete and direct military advantage anticipated from an attack. Thus, if the rule is to be taken literally, all

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1. CDDH/III/SR.8, para. 79
2. CDDH/III/SR.8, para. 48.

incidental civilian losses would be unlawful. But certainly this is not what the law makers had in mind, and only God knows what 'excessive' in this context is supposed to mean.

But assuming for the sake of argument that civilian losses and military advantage are comparable, the laxity of the rule remains evident from the fact that it requires a comparison between incidental losses and the concrete and direct military advantage 'anticipated', not the concrete and direct military advantage 'obtained'.

It seems reasonable, therefore, to conclude that the so-called proportionality rule laid down in sub-paragraph 5(b) of Article 51 of Protocol I is simultaneously illogical and impracticable, even as a precautionary measure.

As for the regulation of 'prohibition' of indiscriminate attacks, it must be admitted that, by and large, it is unlikely to improve the protection of the civilian population and civilian objects in any significant way.

In order to improve the protection of the civilian population and civilian objects in any meaningful way, it is necessary to abolish the 'right' of the Parties to the conflict to 'gratuitous' incidental civilian losses and regulate the responsibility for all incidental civilian losses; whether intended or not, avoidable or unavoidable, excessive in relation to the concrete and direct military advantage anticipated from an attack or not, all should be treated as torts. How the responsibility should be divided between the parties to the conflict should be discussed and regulated by an international conference. But unless and until this is done, it would be unrealistic to speak of improving the protection of the

civilian population against effects of hostilities.

9. Precautionary Measures

The obligation to ensure respect for and protection of the civilian population and civilian objects necessarily implies that the Parties to the conflict should do everything they can to avoid, and in any case to minimize, loss of civilian life, injury to civilians and damage to civilian objects. It seems only natural, therefore, that Section I of Part IV of Protcol I affording general protection to the civilian population against effects of hostilities contained a chapter on precautionary measures consisting of two articles. One lays down a set of precautions to be taken in attacks (Article 57); the other lays down a set of precautions to be taken against attacks by each Party in the territory under its control - (Article 58). These sets of precautionary measures may be said to be as clear (or as vague) as the rules on which they depend. As these rules have already been discussed in this and the preceeding Chapters, it may be sufficient to quote the provisions of Articles 57 and 58 of Protocol I and make some necessary remarks.

9.1. Precautions in Attack

The general principle with regard to precautions in attacks is laid down in the first paragraph of Article 57 which provides:

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

It may be useful to note that this principle was one of the "basic principles for the protection of civilian populations in armed conflicts" which were affirmed by the General Assembly of the United Nations in its resolution 2675(XXV) of 9 December, 1970. This resolution was adopted unanimously, and therefore it may be said that paragraph 1 of Article 57 codifies a generally accepted principle of positive international law.

It should be noted that, unlike paragraph 2 of Article 57 which is addressed to "those who plan or decide upon attack", paragraph 1 is addressed to all members of the armed forces, as well as to those who plan or decide upon an attack.

"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."

At the Diplomatic Conference, a major group of Western delegations made three almost identically worded statements of understanding, (or interpretations), of certain terms used in this and other paragraphs of Protocol I. One of these understandings related to Articles 51 to 58 (inclusive) and states that "military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time."[1]

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1. Please see footnote 1. on following page.

The statement of understanding related to the word 'feasible' used in Articles 41, paragraph 3, 57, paragraph 2, and 58, states that the word 'feasible' means that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations.[2]

The third statement of understanding related to the term "military advantage anticipated" used in paragraph 5(b) of Article 51 (the so-called proportionality rule) and paragraph 2 of Article 57; it states that "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."[3]

Each of these statements in its own way inject into the law subjective elements which make it even more difficult to standardize what is legal and what is illegal.

Paragraph 3 of Article 57 provides that:

"When a choice is possible between several military objectives for obtaining a similar military advantage,

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1. For this and other statements of understanding made by the delegation of the United Kingdom at the time of signature, see Roberts and Guelff, Documents on the Laws of War, 1982, pp. 461-62. But also see the explanation of vote made by the delegations of the United Kingdom, CDDH/RS.41, para. 121; Italy, CDDH/SR.41, para. 122; Netherlands, CDDH/SR.42, para. 1; United States of America, CDDH/SR.42, (Annex); Federal Republic of Germany, CDDH/SR.42, (Annex).
2. To the same effect were the explanations of votes by the delegations of the United Kingdom, CDDH/SR.42, para. 59; Italy, Canada, Federal Republic of Germany, United States of America, CDDH/SR.42 (Annex); India, CDDH/SR.42 (Annex); and Turkey, CDDH/SR.42, para. 41.
3. To the same effect, the United Kingdom, CDDH/SR.41, para. 120; Canada, Netherlands, and the Federal Republic of Germany, CDDH/SR.41, (Annex); Italy and the United States of America, CDDH/SR.42, (Annex).

the objective to be selected shall be that the attack on which may be expected to cause the least danger to avoid losses of civilian lives and damage to civilian objects."

This is indeed a rule of reason as well as of conscience, but it is unlikely to be raised in practice because it raises sensitive matters of military strategy and military tactics.

Paragraph 4 of Article 57 may seem out of context because it is concerned with the conduct of military operations at sea or in the air. It provides that:

"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."

This rule was a compromise solution to the controversy at the Diplomatic Conference regarding the field of application of the Protocol's provisions with respect to attacks, which is now regulated by Article 49 of Protocol I and examined at length in Chapter 6 of this thesis. For the purposes of this section it may be sufficient to note that, at the Diplomatic Conference, there were two trends: some delegations argued that the field of application of the Protocol's provisions with respect to attacks should govern military operations at sea and in the air; other delegations argued that the field of application should be confined to attacks from land, sea or air, which may affect the civilian population, individual civilians or civilian objects on land. In the end, however, the latter view was adopted, but subject to the provision of

paragraph 4 of Article 57.[1]

Lastly paragraph 5 of Article 57 which does not lay down a precautionary measure but a safeguard clause. It provides:

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

This provision would have made sense if all direct and indirect attacks against the civilian population, civilians and civilian objects were unlawful. But inasmuch as incidental losses are lawful there will always be some way round this provision, for it can always be argued that the civilian population, civilians or civilian objects were not intended to be the objects of attack, even though only civilians and civilian objects were hit. Nor is it clear how a provision would not be construed as authorizing any attacks against the civilian population, civilians or civilian objects, if, for instance, in spite of the available information and of doing everything feasible to verify that the objective to be attacked was a military objective the attacked object was in fact civilian in character. And what about attacks which as a result of inaccurate information, misidentification or inaccurate targeting hit only civilians and civilian objects. Are such attacks lawful or unlawful ? If they were lawful, it would be difficult to escape the conclusion that some paragraphs of Article 57 may be lawfully construed as authorizing attacks against the civilian population, civilians or civilian objects. Conversely, if they were unlawful the law should clearly say

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1. See further, Section 6 of Chapter 6 of this thesis.

so and regulate the responsibility for such civilian losses.

9.2. Precautions Against Attacks

Article 58 of Protocol I which spells out this set of precautions provides as follows:

> "The Parties to the conflict shall, to the maximum extent feasible:
>
> (a) without prejudice to Article 49 of the Fourth Convention, endevour 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."

According to the Report of Committee III agreement was reached fairly quickly on this text when the phrase "to the maximum extent feasible" was made to modify all paragraphs of the Article. This phrase reflected the concern of a number of delegations that small and crowded countries would find it difficult to separate civilians and civilian objects from military objectives. But the Report also notes that other representatives pointed out that even large countries would find such separation difficult or impossible to arrange.[1] The

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1. Report of Committee III, Second Session, Doc. CDDH/215/Rev. 1, para. 102.

humanitarian purpose of the Article had therefore to be weighed against the requirements of national defence and the success of military operations, and the phrase 'to the maximum extent feasible' provided the best compromise.

Yet, some delegations said they would have preferred to see the Article deleted because, in their view, it might prove prejudicial to a country's national defence.[1] But no delegation had voted against the Article, which was adopted by 80 votes to none, with 8 abstentions.[2]

The phrase 'to the maximum extent feasible' has been interpreted by many delegations as referring to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.[3] In this sense, Article 58 does not hamper any Party to the conflict in organizing its defences as it sees fit. Not does the failure to act in accordance with Article 58 release the attacker from its obligations with respect to the civilian population, civilians and civilian objects, including the obligation to take the precautionary measures provided for in Article 57 of Protocol I.[4] The purpose of the Article is to increase, not to decrease the protection of the civilian population, individual

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1. See for examples the remarks made by the delegations of France, Switzerland and Austria, CDDH/SR.42, para. 54, 57 and 60 respectively.
2. CDDH/SR.42, para. 56.
3. See the explanations of votes by the following delegations: United Kingdom, CDDH/SR.42, para. 59; Italy, Canada, Federal Republic of Germany, the United States of America, India, CDDH/SR.42, (Annex); and Turkey, CDDH/SR.42, para. 41.
4. See Article 51, para. 8 of Protocol I.

civilians and civilian objects.

As to the territorial scope of application, it was clearly understood that Article 58 applies to all territory under the effective de facto control of a Party to the conflict, that is including both its own national territory which is under its control and any foreign territory which it occupies.[1] But it should be emphasized that Article 58 of the Protocol is without prejudice to Article 49 of the Fourth Geneva Convention of 1949.

The phrase in paragraph 1 of Article 58, "without prejudice to Article 49 of the Fourth Geneva Convention", "was chosen to make it clear that the provisions of the paragraph are not intended to amend in any way that Article. This paragraph, on the contrary is intended to stand on its own in all cases except where action proposed to be taken under it would be contrary to Article 49 of the Fourth Geneva Convention of 1949; in which case, Article 49 would govern."[2]

Article 49 of the Fourth Geneva Convention provides as follows:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.

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1. Report of the Third Committee, Second Session, Doc. CDDH/215/Rev. 1, para. 103.
2. Ibid., para. 104.

Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilites in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ehsure, to the greatest practicable extent, that proper accomodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

It should be noted in this respect that Article 17 of Protocol II applicable to armed conflicts of non-international character also prohibits the forcible movement of the civilian population for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should displacement have to be carried out, all possible measures have to be taken in order that the

civilian population be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. Moreover, the Article expressly states that civilians shall not have to leave their own territory for reasons connected with the conflict. Thus, as far as forcible movement of civilians is concerned, it may be said that the same rules apply whether the armed conflict was of an international or non-international character.

CHAPTER SIX

GENERAL PROTECTION OF THE CIVILIAN POPULATION AGAINST EFFECTS OF HOSTILITIES: THE BASIC RULE AND FIELD OF APPLICATION

1. Delimitation of the Field of Application in General

As the very title of this chapter suggests, it is about the field of application of a basic rule underlying the whole structure of the protection of the civilian population against effects of hostilities. This basic rule laid down in Article 48 of Protocol I, states that:

"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."

But the title also suggests that there are situations where this basic rule does not apply, or, put rather differently, there are situations where the civilian population and civilian objects do not seem entitled to any legal protection against effects of military operations.

Of course it is not civilians of an enemy State that I am talking about; they are entitled to the fullest protection envisaged in Part Four of Protocol I. What I am talking about is a Party's own civilians; their protection against effects of hostilities, not those committed by the adversary, but those committed by their own Party to the conflict. For the first time in the history of law-making conferences the question has been raised: to what extent, if any, should a Party to a conflict of an international character apply the rules of warfare to its 'own' civilian population?

The question is doubly strange and alarming especially when it is raised at a Diplomatic Conference the purpose of which is the reaffirmation and development of humanitarian law applicable to armed conflicts. The reader, by now, is perhaps familiar with rhetorical defences of the sovereignty of the state in the context of armed conflicts of a non-international character, but probably, not yet familiar with such rhetoric in the context of armed conflicts of an international character. Be that as it may, the Diplomatic Conference seems to have given a qualified answer to the question whether a Party to the conflict should apply to its own civilians the Protocol's provisions with respect to attacks. The relevant provisions which answer the question are paragraphs I and 2 of Article 49, and paragraph 5 of Article 54 of Protocol I.

Paragraphs I and 2 of Article 49 read as follows:

I. "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."

It seems worthwhile recalling that during the debate on the general protection of the civilian population, Mr. Blix of the delegation of Sweden drew attention to the 'possible effects' of using the term 'attack'. The word 'attack', he said, considerably limited the scope of the articles in Section I of Part 4 of Protocol I and a careful study should be made of the possible effects of using that term.[1]

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1. Blix, (Sweden), CDDH/III/SR. 4 para., 37.

Indeed, the very title of Article 49 - Definition of attacks and scope of application - suggests that the definition of attacks was intended to limit the field of application of the basic rule of distinction quoted above. Further evidence may be found in the debate on whether to delete or retain the words 'against the adversary' in the definition of attacks.

It may be remarked that when Mr. Blix made his above mentioned statement, paragraph 2 of Article 49 and paragraph 5 of Article 54 were not yet in existence. To put paragraph 5 of Article 54 in perspective, it may be useful to reproduce the text of Article 54. It reads as follows:

1. "Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensible 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 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."

In plain English, paragraph 5 of Article 54 has a 'scorched earth' policy in view. This may explain why the words "but under the control of an adverse Party" were inserted at the end of paragraph 2 of Article 49. Without these words it would have been possible to argue that the civilians of all Parties to the conflict benefit from the general protection against effects of hostilities or military operations of all Parties to the conflict, as the law stands at present, this seems to be doubtful, notwithstanding 'the imperative military necessity' which, however, is open to different interpretations and, therefore is open to abuse.

Thus reduced to its simplest form, the field of application of the Protocol's provisions with respect to attacks is the territory under the de facto contol of the adversary. In other words, the Conference has adopted a 'territorial' rather than a 'national' criterion.

The main difficulty in applying this criterion is that the words 'under the control of the adverse Party' are open to different interpretations.

On another level of delimitation, the Protocol's provisions with respect to attacks do not apply to military operations at sea or in the air, but they do apply to attacks from the sea or from the air 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.

Thus, although the Protocol as such does not affect the rules of international law applicable in armed conflicts at sea or in the air, it has the merit of reaffirming the validity of these rules, particularly the customary and conventional rules relating to the protection of civilians and civilian objects at sea or in the air, notwithstanding their violation during the Second World War. Suffice it here to emphasize that civilians and civilian objects, at sea or in the air, are not without protection.

The last remark to be made in this introductory section is that the Provisions of Section I of Part IV of Protocol I affording the civilian population general protection against effects of hostilities "are additional to the rules concerning humanitarian protection contained in the Fourth (Geneva) 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." (Article 49, para., 4)

It appears even from this cursory exposition that not only the protection of civilians at sea was affected by the definition of attacks but also the protection of civilians and civilian objects on land has been affected. Sea blockade, for instance, which is a military operation par excellence, may not qualify as an attack in the technical military sense although its impact on civilians on land can be greater than the killing of civilians and damage to civilian objects incidental to lawful attacks on military objectives on land. Similarly, the sinking of neutral merchant ships, in the circumstances that make it permissable, may not qualify as "attacks" because it is not committed "against the adversary".

The 'scorched earth policy', the permissibility of which seems controversial to the invader/occupant under the Geneva Conventions[1], but made permissible by the Protocol only to the Party to the conflict within its national territory still under its own control where required by imperative military necessity, may not, in the latter case, be an attack in the technical military sense because one does not attack what was in ones possession.

This may shed some light on the role of "contol" whether in paragraph 2 of Article 49 or in paragraph 5 of

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1. See Schwarzenberger, International Law, Vol. 2, 1968, pp 254 - 257, See also Pictet (ed.) I.C.R.C. Commentary, on Geneva Convention IV, 1958, pp. 302.

Article 54 of Protocol I. The problem of legal implications of using the term 'attacks, 'against the adversary' and 'control' to the protection of civilians and civilian objects is not a problem of semantics but of substance. No wonder therefore that Article 49 of Protocol I was one of the Articles that proved to be very difficult to draft.[1]

2. Relevancy of the Definition of Attacks

The history of armed conflict does not seem to suggest that a controversy had ever arisen concerning the protection of civilians the solution of which required a definition of 'attacks'. This is probably why in the past no attempt was ever made to define attacks in the multilateral treaty on the law of armed conflict.

Nevertheless a definition of 'attacks' has been inserted in Protocol I, the necessity for, and the utility of, are questionable. It is also questionable whether in humanitarian terms it may not be counterproductive.

The argument for having a definition of attacks as put by the ICRC representative was that "the number of provisions where the word 'attack' was used in the Protocol was so great that the ICRC thought it necessary for that idea to be defined."[2]

But is this sufficient reason? If so - that is if

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1. For the Summary Records of the debate on this Article, see Levie, Protection of War Victims, Vol. 3, 1980, pp. 75-108.
2. CDDH/III/SR. 2, para. 12.

frequent use signifies necessity for a definition - why were other frequently used terms not defined? There would have been a necessity for a definition if it had contributed to the protection of the civilian population. But unfortunately, this does not seem to be the case of the Protocol's definition of attacks. There is ample evidence to suggest that that definition, far from strengthening the protection of civilians against effects of hostilities, has weakened it. The definition, despite the ostensibly innocent intention of the ICRC, seems to have opened a 'pandora's box'.

Another reason for defining attacks, but rather implicitly stated, was to specify the purely technical military nature of that notion - 'attack'. Such expressions may seem rather impressive. But reverting to the dictionary meaning of the word 'attack', and to some encyclopedic military literature, and even to ordinary people, I could not pinpoint any significant difference in usuage, whenever the matter related to military action.

The Concise Oxford Dictionary, for example, explains that 'attack' means "act against with (esp. armed) force; seek to hurt or defeat;... act of attacking; offensive operation...".

The Encyclopedia Americana explains that 'attack' in military terminology means "offensive action against an enemy, usually involves an advance combined with firing and fighting at close range."[1]

And in the Great Soviet Encyclopedia, 'attack' means

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1. Encyclopedia Americana, Vol. 19, 1973, p.86, see under "Military Strategy - Military terms." The encyclopedia defines military operations as "military action, combination of all the details of planning and executing a phase of combat", ibid, p. 89.

"a combination of fire and swift movement of units and sub-units in order to strike and rout the enemy."[1]

But if all these definitions are not substantially different, was it then the intention of the Diplomatic Conference to give a special meaning to the term 'attack'?

According to the law of treaties, "a special meaning shall be given to a term if it is established that the parties so intended."[2] The question therefore is a matter of evidence. It should be noted, however, that we are concerned with the impact of the definition on the protection of the civilian population, rather than with technical meaning as such.

The implications for the protection of the civilian population of a definition of attacks seem to have been realised as early as the second session of the Conference of Government Experts in 1972.

The ICRC Draft Protocol stated that:

"Acts of violence, whether offensive or defensive, committed against the adversary by means of weapons, in the course of hostilities, are considered as attacks."

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1. The Great Soviet Encyclopedia, Vol. 2, under'attack', This encyclopedia, Vol. 18, p. 472, defines military operations as, "the totality of strikes, encounters, and battles, co-ordinated and interrelated by objective, time and place, and conducted by operational commands of one or more armed services according to a single concept and plan for fulfilling operational or strategic mission."
2. Article 31 (4) of the Vienna Convention on the Law of Treaties. Text in Brownlie, Basic Documents in International Law, second edition (1978).

During the discussion of this text, several amendments were submitted, some of them substantive. Thus, the expert from Australia proposed to delete the definition;[1] The Canadian expert proposed to extend the notion of attack by substituting the words, "any means", for the words, "means of weapons", in the ICRC text;[2] the French expert proposed to reword the ICRC text so as to read, "any acts of violence committed against the adversary in the course of hostilities shall be considered attacks."[3] One expert (unidentified in the ICRC Report) put forward a compromise solution, namely; that the words "means of weapons" in the ICRC text, be replaced by the words "means of combat".[4]

In brief, opinions differed on whether to define 'attacks' or not; whether 'any' act of violence committed against the adversary constitutes an attack or not; and whether the means of attack should be specified as 'weapons', 'means of combat', or 'any means'.

These differences should have indicated to the ICRC the seriousness of the implications of the definition of attacks for the protection of the civilian population and should have moved the ICRC to abandon the idea of a definition altogether.[5] But instead, the ICRC seems to have

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1. ICRC, Report on the Work of the Conference of Government Experts, second session, 1972, Vol. 2, p. 81.
2. Ibid., p. 68.
3. Ibid., p. 74.
4. ICRC, Report on the Work of the Conference of Government Experts, Second Session, 1972, Vol. 1, p. 148.
5. In presenting the subject of the 'definition of attacks' to the second session of the Conference of Government Experts, the ICRC expert specified that "the concept of attack should be understood in a military and technical sense and not in a politico-legal sense." Ibid., p. 148, Thus the ICRC was aware of the 'politico-legal' implications of the definition of attacks.

taken an 'ostrich attitude'; it proposed to the Diplomatic Conference a draft definition from which all the phrases which proved controversial at the Conference of Government Experts were deleted.

It should be noted here that the definition of attacks which was submitted to the Government Experts stood on its own as draft Article 44, while in the draft rules submitted to the Diplomatic Conference it was associated with the 'field of application' of Section I of Part 4 of Protocol I, affording general protection to the civilian population against effects of hostilities. This connection suggests that the ICRC was aware of the role of the definition of attacks in delimiting the field of application of the Protocol's provisions with respect to attacks. Yet, it insisted in its Commentary on the Draft Protocols that;

> "The definition of 'attacks' specifies the purely technical nature of this notion. Every time the term 'attack' is employed, it is related to only one specific military operation, limited in space and time."[1]

However, this explanation does not seem to add any thing to what ordinary soldiers already know. Besides, it is not the purpose of the Protocol to lecture in military terminology; the main purpose of the part of the Protocol

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1. ICRC, Commentary on the Draft Protocols, Geneva, 1973, p. 54. See also, ICRC, Report on the Work of the Conference of Government Experts, Second Session, 1972, p. 148.

in which the definition of attacks has been inserted is to protect the civilian population against effects of hostilities. It is not clear how the definition of attacks would promote or clarify that protection. It is not clear, for instance, how the definition of attacks would be helpful in clarifying "the concrete and direct military advantage anticipated" from an attack, on which depends the legality or illegality of an attack.

Thus without multiplying examples, it is not clear how the definition of attacks might be relevant to the proper application of the Protocol. Besides if there is any relevancy (which, admittedly I am unable to see), it must have been weakened by the definition of attacks (in plural) rather than attack (in the singular).

One thing, however, seems to be clear; that some relation exists between the definition of attacks and the field of application of the basic rule of distinction. In other words there is a relation between the definition of attacks and the protection of the civilian population against effects of hostilities. It is not in vain that the definition of attacks was linked with the protection of civilians and civilian objects.

Accordingly, it is believed to be the duty of the international lawyer to try to discover that relation and its impact on the legal protection of civilians and civilian objects.

Unfortunatly, no writer (to my knowledge) has so far tried to explore this area of Protocol I, which is one of the purposes of this chapter.

3. The Delimitation Process: Policy Considerations

If it were the policy of the Diplomatic Conference to protect the civilians as such, against effects of hostilities, and to treat them as though they were neutral vis-a-vis members of the armed forces of all Parties to the conflict, deletion of the definition of attacks would have been a step in the right direction.

The same may be said about paragraph 2 of Article 49 and paragraph 5 of Article 54 of Protocol I. The provisions of these paragraphs are seen here as by-products of the definition of attacks and altogether as having produced a philosophy, that for want of a name, might be called 'Attacks . Protectionism'; that is to say, a protection that depends on whether an act of violence may qualify as an attack or not.

This philosophy provides a convient cloak for pursuing a policy of vindictiveness in the guise of legal rectitude. The founding father of this philosophy, it appears, was the United States of America; it's testing ground was Vietnam. The notorious historical example is the so-called 'Free-fire zones', (renamed 'specified strike zones' to neutralize adverse publicity). Its legal rectitude may now be found, unfortunately, in Protocol I, which has been described as one of the rare treaties that improve in a meaningful way the protections given by law to individual human beings.[1]

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1. George Aldrich, Remarks, on the Protocols Additional to the Geneva Conventions of 1949, proceeding, of the A.S.I. L. 1980, p. 191.

But while it is hoped that this would be the case, one should not be oblivious to the fact that, on so many occasions, the fruits of reaffirmation and development of the law of armed conflict were withheld from otherwise protected persons, by disagreements about the scope of application of a certain treaty. Article 49 of Protocol I, and related provisions, are good grounds for such differences.

To provide evidence on this thesis, and more importantly, to warn against its implications for the protection of civilians, is the purpose of this discussion.

For a start it is well to appreciate the unusual frankness of the remarks which George Aldrich made at a panel of the American Society of International Law.

He said that,

> "the Protocol on international armed conflicts can only be understood in the light of the sad experience of the world in the last 20 years in dealing with international armed conflicts. Virtually every issue discussed in that negotiation had its origins in the conflicts in the Middle East, Korea, South East Asia or elsewhere in the world. <u>For each of the proposals that were pressed, there were experiences that were relevant</u>. Certainly the U.S. Government was very reluctant, since the Geneva Conventions were concluded in 1949, to consider even geting into negotiations again that would expand those protections - in particular through negotiations that would deal with the Law of the Hague including aerial bombardment,

the protection of the civilian population, and the conduct of military operations."[1]

Aldrich thought that it was only the experience in Vietnam that brought the U.S.A. around to the view that not only was it timely to get into these negotiations, but that it was in fact necessary. He referred specifically to two 'conditioning' factors that had a lot to do with U.S. interest in seeing Protocol I produced. The first was, as he put it, "the experience of the mistreatment of U.S. prisoners, its inability to get accountings of them, and its inability to get any protecting power to look after their interests". The second 'conditioner' was the"non-participants" in the conflict, as he described them, who had the opportunity to watch every evening on their television news what war was like and what happened to the civilian population and to the military persons involved.[2]

Obviously, these conditioning factors were not of equal weight. If one recalls Aldrich's remarks elswhere,[3] that in any multilateral negotiations each participating state arrives with its own positions, which are based upon its understanding of its own national interests, it would seem difficult to escape the conclusion that what was foremost in the mind of the U.S. delegation was prisoner of war status, the protecting power and the principle of

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1. Ibid.,p. 191-192.
2. Ibid.,p. 192.
3. G. Aldrich, Establishing Legal Norms through Multilateral Negotiations - The Laws of War, in Case Western Reserved Journal of International Law, 1977, Vol. 9, pp. 9-16, at p. 13.

proportionality.[1]

The protection of the civilian population against effects of hostilities was probablythe least demanded item on the agenda of the United States delegation. This belief is neither dogmatic, nor is it simply inferred from Aldrich's statement quoted above. The military superiority of the United States as against any other state but the Soviet Union; the almost de facto immunity of its civilians against attacks in any convential warfare in which the United States might be involved especially outside the American continent; the interventionary policy of the United States in support of right wing military juntas in South America and other 'clients' the world over, assumed to be threatened by 'Soviet danger'; reliance of U.S. military strategy on fire power and attrition rather than on manpower, are but some of the reasons which make the United States reluctant to get involved in a serious discussion of the protection of the civilian population against effects of hostilities.

This is neither a comprehensive list, nor is it an assessment of U.S. military strategy.[2] The purpose is simply to suggest, contrary to Mr. Aldrich, that the United States, far from being moved by public opinion or what he called 'the nonparticipants' in the conflict in Vietnam who had

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1. See for example the article by General Walter Reed, Laws of War: The Developing Law of Armed Conflict - Some Current Problems, in Case Western Reserve Journal of International Law, 1977, Vol. 9, pp. 17 - 37. General Reed was a member of the U.S. delegation to the Diplomatic Conference 1974 - 1977.
2. For an assessment of U.S. military strategy, see Osgood, Limited War Revisited, 1979, especially chapters 1 and 2.

the opportunity to watch every evening on their television news what war was like and what happened to civilians, appears to have approached the question of delimitation against the 'free-fire zone' background.[1] No wonder therefore that the theoretical context of the delimitation process was the definition of 'attacks' and the ICRC draft Articles 48 and 66 of Protocol I, the purpose of which was to secure an absolute legal protection of objects indispensible to the survival of the civilian population.

Underlying the delimitation process was the question: to what extent, if any, should a Party to the conflict apply the Protocol's provisions with respect to attacks to its civilian population?

It strikes the observer, that, historically, the discusion at law-making conferences usually concentrated on how far enemy civilians should be protected against effects of hostilities committed by the adverse Party to the conflict. Suddenly, by a reversal movement of history, the central question has become, how far should a Party to a conflict of an international or 'internationalized' character be bound to apply to its own civilian population the rules which it should apply to enemy civilians.

This reversal of the movement of history, or rather,

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1. General Reed's remarks, (op. cit., p.20 are suggestive): "The preliminary work of the Conference took place primarily in the 1969- 1973 period.Consequently the Vietnam War had a particularly disproportionate effect on the first session of the Diplomatic Conference. Representatives from countries who sought to criticize the practices in Vietnam introduced provisions on the use of Napalm and defoliants, and restrictions on bombbardment, especially in the free-fire zones or jungle (continued overleaf)

this parallel development, is partly explicable by the development of the international character of wars of national liberation, and partly by the bias of the international system against revolutionary challenge.

It is no new thought that violent encounter of major rivals in world affairs has always been primarily a matter of warfare 'between states'; now, it is a matter of warfare 'within ' states.[1]

Preservation and aggrandisement of ideological and political spheres of influence, coupled with the interest of governments in their security of tenure, have always been behind the bias of the international system against revolutionary challenge. Article 3 common to the four Geneva Conventions of 1949 and Protocol II additional to these Conventions are faithful reflections of that bias.

However, practice suggests, as for example in Korea and Vietnam, that the interest of the intervening state or states, or even the interest of the target government, may in the prevailing circumstances, require that the conflict be treated as one of an international character. The main interest of the intervening state in such circumstances is to secure prisoner of war status for its captured military personnel although the other parties to the conflict may continue to regard the war as civil war.

(cont. from previous page) areas. The Vietnam Syndrome seems to be diminishing and the Conference seems more inclined to develop humanitarian principles rather than provide for what they perceived to be the illegal or immoral practices of the last war."

1. See Falk, Legal Order in a Violent World, 1968, pp. 109 - 115.

Indeed, states and international lawyers have never discarded the possibility of applying inter-state humanitarian law as a whole to non-interstate armed conflicts since at least the American War of Independence in the 18th century. This possibility has found expression in Article 3 common to the four Geneva Conventions which stipulates that the Parties to the conflict, "should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention."

This 'obligation of endeavour' to coin a phrase, materialised during the wars in Korea and Vietnam, despite disagreement on the legal character of the conflict as international or non-international, and despite disagreement on the legality of third party intervention and the impact of intervention on the applicable humanitarian law.[1]

The Geneva Convention of 1949 and the additional Protocols refrained from settling the legal problems of 'internationalised' civil wars, that is, civil wars in which foreign states or international organisations intervene with armed troops. The ICRC submitted to the Conference of Government Experts in 1971 and 1972 specific proposals to the effect that when, in case of armed conflict of non-international character, the armed forces of other states take a direct part in the hostilities, the Geneva Conventions and Protocol I shall apply to the relations of all parties to the conflict. The proposals, however, were rejected on the ground that they might encourage the insurgents to call for foreign aid in troops in order to bring the Conventions

1. See Whiteman, Digest, Vol. 10, pp. 213-222.

in their entirety into effect. The argument is unconvincing; more realistically, the governments in such cases preferred to remain their own judges and deal with the situation on an ad hoc basis rather than on the basis of already prescribed rules.

At any rate, if and when, for whatever reasons, humanitarian law was made applicable in its entirety, the legal bias of the international system against revolutionary challenge would be rectified, at least as far as humanitarian law is concerned. This seems to have been too much for governments to digest.

Thus, in order to divest the armed conflict in such eventuality of its true international character, and in order to confine the legal effects of such internationalisation, as far as possible, to prisoner of war status, governments had to guarantee for themselves a certain measure of freedom from legal restraints pertaining to the conduct of military operations. This is a matter which governments, or at least the vast majority of them, seem to have welcomed wholeheartedly. This seems precisely what the definition of attacks and Articles 49 (2) and 54 (5) purport to do.

Attempts to conceal naked interests from public conciousness by garments of legal texture are no novelty, as Julius Stone noted.[1]

Paragraph 2 of Article 49, as will be explained below, was advocated on humanitarian grounds as well as on the basis of reciprocity, while the scorched earth policy envisaged in paragraph 5 of Article 54, as its text says,

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1. Julius Stone, Legal Controls of International Conflict, 1959, p. 57.

was "in recognition of the vital requirements of any Party to the conflict in defence of its territory against invasion."

The language might seem impressive, persuasive and responsive to the fervour of nationalism. But all this is artificial; all that it attempts to conceal is a scorched earth policy, free-fire-zone tactics in the name of the defence of national territory against invasion.

One might not have had any reservations against paragraph 2 of Article 49 and paragraph 5 of Article 54 if the condition of controlling a part of national territory by the insurgents was not inserted in Article I of Protocol II, and if by invasion was meant the invasion of one state by another. But the term invasion in the parlance of the cold war has been trivialised, prostituted, and impregnated with almost every sort of insurgency or revolutionary challenge to 'established governments'. Indirect aggression, subversion, war by proxy, terrorism, etc. are but some of the labels affixed to revolutionary movements and hence called for 'collective self defence' against 'aggression'.[1] It is the prostitution of legal terminology by politicians of different ideological persuasions which makes one sensitive to apparently innocent, indeed, sacred concepts such as 'the defence of national territory against invasion.'

Having outlined the policy considerations underlying the process of delimitation, the theoretical context in which the delimitation process was worked out should now be examined

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1. See in this respect, Thomas M. Frank, Who Killed Article 2 (4) ? or Changing Norms Governing the Use of Force by States, A.J.I.L. 1970, pp. 809-837.

as it sheds more light on the 'objectives' of the delimitation process.

4. The Theoretical Context of the Delimitation Process

The context of the delimitation process, as pointed out, was the definition of attacks and the ICRC Draft Rules on the protection of objects indispensible to the survival of the civilian population. Connotations of the words 'attack' and'against the adversary' seem to have set the process in motion, but it was brought to an 'unhappy' end through an amendment submitted jointly by delegates of the U.S.A., Britain, and the Netherlands, which proposed that;

> "1. The provisions of this Protocol with respect to attacks, as defined in paragraph 2 of Article 44, apply to attacks wheresoever conducted, including the national territory belonging to a Party to the conflict but under the control of an adversary.
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> 2. The prohibition contained in paragraph 2 of Article 48 apply in the national territory of a Party to the conflict, except where a derogation therefrom is required by imperative military necessity."[1]

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1. Duc CDDH/III/261, 24th March, 1975, as reproduced in Levie, Protection of War Victims, Vol. 3, p. 98.

The text which this amendment ostensibly intended to replace was that of ICRC Draft Article 66 which intended to provide for 'absolute protection' of objects indispensible to the survival of the civilian population. It reads as follows:

> "It is prohibited to destroy, render useless or remove objects indispensable to the survival of the civilian population, namely, foodstuff, food-producing areas, crops, livestock, drinking water supplies and irrigation works, whether to starve out civilians, cause them to move away or for any other reason. They shall not be the object of reprisals."[1]

This provision, as the ICRC commented, was intended to apply to the party to the conflict in whose power these indispensable objects happen to be.[2]

The ICRC had also draft Article 48 for the protection of these indispensable objects, but this time, it was

> "addressed to the Party to the conflict not in possession of the indispensable objects, which are therefore not in its control."[3]

In order to suit the addressee, the ICRC used in draft Article 48 the words, "it is forbidden to attack or destroy", while in draft Article 66, it used the words, "it is prohibited to destroy, render useless or remove". The word 'attack was not used in Article 66.

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1. ICRC - Draft Additional Protocols - Commentary, 1973, p. 84.
2. Loc. cit.
3. Ibid., p.62.

This variation in phraseology, (i.e. attack, destroy, render useless or remove), had two purposes in view; the first was to neutralize and hence guarantee absolute legal protection to objects indispensable to the survival of the civilian population; the second was to guard against connotations of the word 'attack'.[1] As the ICRC representative had explained with reference to draft Article 66:

> "The words used to describe prohibited actions took account of the fact that the objects to be protected were in the hands of the Party against which it was necessary to protect them, the Party which was, accordingly, in a position "to destroy, render useless or remove" them. The words "to attack" were not included in draft Article 66 because one did not attack what was in ones possession. If the words "to... destroy" were also included in ICRC's proposed Article 48, it was for the purpose of citing acts which might have been regarded as not constituting "attacks, even though perpetuated by the adversary."[2]

The ICRC's exercise in drafting articles for the protection of objects indispensable to the survival of the civilian population, suggests simultaneously, the perplexity which may result from using the word 'attacks', and the implications for the protection of the civilian population.

Underlying that exercise and the discussion that

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1. See the speech of the ICRC representative. CDDH/3/SR 37, para. 35 to 41, in Levie, Vol. 3 pp. 98 -99.
2. CDDH/3/SR 37, p.9, para. 36, in Levie, Vol. 3 p. 98.

followed was the serious issue of whether 'a scorched earth policy' should be allowed to any Party to a conflict. No wonder therefore, that the protection of objects indispensable to the survival of the civilian population was the context in which paragraph 2 of Article 49 and paragraph 5 of Article 54 were developed.[1] Throughout that law-making process, whether with regard to the protection of objects indispensable to the survival of the civilian population, or the wider issue of the scope of application of the Protocol's provisions with respect to attacks, the law-makers seemed entangled in the connotation of 'attacks': "one does not attack what was in one's possession", as the ICRC representative had explained. This is the first connotation of the term 'attack'.

This connotation of the term'attack', namely, that one does not attack what is in one's possession, is consistent with the philosophy of 'Respect and Protection' on which the whole system of humanitarian law is based. According to this two-word philosophy, 'respect' means 'to spare, not to attack', while 'protection' means 'to come to someone's defence, to give help and support'.[2]

It is according to this philosophy that the ICRC devoted two draft Articles to the protection of objects indispensable to the survival of the civilian population; one draft Article 48 was placed among the rules relating to attacks, that is, Section I of Part 4 of Protocol I; while the other, draft Article 66 was placed among the rules

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1. See the Summary Records, Levie, Vol.3, pp.96 - 105.
2. ICRC Commentary on the Fourth Geneva Convention of 1949, pp.133-134 and the speech of the ICRC representative, CDDH/3/SR.37, para. 37.

relating to protection', that is, the rules relating to the treatment of persons in the power of a Party to the conflict, namely, Section 3 of Part 4 of Protocol I.

This philosophy of 'Respect and Protection', while clear to the ICRC and its representatives, does not seem to have been clear to as many delegates as the ICRC seem to have assumed. Had it been clear to the minds of all the delegates, the debate on whether to retain the words 'against the adversary' in the definition of attacks, and the debate on the scope of Article 48 as adopted by the Third Committee on 14 March, 1975, might not have taken place. As adopted by the Third Committee at that time, Article 48, (finally Article 54 of Protocol I), consisted of the first four paragraphs of what is now Article 54.

On the ot er hand, the philosophy might have been clear but the but the different delegates wanted to be clear about one fu demental issue, namely to what extent, if any, should a Party to the conflict apply the Protocol's provisions prohibiting or restricting attacks, to its own civilian population?

The answer to this question came up at two stages; the first was in the context of the definition of attacks; and the second was in the context of the protection of objects indispensable to the survival of the civilian population.

In the context of the definition of attacks, the Third Committee of the Diplomatic Conference was faced with the question whether the words 'against the adversary' should be retained or deleted.[1]

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1. Doc. CDDH/3/52, Proposed by the Working Group, Committee 3, 19 March, 1974, reproduced in Levie, Vol. 3, pp. 84 - 85.

The matter was regarded as one of substance, bearing on the scope of application of the Protocol's provisions with respect to attacks.[1] Thus, delegates in favour of deleting the words'against the adversary', considered that the provisions of the Protocol with respect to attacks should apply to the civilian population of all Parties to the conflict, including one's own civilians. But on the other hand, delegates in favour of retaining the words 'against the adversary', pointed out that attacks are acts of violence committed against the adversary.[2] This summary of views was made by the Rapporteur of the Working Group of the Third Committee, but he did not elaborate. It seems clear, however, that at least from the point of view of those who wanted the words 'against the adversary' to be deleted, the effect of retaining these words was that a Party's own civilian population would not be protected by the Protocol's provisions against the effects of attacks committed by their own Party to the conflict.

The report of Committee III had the following to say about this aspect of the matter:

> "In view of the variety of views expressed in the Working Group about the extent, if any, of the application of Protocol I to a Party's own population, the Group decided to submit to the Committee in Document CDDH/3/54 the question whether the words

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1. See the remarks of the Rapporteur of Committee III, (Baxter), CDDH/3/SR.
2. Para. 2,3, in Levie, Vol. 3 p.86.

'against the adversary' in the ICRC text should be deleted. The Committee decided not to delete the words 'against the adversary' by 38 votes to 18, with 10 abstentions."[1]

In the light of the preceding remarks, it appears that the vote on whether to delete or retain the words 'against the adversary' was simultaneously a vote on whether a Party to the conflict should apply the Protocol's provisions with respect to attacks to its own civilian population. As the result of the vote indicates, the answer at that stage was probably negative. But apparently, there was still some disagreement on what the term 'adversary' was supposed to mean. For instance, Sir David Hughes-Morgan of the British Delegation thought that the words 'against the adversary' should be retained, because, in his view, "the adversary was in any case a military adversary, and protection of the civilian population covered the population of all Parties to the conflict."[2]

Sir David Hughes-Morgan did not explain how, in his view, "protection of the civilian population covered the population of all Parties to the conflict." The Fourth Geneva Convention of 1949 to which the Protocol's provisions with respect to attacks are additional or complementary, provides in paragraph 1 of Article 4, that:

"Persons protected by the Convention are those who, at a given moment and in any matter whatsoever, find

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1. Loc. cit. para. 4.
2. Report of the Committee 3, First session, Document CDDH/50/Rev.1.

themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals ."

The authors of the ICRC Commentary on the Fourth Geneva Convention would only make three exceptions to this definition of protected persons. They are: Article 3 relative to armed conflicts not of an international character; Part II of the Convention entitled "General Protection of Populations Against Certain Consequences of War", (Articles 13 - 26 inclusive, which are actually concerned with the protection of Hospitals and the establishment of safety zones and localities by means of special agreements); and finally the exception made in Article 70 (2) regarding nationals of the Occupying Power who, before the outbreak of hostilities have sought refuge in the territory of the occupied state.

Accordingly, by and large, the civilians of a Party to the conflict would not be protected against hostilities committed by the Party to the conflict of which they are nationals. So, how can one say that protection of the civilian population covered the population of all parties to the conflict?

Not even Section 1 of Part III which is expressly entitled "Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories" has been considered applicable to the relation between a Party to the conflict and its nationals.[1]

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1. See ICRC, Commentary IV, 1958, p. 222, and the Summary Records of the Geneva Diplomatic Conference of 1949, Vol. 2B, pp. 407 -410.

This Section is indeed the core of the Geneva Convention (Fourth) and the disregard of its provisions amounts, in fact and in law, to the commision of not only 'cultural genocide' but also to genocide in the proper technical sense.[1]

If this is really the proper field of application of the Fourth Geneva Convention, it cannot be understood how the protection of the civilian population covered the population of all parties to the conflict.

As noted above, Sir David Hughes-Morgan did not say how, in his view, protection of the civilian population covered the population of all parties to the conflict. Indeed, the sponsors of the amendment CDDH/III/261, (The United States of America, Britain and Netherlands), thought that Section III of Part IV of Protocol I might be the appropriate place to insert a provision of the kind contained in their amendment, since that section is complementary to Parts I and III of the Fourth Geneva Convention.[2] In such a case, the language of their amendment would be as deceptive as the description of Section I of Part III of the Geneva Convention as "Provisions Common to the Territories of the Parties to the Conflict and Occupied Territories", since these provisions, as interpreted by the authors of the ICRC Commentary, protect civilian persons

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1. On the definition of Genocide, see Articles 2 and 3 of the Convention on the Prohibition and Punishment of the Crime of Genocide. Text in Roberts and Guelff, Documents on the Laws of War, Oxford, 1982, pp. 158 et seq.
2. See the speech of Mr. Schutte (Netherlands), CDDH/III/SR.37 para. 61.

who are in the hands of a Party to the conflict of which they are not nationals. If this was also the understanding of other delegates (which apparently it was, for governments are not in the habit of agreeing 'fairly quickly' on restricting their military operations in their national territory), then all our fears regarding the implications of paragraph 2 of Article 49, and paragraph 5 of Article 54 of Protocol I must have been well founded.

But whatever might have been in the minds of the delegates to the Diplomatic Conference, an attempt will be made later in this chapter for a more favourable interpretation - one that affords more protection to the civilian population, but letus now revert to the theoretical context of the delimitation process.

As noted above, the joint (U.S.A., Britain and Netherlands) amendment was proposed to replace ICRC draft Article 66. It was submitted on 24th March, 1975. Paradoxically, by that time, ICRC draft Article 66 had already been overtaken by the adoption of Article 48, (finally Article 54), by the Third Committee on 14th March, 1975. This point was made clear by the ICRC representative during the deliberations in the Third Committee, 4th April, 1975, on what to do with ICRC draft Article 66. She said:

> "She had spoken in the past tense in connection with Article 48 because it was no longer possible to speak of Article 66 without taking into consideration Article 48 as adopted by the Committee at the thirty-first meeting (CDDH/III/SR.31). Thus, although in ICRC's draft Article 48 it was forbidden 'to attack

or destroy' indispensable objects in the possession of the adversary, the text produced as a result of the Committee's deliberations forbade not only to 'attack and destroy', but also to 'remove' and 'render useless' - words borrowed from Article 66. Consequently, the present text of Article 48 covered the cases referred to in Article 66 also. Article 48 accordingly forbade attacks on objects indispensable to the survival of the civilian population which were in possession of the enemy whether on national territory or on territory occupied by the enemy. It also forbade a Party to deny the use of or to exhaust objects in its possession, whether occupied or on national territory."[1]

Immediatly after this explanation, she added:

"In view of that situation, the Committee would have to make a choice between giving up Article 66 as submitted in the ICRC draft, or revising Article 48, as accepted by the Co mittee, by deleting the words 'remove', or 'render useless'."[2]

But if such was the situation, the logical step ought to have been the deletion of the ICRC draft Article 66.

Indeed, Mr. Schutte of the Netherlands noted that "certain delegates had already suggested its ultimate deletion",[3] but instead, under the cover of alleged ambiguity

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1. CDDH/III/SR.37, para. 36, in Levie, Vol. 3, p. 98.
2. Ibid., para. 38.
3. CDDH/III/SR.37, para. 45.

in Article 48, his delegation, together with the delegations of Britain and the United States, introduced their amendment to replace ICRC draft Article 66. As Mr. Schutte's speech introducing the joint amendment (in my view) sheds more light on what has been said so far about 'Policy considerations underlying the delimitation process' as well as on the following sections, it is thought convenient to pay it the attention it deserves. He said: "During the debate in the Working group, distinctions were made between four legal situations:[1]

(a) the destruction of objects consequent on attack within the territory of the adversary not subject to occupation;

(b) the destruction of objects within the territory of the enemy under occupation;

(c) the destruction of objects by way of attack within a Power's own territory subject, however, to enemy occupation;

(d) the destruction of objects within a Party's own territory being not, or not yet, subject to enemy occupation."

Article 48, as adopted by the Committee, he said, "covered at least the first three legal situations just mentioned. For Article 66 only the fourth legal situation seemed to remain, namely the prohibition for a Party to the conflict to destroy the objects in question within its non-

1. CDDH/III/SR.37, para. 51.

occupied territory."[1]

Such'vacillation' as may be inferred from the words "at least" and "seemed to remain", suggests that the question was not one of ambiguity in Article 48 as adopted by the Third Committee. Nor did Mr. Schutte explain how the fourth (d) legal situation was not covered by Article 48 as adopted by the Third Committee. The ICRC representative in her interpretation quoted above said it was covered.

So what actually was the problem? Mr. Schutte did not leave it for speculation; "the whole problem of the rights of a Party to a conflict within its own territory called for a different approach", he said.[2] This may explain why the language of the amendment to the ICRC draft Article 66 went far beyond the clarification of the 'alleged ambiguity' in draft Article 48. As the report to the Third Committee on the Work of the Working Group, dated 28th April, 1977, explained in retrospect;

> "Once Committee III adopted Article 48 in 1975, the ICRC text proposed for Article 66 became out of date.The Working Group decided, however, that this Article provided a useful occasion to clarify the scope of application, not only of Article 48, but also of all articles restricting or prohibiting attacks."[3]

No wonder, therefore, that soon after the adoption

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1. CDDH/III/SR.37, para. 55, 56.
2. CDDH/III/SR.37, para. 57.
3. Doc. CDDH/III/369, in Levie, Vol. 3, pp. 103-104.

of a more attractive formula of the amendment submitted by the delegations of the U.S.A., Britain and Netherlands as a 'new' Article 66, it was simply divided between Articles 44, (finally 49) and 48, (finally 54), which were already adopted. In plain English, ICRC draft Article 66 was simply a cover for the revision of the scope of application of the Protocol's provisions to a Party's own civilians. What little, but precious, protection the civilian population might have had under Articles 44 and 48 (i.e. Articles 49 and 54) before the joint amendment came to bear on them seems to have diminished as a result of that amendment. Here again we leave it to Mr. Schutte to draw the general picture. He said:

> "Finally, the proposed amendment did not enter into the question whether, notwithstanding imperative military necessities, there were still any limits to the powers of a Party to the conflict with respect to its own population within its own territory. Everyone knew that the International Covenant on Civil and Political Rights allowed States that were Parties to a conflict to derogate from their obligations in time of public emergency which threatened the life of the nation, even if only to the extent strictly required by the exigencies of the situation, and provided that the measures taken were not inconsistent with other obligations under international law. In other words, the Covenant explicitly assumed the existance of such limits."[1]

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1. CDDH/III/SR. 37, para. 63.

To this it should be added that 'imperative military necessity' and the International Covenants on Human Rights amount to no more than a token protection, and therefore, are not a real alternative to at least the moderate ICRC proposals to protect objects indispensable to the survival of the civilian population against hostilities by all Parties to a conflict.

Be that as it may, the fact remains that Articles 49 (2) and 54(5) have introduced into international law a new criterion for the protection of the civilian population against effects of hostilities. In the following sections, the de facto control criterion, its practicability and its ramifications are examined.

In order to obtain a clear picture of all this, four legal situations are considered here to be essential for a useful legal analysis.

1. An interstate armed conflict where the issue of territorial sovereignty is not involved;
2. An interstate armed conflict where the issue of territorial sovereignty is involved;
3. Non-interstate armed conflicts (i.e. wars of national liberation) of the types mentioned in Article I(4) of Protocol I;
4. International or internationalised civil war.

Before proceeding any further, it seems useful to note that Mr. Schutte (Netherlands) throughout his speech introducing the joint amendment referred to 'occupied territory'while the words of the amendment he was introducing spoke of "national territory belonging to a Party but under the control of an adversary". 'occupation' is a term of art

while 'control' is a versatile term. The latter covers the former, but it also covers situations which are not 'occupation' in the technical sense. Thus the language of 'occupation' seems to have been deliberately chosen to give the false impression that what was at stake is the freedom of a state to defend itself against invasion. Apparently, this 'negotiation tactic' was successful in rallying support to the proposed amendment as well as in deflecting attention from its side effects. Moreover, it left in doubt the demarcation line between the national territory remaining under the control of the national government, and the national territory belonging to a Party to the conflict but under the control of the adverse Party.

5. The Concept of Control

The Working Group of Committee III noted in its report that the term 'control' in paragraph 2 of Article 49 and paragraph 5 of Article 54 of Protocol I refers to areas of de facto control. In paragraph 2 it is the area under control of the occupying power, and in paragraph 5 it is the area of national territory remaining under the de facto control of the lawful sovereign.[1]

But what does de facto control mean? As Professor Stone noted, actual control of enemy territory may range in numerous degrees from the mere ephemeral passage of military forces

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1. Report to the Third Committee on the Work of the Working Group, Comm. III, 28 April, 1977, (CDDH/III/369), in Levie, Vol. 3, p. 104.

over a sullen but intimdated land and its people, through stable control, barely distinguishable pro tempore from that of a sovereign government, to permanent sovereign control thereof.[1]

Such graduation has traditionally been made in order to fix the point at which the law of belligerent occupation applies de plein droit. The traditional view in this respect is that control is either stable enough to constitute belligerent occupation, or it is not, leaving the occupant subject to the ordinary rules of warfare.[2] Thus, the traditional view distinguishes between invasion and occupation and subjects them to different sets of rules mutually excluding each other. Accordingly, until invasion has reached the stage of proper occupation, that is to say, until the invader has secured actual control of invaded territory, he is not subject to the law of occupation, but he is subject only to the less severe restraints of the law governing the active conduct of military operations or hostilities as called for in the Hague Regulations and in Protocol I additional to the Geneva Conventions of 1949. In land warfare, the rules governing hostilities consist mainly, but not exclusively, of; Section III of the Regulations annexed to the Fourth Hague Convention of 1907, Part II of the Fourth Geneva Convention of 1949, and Parts 3 and 4 of Protocol I additional to the Geneva Conventions of 1949.

It may be noted here that despite the importance which

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1. See Julius Stone, Legal Controls of International Conflict, 1959, p. 694, note 4.
2. See Stone, loc. cit., Schwarzenberger, International Law, as applied by the International Courts and Tribunals, Vol. 2, 1969, p. 176, and pp. 321-324.

traditionalists usually attach to the rule of 'effective control of the invaded territory',[1] strict adherence to the rigid concept of effective control as understood or expressed by traditionalists leaves the civilian population at the mercy of the invader who, although he is in effective control, may choose not to place the controlled territory under his authority pending the outcome of the conflict.

If in such a case only the harsher law of hostilities is held applicable but not the comparatively less severe law of occupation, as the traditional view seems to imply, the very purpose of the law of occupation would be easily thwarted. As Schwarzenberger observed,

> "Far from offering adequate protection, application of the laws of war stricto sensu to the occupied territory at large might become a convenient cloak for pursuing a policy of vindictiveness in the guise of legal rectitude."[2]

To deprive the invader of such a convenient cloak, and in any case to mitigate the plight of the population of invaded territories, different concepts of de facto control emerged in addition to some policy recommendations. Three concepts of de facto control and one policy recommendation at least may be singled out.

It may be worthwhile mentioning that we are not concerned here with 'kinds of military occupation' or with a

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1. Schwarzenberger, ibid., pp. 325-348.
2. Ibid., pp. 177-178.

typology thereof,[1] but rather with the different manifestations of de facto control for the purposes of Articles 49 and 54 of Protocol I. The continuum of these manifestations ranges factually,and one may even say, legally, "from initial attack to a fully functioning occupation government."[2]

Within this range, however, it is customary to distinguish invasion from belligerent occupation. Articles 42 and 43 of the Regulations annexed to the Fourth Hague Convention of 1907 have been usually taken as the basis of such a distinction. Article 42 states:

> "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

Article 43 states:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

The first sentence of Article 42 bears some

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1. William G. Downy, jr., "Revision of the Rules of Warfare, 1949, Proceedings of A.S.I.L., p.103, beside belligerent occupation, mentions 'hostile occupation','pacific occupation' and 'peaceful occupation'. Schwarzenberger, International Law, Vol. 2, pp. 317 - 321.
2. McDougal and Feliciano, Law and Minimum World Public Order, 1967, p. 734.

elaboration as it deals with the crucial question, "When is a territory considered occupied?" To answer the question, it has been customary to distinguish between invasion on the one hand, and belligerent or hostile occupation on the other hand. Thus, according to Oppenheim and Lauterpact,

> "it is certain that mere invasion is not occupation. Invasion is the marching or riding of troops - or the flying of military aircraft - into enemy country. Occupation is invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent from the fact that an occupant sets up some kind of administration, whereas the mere invader does not."[1]

Oppenheim and Lauterpacht seem to require a degree of control and an administration which, comparatively, appears to be less than what other authorities had demanded as the following passage illustrates.

> "The troops march into a district, and the moment they get into a village or town - unless they are actually fighting their way - they take possession of the municipal offices, the police station, the post office, and the like, and assert their authority there. From the military point of view, such villages and towns are then 'occupied'."[2]

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1. Oppenheim - Lauterpacht, International Law, Vol. 2, 7th ed., 7th impression, 1969, p. 434.
2. Ibid., p. 434.

From a military point of view, this is undoubtedly a correct view. In military practice, such facts are usually sufficient upon which to declare the 'capture' of a certain locality, but this does not necessarily mean that the locality has become ipso facto under the government of the law of occupation with all its attendant rights and duties. What in military usuage may factually be described as 'occupation' may, in the ruling circumstances, amount to no more than a successful phase of a military operation. In such a case, the alleged occupant is merely an invader, notwithstanding his physical control, his proclamation of occupation (if any has been made), or his administration (if any has been set up).

It is true, as it has always been maintained, that occupation is a question of fact and as such leaves ample room for varied appreciation, but it is clear at least that a mere proclamation that occupation has taken place does not suffice.[1] As Professor Stone states:

> "Whether belligerent occupation has been established depends not on the will of the belligerent, but on whether his actual control satisfies the standards of range and stability laid down by international law.If it does not, he is a mere invader enjoying comparatively narrow legal authority. If it does, international law attributes to him legal powers which'merely'as a 'belligerent' he does not have,

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1. Julius Stone, Legal Controls of International Conflict, p. 696. McDougal and Feliciano, p. 752.

touching almost all aspects of the government of the territory and the lives of its inhabitants."[1]

The standards of range and stability, or effectiveness of occupation, or, for that matter, the distinction between 'invasion in progress' and an 'occupation accomplished' has probably nowhere been more ably laid down than in the 'Hostages Case' decided by the United States Military Tribunal at Nuremberg on February 19th, 1948.

The judgement read in part:

> "The question of criminality in many cases may well hinge on whether an invasion was in progress or an occupation accomplished. Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order."[2]

"These findings", said the Tribunal, "are consistent with Article 42 of the Hague Regulations of 1907."[3]

Opinions of writers,[4] 'mutatis mutandis', as well as the United States Army Field Manual (1956),[5] seem to have

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1. Stone, ibid, p. 694.
2. From the 'Hostages Case', as quoted in Whiteman, Digest, Vol. 10, p. 543.
3. Ibid, p.544.
4. See Stone, ibid, pp. 695-97, Schwarzenberger, ibid, p. 176, pp. 321-24, McDougal and Feliciano, pp. 732-35.
5. See U.S. Army Field Manual, para. 352, 355-357, cited in Whiteman, Digest, Vol. 10, p. 540-41.

adopted the view of the Nuremberg Tribunal. Thus, according to the United States Military Manual (1956), an invader may attack with naval or air forces or its troops may push rapidly through a large portion of enemy territory without establishing that effective control which is essential to the status of occupation. Small raiding parties or flying columns, reconnaisance detatchments or patrols moving through an area connot be said to occupy it. Occupation on the other hand, is invasion plus taking firm possession of enemy territory for the purpose of holding it.[1] It presupposes a hostile invasion, resisted or unresisted,[2] as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and has successfully substituted its own authority for that of the legitimate government in the territory invaded.[3]

Accordingly, it seems only logical to state, as did the second paragraph of Article 42 of the Hague Regulations of 1907, that the occupation extends only to the territory where such authority has been established and can be exercised.

In summary of the above exposition of the traditional law on the question of 'control', or effectiveness of occupation, it appears that two conditions have generally been required first: that the organized local

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1. Ibid, para. 352, in Whiteman, Digest, Vol. 10, p. 540-41.
2. See para. 2 of Article 2, Common to the four Geneva Conventions.
3. See Whiteman, Digest, Vol. 10, p. 540-41.

resistance must have been overcome, and, second, that the invader in possession (i.e. in de facto control) of enemy territory must have established an administration in the territory under his control to preserve law and order in accordance with Article 43 of the Hague Regulations of 1907 on land warfare. A third but rather implicitly stated condition, is that hostilities must have been brought to an end, either generally and formally (as in the Capitulation Treaties during the two World Wars and the general but 'unlimited' ceasefire in the Arab - Israeli conflict in 1967 and 1973), or locally and informally as, for instance, when actual fighting dies out in a region or district.

It should be noted that as long as the active hostilities continue, it would be difficult, and to some writers, it is 'rarely practicable', to point to any particular degree of control as marking a precise dividing line between invasion and occupation.[1]

Thus according to McDougal and Feliciano, however effective the occupant's control may be within the occupied territory, such control may nonetheless remain precarious and tentative when viewed in relation to the over-all conduct of the war. Outside the captured territory, they argue, hostilities may continue to be waged by the forces of the Party to the conflict whose territory was occupied or by those of its allies who may yet succeed, in the protracted course of hostilities, in liberating the territory held by the occupant. In this sense, belligerent occupation represents a phase or incident of a continuing sequence of

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1. McDougal and Feliciano, Law and Minimum World Public Order, p. 734.

hostilities of combat.[1]

Accordingly, McDougal and Feliciano state that it is commonly more accurate to speak of a gradual acquisition and solidification of control by one belligerent and of the gradual settling of the corresponding expectations on the part of the inhabitants; the continuum ranges from initial attack to a fully functioning occupation government. In their view, "this condition of precariousness is resolved, and expectations about final and permanent authority become fixed, one way or the other, upon the general termination of hostilities."[2]

On a factual level of analysis, McDougal and Feliciano's emphasis upon the character of belligerent occupation as a stage that follows successful combat operations in a continuing process of coercion may be justified in the light of experience of the two World Wars.

On the legal level, however, it neither finds support in the jurisprudence of the Nuremberg Tribunals nor in the Fourth Geneva Convention of 1949, relative to the protection of civilians in time of war. Besides, the gradual acquisition and solidification of control by a belligerent does not necessarily correspond to, or result in, a gradual settling of the expectations on the part of the inhabitants of occupied territories. Thus, in all the countries occupied by Germany during the Second World War, the inhabitants set up

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1. Ibid., p. 734-35.
2. Ibid., p. 735.

their 'resistance movements' despite firm control on the part of the occupant and even the formal capitulation or surrender on the part of some governments of the occupied countries. Similarly, the firm'control' by Israel of the territories it occupied as a result of the 1967 Arab - Israeli War, and the formal acceptance of a general cessation of hostilities (by Egypt, Syria, and Jordan on one side, and by Israel on the other side), and even the failure of the Arabs in the 1973 war to restore their occupied territories, have not yet resulted in settling the expectations of the inhabitants.

Thus,to include in the effectiveness of occupation the element of expectations on the part of the inhabitants is tantamount to a suspension of the application of the Fourth Geneva Convention relative to the protection of civilians in armed conflicts of international character until the precariousness of the military accupation is solved.

Indeed, McDougal and Feliciano did not insist on this logical conclusion. Their view which, however, does not seem to have been expressed in their main discussion of belligerent occupation, is as follows:

> "In this time period, after successful invasion but before final victory, the expectations of all parties about future permanent authority in the area are obscure; but some temporary authority must be conceded, and the inhabitants, for whom life must go on, present against the occupant counter-demands for continuity

and minimum dislocation of their value processes."[1]

Thus, McDougal and Feliciano remained, in the main, within the ambit of the traditional theory.

So far, we have examined two theories about 'de facto control'; one was that of Oppenheim and Lauterpacht, the other was the traditional theory. It seems, however, that both these theories do not take sufficient account of the Fourth Geneva Convention of 1949, relative to the protection of civilians. Even Oppenheim and Lauterpacht, whose view as cited above comes very close to the requirements of the Fourth Geneva Convention and who therefore criticise the definition of occupation as enshrined in Article 42 of the Hague Regulations of 1907 on land warfare, as being "not at all precise", seem to have moved backwards as they added, that Article 42 "is as precise as a legal definition of a fact such as occupation can be."[2]

On the 'beginning' of the application of the Fourth (civilian) Geneva Convention, the first paragraph of Article 6 states that:

"The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2."

It is perhaps obvious from what has been said above, that modern writers continued to interpret the word 'occupation' in this paragraph of Article 6 in terms of Article 42 of the Hague Regulations of 1907. But the ICRC

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1. Ibid., p.82.
2. Oppenheim - Lauterpacht, Vol. 2, 7th ed., 7th impression 1969, p. 435.

Commentary makes it absolutely clear that:

> "By using the words 'from the beginning' the authors of the Convention wished to show that it became applicable as soon as the first acts of violence were committed, even if the armed struggle did not continue. Nor is it necessary for there to have been many victims. Mere frontier incidents may make the Convention applicable, for they may be the beginning of a more widespread conflict. The Convention should be applied as soon as troops are in foreign territory and in contact with the civilian population there."[1]

Even more articulate is the following comparison between Article 42 of the Hague Regulations of 1907, and Article 6 of the Fourth Geneva Convention of 1949. As the ICRC Commentary on Article 6 puts it;

> "The word 'occupation', as used in the Article, has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existance of a state of occupation within the meaning of Article 42 referred to above. The relations between the civilian population of a territory and troops advancing in that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation."[2]

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1. ICRC Commentary 4, p.59.
2. Ibid., p. 60.

Article 3 of Protocol I additional to the Geneva Convention of 1949 reaffirms the ICRC interpretation. It states in part:

> "Without prejudice to the provisions which are applicable at all times:
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> (a) The Conventions and this Protocol shall apply from the beginning of any situation referred to in Article I of this Protocol;"
>
> (b).....

To complete the spectrum, it seems worth mentioning that the United States Army Field Manual (1956) appears to have adopted a reconciliatory attitude between Article 6 of the Fourth Geneva Convention as interpreted by the authors of the ICRC Commentary, on one hand, and the traditional theory on the other hand. It provides that the rules of the law of occupation "apply of their own force only to belligerently occupied areas, but they should, as a matter of policy, be observed as far as possible in areas through which troops are passing and even on the battle field."[1]

Having reviewed the different conceptions and the varying degrees of 'control', we revert now to the original question: what does the term 'control' mean in paragraph 2 of Article 49 and paragraph 5 of Article 54 of Protocol I?

Obviously it is not helpful at all to say as did the Report to the Third Committee on the work of the Working

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1. U.S. Army Field Manual 1956, Section 352, (b), cited in Whiteman, Digest, Vol. 10, p. 541.

Group that the term 'control' in these paragraphs means de facto contol.[1] On the other hand, it seems certain that the best from the point of view of the protection of the civilian population to consider the mere presence of enemy military objectives on the national territory of a Party to the conflict as sufficient for the application of the provisions of Protocol I with respect to attacks. But it is unlikely that the government or the authority of the invaded territory would consider this as sufficient, given the obsession of governments with the defense of national territory against invasion. Moreover the Report to the Third Committee on the work of the Working Group speaks of "territory under the control of the Occupying Power", and of "territory remaining under the control of the lawful sovereign" - which suggests a certain degree of control or occupation in a legal, or at least in a military sense.

The difficulty with the concept of 'control' or occupation in the sense of Article 42 of the Hague Regulations of 1907, and control or occupation in a military sense is the former requires a stable degree of control which can be ascertained only when the fighting has abated and the hopes of recovering the 'lost' territory have waned - at least temporarily, while the latter (i.e. control in the military sense) is open to abuse in propaganda warfare. Both Parties to the conflict are usually too quick to declare military victories and too slow to admit defeats as long

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1. See the first paragraph of this section.

as military operations continue. Control is thus a subjective criterion incapable of objective appreciation. This is probably why, agreement on paragraph 2 of Article 49, and paragraph 5 of Article 54 of Protocol I has been reached fairly quickly.

One point, however, seems to be certain; that each Party to the conflict would be bound by the provisions of the Protocol with respect to attacks carried out in the territory under the control of the adverse Party. The Party to the conflict whose national territory is in part or in whole under the control of the adversary is required by paragraph 2 of Article 49 to treat its own civilian population in occupied territory in accordance with the Protocol's provisions with respect to attacks, notwithstanding the fact that they are nationals of the attacking party.

On the other hand, in the national territory of a Party to the conflict which has not, or not yet, come under the control of the adversary, it seems difficult to say with any certainity, whether the civilian population is protected by the Protocol's provisions with respect to attacks carried out by the Party to the conflict of which they are nationals.

In view of the experience of the 'free-fire-zone' pratices in Vietnam and of the obsession of governments with the defense of national territory against invasion, the risk to which the civilian population is exposed can hardly be exaggerated. In the rest of this section an attempt will be made to interpret paragraph 2 of Article 49, and paragraph 5 of Article 54, of Protocol I, in such a manner that brings the civilian population under the protection of the Protocol's

provisions with respect to attacks, regardless of control or nationality.

In this respect, it should be noted first that traditional international law did not impose any restrictions on attacks carried out by a Party to the conflict within its national territory whether or not it was under the control of an adverse Party. Accordingly, in so far as paragraph 2 of Article 49 extends the field of application of the Protocol's provisions with respect to attacks, to a Party's own attacks within its national territory it must be considered a progressive development, however that paragraph is interpreted. This progressive development was made possible thanks to the international character of wars of national liberation. For without paragraph 2 of Article 49 it would be possible to argue that liberation movements would not be bound by the Protocol's provisions with respect to attacks carried out by the national liberation movement in its national territory which is 'under the control of the adverse Party', while the enemies of national liberation movement would be bound by these provisions in their military operation. Thus, theoretically at least, there would have been situations in which only one Party to the conflict would be bound by the Protocol's provisions with respect to attacks. In order to redress this seeming imbalanced situation, paragraph 2 of Article 49 was devised. This may explain the statement in the Report of the Working Group of Committee III that:

> "The overwhelming view in the Working Group, however, was that a regime of reciprocity must prevail and that it could not be expected that restrains on attacks would

be effective if they did not bind both sides."[1]

This argument carries even more weight in cases of civil wars notwithstanding whether the armed conflict was characterized as one of international or non-international character.

Another argument may be found in the speech of Mr. Schutte of the Netherlands who introduced the joint amendment sponsored by the delegations of the Netherlands, the United Kingdom, and the United States of America, which ultimately became paragraph 2 of Article 49 and paragraph 5 of Article 54 of Protocol I, although this argument seems to contradict other statements in the same speech. Mr. Schute said that:

> "the sponsors thought it useful to codify what had emerged from the discussions held in the Working Group, namely that any Party to a conflict that attacked military objectives situated in parts of its own territory which were subject to enemy occupation, or in part of a combat zone, should be bound to respect the provisions and prohibitions contained in Articles 46 to 51 of Draft Protocol I (Articles 51 to 58 of Protocol I).
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> Draft Protocol I spoke of "the civilian population" without drawing a distinction between "enemy civilian population" and the "own civilian population of the party concerned. The civilian population as such was entitled to protection, and in that respect might be considered as neutral."[2]

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1. Report to the Third Committee on the Work of the Working Group, Committee III, 28 April, 1977, Doc. CDDH/III/369.
2. CDDH/III/SR.37, para. 59, 60.

If this was truely the intention of the Working Group of Committee III, then on the strength of the phrase "or in part of a combat zone" one may put the emphasis on the first part of paragraph 2, namely on the statement that "The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted." And since attacks are by definition "acts of violence against the adversary, whether in offence or defence", it may be argued that the mere presence of the adversary proclaims its 'de facto control', and therefore, the rest of paragraph 2 of Article 49 does not imply an exclusion of the national territory which is not, or not yet, under the control of the adverse Party.

This may be fortified by another argument inferred from the text of Article 49, paragraph 3, which states that the provisions of the Protocol with respect to attacks "are additional to the rules concerning humanitarian protection contained in the Fourth Geneva Convention, particularly in Part II thereof." This suggests that the field of application of the Protocol's provisions with respect to attacks should not be less than that of Part II of the Fourth Geneva Convention of 1949. Article 13 of the Fourth Geneva Convention defined the field of application of Part II in the following terms:

> "The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war."

The ICRC Commentary on this provision, inter alia, reads as follows:

> "Military operations nowadays - particularly bombing from the air - threatens the whole population. Consequently the provisions in Part II are as general and extensive in scope as possible: Article 13, independently of the rest of the Convention, defines the field of application of Part II, by specifying that it covers the whole of the populations of the countries in conflict. The provisions in Part II therefore apply not only to protected persons, i.e., to enemy or other aliens and to neutrals, as defined in Article 4 but also to the belligerents own nationals; it is that which makes these provisions exceptional in character: the mere fact of a person residing in a territory belonging to or occupied by a Party to the conflict, is sufficient to make Part II of the Convention applicable to him."[1]

Since the provisions of the Protocol with respect to attacks are additional to the provisions of Part II of the Fourth Geneva Convention, it necessarily follows that the field of application of the Protocol's provisions with respect to attacks is equally as general and extensive as that of Part II of the Fourth Geneva Convention.

But while the above mentioned arguments may remove the danger posed by the analysis of paragraph 2 of Article 49 of Protocol I in terms of inclusion and exclusion depending on the meaning one attaches to the term 'control', they do not remove the dangers posed by paragraph 5 of Article 54 of Protocol I. As noted above, this paragraph allows a Party to the conflict

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1. Pictet (ed.), Commentary on the Fourth Geneva Convention of 1949, (1958), p. 118.

to derogate from the prohibitions to "attack, destroy, remove or render useless objects indispensible to the survival of the civilian population." In other words, it permits a Party to the conflict to conduct a scorched earth policy in the part of its national territory which is still under its control. This 'right' as the paragraph says, is permitted in recognition of the vital requirements of a Party to the conflict in the defence of its national territory against invasion.

In order to remove the dangers of paragraph 5 of Article 54 in cases of non-interstate armed conflicts of international character, it may be that the best way is to insist on a restrictive interpretation of the term 'invasion' and thus confine it to the case where armed forces of a state invade another state. Any other use of the term, e.g. as referring to the so-called indirect aggression or intervention by proxy should be dismissed as an abuse of terminology.

Nevertheless, it seems difficult to escape the conclusion that the term 'control' in paragraph 2 of Article 49 and paragraph 5 of Article 54 of Protocol I may have disastrous consequences to the legal protection of civilians and civilian objects in the context of non-interstate armed conflicts of international character. In the case of interstate armed conflicts, their effects are merely theoretical since it has never been proved that the conduct of a scorched earth policy in defence of national territory against invasion is a viable policy, and it is unlikely that any state would resort to it.

On the other hand, it may be that paragraph 2 of Article 49, although formulated in general terms, was actually intended to make it clear that the provisions of the Protocol with

respect to attacks are binding on all Parties to the conflict and are intended to protect the civilian population and civilian objects against all attacks, wherever conducted, and without distinction between "one's own civilian population" and the "enemy's civilian population". If this proved to be the case, the purpose of the discussion in this chapter would still be fulfilled, for as noted at the beginning of this discussion, the purpose was merely to warn against, not to condone, certain possible consequences of the use of the term 'attacks' and 'control' in Article 49, paragraphs 1 and 2, and Article 54, paragraph 5, of Protcol I.

6. Exclusion of Civilians and Civilian Objects at Sea and in the Air

One of the burning questions at the Diplomatic Conference was whether Protocol I additional to the Geneva Conventions of 1949 should protect civilians and civilian objects on land, at sea and in the air, or whether it should be less extensive.

The text proposed by the ICRC in this respect was paragraph 1 of draft Article 44 which read as follows:

> "The provisions contained in the present Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians and civilian objects on land."[1]

The section refered to here is Section I of Part 4 of Protocol I entitled "General Protection Against Effects of Hostilities".

In its Commentary on the text of paragraph I of draft Article 44, the ICRC explained that the obligations contained in this Section are binding on members of armed forces on land, at sea or in the air. The Commentary recalled that Section I of Part III of Protocol I, entitled "Methods and Means of Combat", which refers mainly to the behaviour of combatants towards each other, extends its scope to military operations as a whole carried out within the general framework of land, air or sea warfare. In the view point of the ICRC, the same cannot be said of the present Section, the scope of which has been circumscribed. The phrase, "which

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1. ICRC - Draft Additional Protocols - Commentary, 1973, p. 54.

may affect the civilian population... on land", meant that only military operations liable to cause effects on land are the objects of this section; as these operations could obviously be directed from the air or the sea as well as from points on land, it was necessary to qualify them accordingly.[1]

This restrictive approach did not seem satisfactory to many delegates. For example, Mr. Rezek (Brazil) said that the members of his delegation had devoted special attention in their preparatory studies to the words "on land" in draft Article 44, paragraph 1. They had felt that such restrictive terms should be based on specific reasons, possibly linked to the consideration of the rules of the law of the sea. He thought that it would be useful to have some enlightenment on that subject from the experts of theICRC.[2]

The ICRC representative seems to have been embarrassed by that request. He explained that neither the text of 1971 nor that of 1972 had contained the words 'on land' which, he said , had been added at the explicit request of some delegations at the first and second sessions of the Conference of Government Experts, so as not to interfere with any of the provisions of the law of the sea.[3] Thus, the ICRC representative evaded a direct answer, leaving it to the proponents of retaining the words 'on land' to defend their case.

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1. Loc. cit.
2. CDDH/III/SR.2, para. 24.
3. CDDH/III/SR.2, para. 25.

With all fairness, it may be said that most of the arguments adduced to justify the exclusion of civilians and civilian objects at sea and in the air from the field of application of Protocol I, do not seem convincing. The delegation of the U.S.A., for instance, argued that the ICRC had been correct in inserting the limitation 'on land' since the vast majority of civilians were in fact on land. They added that, although the Article applied to attacks on land from the sea or the air, the law of sea warfare was too complex to be dealt with at the Conference. Deletion of the words 'on land' , they argued, might inadvertently modify the law of the sea.[1]

Sir David Hughes-Morgan (United Kingdom) agreed with the views put forward by the United States representative against deleting the words 'on land', "since to do so would be likely to cause confusion." Draft Protocol I, he said, was to amplify the Geneva Conventions and the Hague Law and not to modify international law with regard to warfare at sea.[2] On another occasion he pointed out the obvious; that the *deletion of the words 'on land' from Article 44*, paragraph 1, would have the same effect as the insertion of the words "..., sea or air", namely, the application of Section 1 of Part 4 of Protocol I to all warfare, on land, at sea or in the air.[3] Substantive arguments of varying relevancy, however, were adduced. Customary law for the

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1. CDDH/III/SR.2, para. 26.
2. CDDH/III/SR.2, para. 28.
3. CDDH/III/SR.3, para. 14.

protection of civilians and civilian ships in the case of warfare at sea, it was argued, differed greatly from that proposed in the draft Protocol. Under both bodies of law, civilians included crews and passengers in merchant ships and non-combatant passengers in warships, although the protection granted to them must obviously differ from one category to another.[1]

The case of armed merchant ships and the circumstances under which a submarine or other warship may sink a merchant vessel, with or without warning, and with or without removing the crew and passengers, were also cited as points of difference between the protection afforded civilians and civilian objects at sea under customary law, "and the more comprehensive protection which was proposed to grant to civilian objects under Protocol I."[2]

The rules of sea warfare, the British delegate admitted, "perhaps needed to be codified or possibly changed, but a great deal of preparatory work would first be required to resolve the contradictions he had mentioned."[3]

"Air warfare", said the British delegate, "was an even more difficult subject, because the rules relating to it were in many respects uncertain. It might be desirable for those rules also to be codified and expanded, but that again was a matter for extensive study", he said.[4]

Lastly, the British delegate pointed out that the

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1. CDDH/III/SR.3, para. 15.
2. CDDH/III/SR.3, para. 16-18.
3. CDDH/III/SR.3, para. 18.
4. CDDH/III/SR.3, para. 19.

qualified experts who had lengthy discussions with a view to establishing a clear set of rules for the guidance of those who had to engage in warfare had not taken the existing laws of sea or air warfare into account. Accordingly, he concluded that any attempt to make draft Protocol I apply to such warfare would weaken the efforts which had been made to give a clear lead in the field of humanitarian law.[1]

Obviously this is not the case, for if deletion of the words 'on land' would not have resulted in affording more favourable protection to civilians and civilian objects at sea and in the air, it certainly would not have resulted in deteriorating it. Moreover, there is every reason to suggest that by deleting the words 'on land', and hence by implication extending the protection of Protocol I to civilians and civilian objects at sea and in the air, that protection would have been considerably strengthened.

It is not understood for instance, how t e prohibition to destroy an enemy merchant vessel or render her incapable of navigation without first having provided for the safety of passengers and crew as required by Article 22 of the London Naval Treaty of 1930 could be weakened by a prohibition to make civilians and civilian objects at sea and in the air the object of attack or reprisals.

Similarly, if, as the United States Law of Naval Warfare of 1959 states, "it is difficult to estimate the

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1. CDDH/III/SR.3, para. 20.

the extent to which the obligations embodied in the London Protocol of 1936 have been considered by belligerents as applicable, by analogy, to the treatment of non-military enemy aircraft", and if "in the absence of any clearly established practice to the contrary, it may be assumed that the obligations laid down in the London Protocol of 1936 have not been considered mandatory in the case of (non-military) enemy aircraft",[1] it is not understood how this legal vacuum serves better the interests of humanity.

It is no new thought, indeed it is well documented, that "during World Wars I and II the belligerent practice of attacking and sinking enemy merchant vessels without warning (or only with the most peremptory warning), and without having first provided for the safety of passengers and crew, was widespread."[2] At best, enemy non-military aircraft received no better treatment than enemy merchant vessels.[3]

In view of such practice, and of the fact that the validity of customary and conventional law of warfare at sea and in the air (to my knowledge) has not explicitly been reaffirmed since the close of Trials of Major War Criminals following the Second World War, deletion of the words 'on land' would have been a step in the right direction pending a revision of that body of law governing warfare at sea and

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1. See Whiteman, Digest, Vol. 10, pp. 644-645.
2. Ibid., p.645.
3. Loc. cit. On Naval Measures against Enemy Merchant Vessels, Aircraft and Personnel, see Whiteman, Vol. 10 pp. 644-649. On submarine Warfare on Merchant Ships, ibid., p.650 et seq.

in the air. A resolution by the Conference to that effect without deleting the words 'on land' from draft Article 44 (I) could be a significant contribution.

However, it may be inferred from the discussion of draft Article 44 (I) in Committee III, that the customary and conventional law of armed conflict at sea and in the air is still valid notwithstanding its violation in the Second World War. The Report of Committee III, First Session, with regard to paragraph 1 of draft Article 44, states in part:

> "Several delegations spoke in favour of deleting the words 'on land' so that the protection under section I of part 4 of draft Protocol I would be as broad as possible, embracing the protection of the civilian population, individual civilians, and civilian objects at sea and in the air. Other delegations supported the retention of the words 'on land' in order to exclude the application of the Protocol to attacks on merchant ships and on civil aircraft, which they asserted to be covered by other bodies of law, such as the law of blockade and of visit and search."[1]

The Report of the Working Group of Committee III is even more explicit about the attitude of delegates who wished the term 'on land' to be deleted.

> "These delegates would prefer to have this section of the Protocol affect the law applicable to the conduct of warfare at sea or in the air to the extent that

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1. Report of Committee 3, First Session, doc. CDDH/50/Rev.1 in Levie, Vol. 3, p. 91.

the provisions of this Section would be more favourable to civilians than the existing law."[1]

It may be useful to note that the existing law regarding warfare at sea and in the air allows a great measure of discretion, - a privilege which the super-powers appear extremely reluctant to compromise in favour of a better protection of civilians and civilian objects at sea and in the air. The belief in some western circles, particularly among United States and armchair strategists, in the possibility of conventional and limited nuclear warfare in a confrontation with the Soviet Union (a belief, mistaken as it is, but maintained thanks to being untested and which hopefully will never be tested) may not pass without leaving its marks on the structure of the law.

It is not surprising, therefore, that the main opposition to the deletion of the words 'on land' came from delegates of the United States, the United Kingdom, Belgium, West Germany, Finland and Sweden, to mention but some.

The Soviet delegation, in the first three meetings of Committee III, would only "reserve its position on proposed amendments until they had been presented in writing." In the fourth meeting, the Soviet delegation stated that ICRC draft Article 44, paragraph 1, was satisfactory. But if the majority of the Committee wished the term 'attacks on land' to be defined, some explanations might be added at the end of

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1. Report to the Third Commision on the Work of the Working Group, Committee 3, 27th February, 1975.

the paragraph.[1]

Thus, the general discussions in Committee III showed that it was almost impossible to go beyond the ICRC text which was finally adopted with further clarifications. The final text, that is, Article 49, paragraph 3, reads as follows:

> 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 conflicts at sea or in the air.

It is important to note that, although this paragraph was adopted by a vast majority in Committee III, it represents the lowest common denominator. As the Report of the Working Group to Committee III explains, the Working Group was unanimously of the view that Protocol I should at least cover military operations on land and military operations from the sea and air against persons and objects on land (notably in the form of bombardment) which affect civilians on land.[2]

Beyond that there was disagreement.

Delegations were of differing views whether Section I

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1. See CDDH/III/SR.2, para. 19 and CDDH/IIISR.4, para. 43.
2. Doc. CDDH/III/78/Add.1, reproduced in Levie, Vol. 3, pp. 88-91.

of Part 4 of Protocol I should be applicable to operations at sea (e.g. blockade, sinking of merchant ships etc.) which affect civilians at sea (such as crews and passengers of ships) or on land.[1]

Delegates were also of differing views on whether the Section should be applicable to military operations from land, sea, or air against civilian objects and individual civilians in the air - that is civil aircraft. Operations within planes, such as hijacking, were similarly in issue.[2]

The report of the Working Group did not raise the issue of military operations against merchant ships from land.

Thus, Article 49, paragraph 3, left much to be desired and many problems to be solved. Accordingly, the remarks made by Mr. Cristescu (Romania) after the adoption of the text of Article 49, paragraph 3, by Committee III, but prior to its adoption in Plenary, seem to be correct as a matter of principle. He said that "the words 'on land' like the last phrase of the second sentence of Article 44, paragraph I, (now Article 49, paragraph 3) limited the scope of civilian protection. Accordingly, the titles of the Section and of draft Protocol I should be amended to show that they pertained only to the protection of the civilian population on land. The most important principle laid down by the General Assembly of the United Nations in its

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1. Ibid., p. 89.
2. Ibid., p. 89.

Resolution 2675 (XXV) on "Basic principles for the protection of civilian populations in armed conflicts", was that human rights must always be respected on the basis of equality. Acceptance of the existing wording of Article 44, paragraph 1, would introduce unfair discrimination in the protection of the civilian population, for the deciding factor would be its location at a given moment. The aim was to provide increased protection for the civilian population, not to facilitate military operations or to uphold the rights of belligerents in their actions against civilian populations."

Finally, it should be noted that during the search for agreement on paragraph 3 of Article 49, the Rapporteur of the Working Group of Committee III made an interesting proposal, the final form of which appears in Article 57, paragraph 4. It states that:

> "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 conflicts, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects."

This seems to be the only concession made to those who wished to have Section 1 of Part 4 of Protocol I affect the law applicable to the conduct of warfare at sea or in the air to the extent that the provisions of this Section would be more favourable to civilians than the existing law. How far this concession goes is not clear. One thing however seems to be clear; that the law of blockade has not been affected. If so, then the prohibition of starvation of

civilians, as a method of warfare, must be considered a hollow gesture. It is this aspect of sea warfare which ought to have been made the focus of concern, not the tentative extension of the protection afforded by the Protocol to civilians and civilian objects at sea or in the air, or the obsessions with 'sink at sight' practices of the Second World War.

CHAPTER SEVEN

GENERAL APPRAISAL AND CONCLUSIONS

In an article published in 1952, Professor H. Lauterpacht made a long list of topics in the law of war which needed revision and concluded by saying:

> "In all these matters the lawyer must do his duty regardless of dialectical doubts - though with a feeling of humility springingfrom the knowledge that if international law is, in some ways at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law. He must continue to expound and to elucidate the various aspects of the law of war for the use of armed forces, of governments, and of others. He must do so with determination though without complacency and perhaps not always very hopefully - the only firm hope being that a world may arise in which no such calls will claim his zeal."[1]

Although this is hardly a consolation to the international lawyer or to the combatants and non-combatants which the law of armed conflict is intended to protect against unnecessary suffering, the message, nevertheless, seems clear. The international lawyer must continue to do his duty to expound and to elucidate the various aspects of the law of armed conflict however ineffective that law might be. Moreover as Professor Schwarzenberger observed, to limit a presentation of international law in an unorganized international society to the law of peace would amount to a serious distortion. The effect of such an approach to international law would be to

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1. H. Lauterpacht, The Problem of the Revision of the Law of War, British Year Book of International Law, Vol. 29, 1952, pp. 381 - 82.

give a curiously inflated view of the Rule of Law in international relations. Furthermore, such a mutilation of international law would deprive students of valuable insights that may be gained from pondering over the apparent paradox of the very existence of a law of armed conflicts. Reflections on such lines may lead to a more profound understanding of international law: its functions, the operative factors in moulding and develop: its rules, and the forms of growth of individual rules of customary international law.[1]

Indeed, it is through a serious study of the law of armed conflicts in general, and of non-interstate armed conflicts in particular, that the inconclusiveness of the processes of law-making, law-determination and law-enforcement and their defects become more apparent. For instance, with regard to law-enforcement, Protocol I contains a long part (Part V: Articles 80 to 91) on the "Execution of the (Geneva) Conventions and of this Protocol." Article 90 of the Protocol envisages the establishing of an "International Fact Finding Commission" consisting of fifteen members of "high moral standing and acknowledged impartiality" to enquire into any facts alleged to be grave breaches, and to facilitate, through its good offices the restoration of an attitude of respect for the Geneva Conventions and Protocol I. But it seems gravely doubtful whether such a Commission stands any chance of coming into existence, and, if ever came itno existence, whether it would stand a chance of becoming operative. First of all, the International Fact-Finding Commission may only be set up when

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1. See Schwarzenberger, International Law, Vol. 2 - Armed Conflicts - 1968, pp. 1 - 6, esp. p. 2.

no less than twenty High Contracting Parties have accepted the competence of the Commission without prior 'special agreement' in relation to any other High Contracting Party accepting the same obligation. Henceforth, the Commission would only be competent to enquire into alleged grave breaches or serious violations of the Geneva Conventions if both Parties to the conflict had already recognized the compulsory jurisdiction of the Commission. Failing that, the Commission would only institute an enquiry if all Parties to the conflict agreed to do so. Secondly, even if all these problems were overcome, the findings of the Commission may not be reported publicly, unless all the Parties to the conflict have requested the Commission to do so. All this indicates that governments, not only prefer to keep their dirty linen to themselves, but also prefer to remain their own judges regarding all matters relating to the applicability or non-applicability of the law, its content, and its enforcement. The disastrous consequences of this decentralized 'management' of the law of armed conflict to the protection of combatants and non-combatants can hardly be exaggerated.

The consequences of this 'decentralization' are particularly disastrous in the case of non-interstate armed conflicts, since it is only with regard to these conflicts that the problem of threshold exists, whether the armed conflict was of international or non-international character.

With regard to non-interstate armed conflicts of international character or wars of national liberation in the narrow sense, i.e., 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, as proclaimed in Article 1, paragraph 4, of Protocol I, there is some truth in the statement that the language of this paragraph amounts to a 'built-in inapplicability clause'. For its application would amount to an acknowledgement by the government against which the armed conflict is being waged by the people concerned, that it is 'colonial', 'alien', or 'racist', something which probably no government would admit. But the omission of such 'pejurative' terms would not have facilitated the application of Article 1, paragraph 4, of Protocol I, for the same 'built-in inapplicability clause' would still persist. No government would admit that it is not conducting itself in accordance with the right of peoples to self-determination, or that it does not represent the whole people belonging to the territory of the state, without distinction as to race, creed or colour. Moreover, if not all armed conflicts in which peoples fight for self-determination qualify as armed conflicts of international character, and that the international character is reserved to those armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes, that would be an unjustifiable discrimination between various forms of forcible denial of self-determination.

But even if all these difficulties were overcome there would still remain a major problem emanating from the inconclusiveness of the process of law-making, law-determination, and law-enforcement. Thus if Article 1, paragraph 4, of Protocol I, was a rule of customary international law it would raise the problem of whether a state which objects to a rule from its very inception would be bound by a 'new' rule. On the other

hand, if Article 1, paragraph 4, of Protocol I, was merely an interpretation of the present Article 2 common the the four Geneva Conventions of 1949, it would still raise the problem of who is competent to give an authorative interpretation and whether such an interpretation would be binding on a dissenting state.

In an organized international society capable of enforcing its decisions, all such problems would have been solved in due legal processes. But in an unorganized international society, international law deteriorates into a sort of partisan politics, and nothimg short of the voluntary acceptance of majority decisions by the individual states concerned would bring the law into fruition. Accordingly, without prejudice to the discussion of wars of national liberation in Chapter Three of this thesis, it may be concluded that the Diplomatic Conference of Geneva (1974-1977), and the United Nations itself, have failed to provide definite solutions to all questions which may be raised in theory or in pratice, regarding the application of international humanitarian law to non-interstate armed conflicts of international character. This, however, does not suggest that the 'colonial' or 'alien' or 'racist' government would in any way be justified in denying the applicability of internat-ional humanitarian law in its entirety to wars of national liberation.

The same analysis also leads to the conclusion that the Diplomatic Conferences of 1949 and 1974-77 have failed to provide satisfactory solutions to the problems of the application of international humanitarian law in armed conflicts considered to be of a non-international character, discussed in Chapters One and Two. The deplorable high 'threshold' of Protocol II as

laid down in Article 1 of the Protocol, and the deplorable amputation of 'substantive' rules from the draft Protocol as adopted at Committee level, will remain a stigma on the forehead of the Diplomatic Conference for a long time to come. The draft Protocol proposed by the International Committee of the Red Cross was certainly a better solution, and better still, from this writer's point of view, is the abolition of the distinction between armed conflicts of international character and armed conflicts of a non-international character.

Protocol II, discussed in Chapter Two of this thesis, is a disservice to all peoples involved in non-interstate armed conflict. It is a disservice to wars of national liberation (however defined), because the authorities against which such wars are waged tend to characterize them as armed conflicts of non-international character. The ICRC realized this fact and therefore drafted a Protocol with a relatively low 'threshold' in order to cover almost all sorts of non-interstate armed conflicts, irrespective of the intensity of the armed conflict, of its duration, and of the success of the insurgents in controlling a part of the national territory. But this solution was not to the taste of the vast majority of delegations of all ideological persuasions, who did not seem to distinguish between the adoption of a resolution at the United Nations General Assembly and the making of effective laws. This, however, does not suggest that wars of national liberation ought to have been treated as armed conflicts of non-international character; it only confirms my suggestion that the distinction between international and non-international armed conflicts ought to have been abolished. Indeed, the international

characterization of wars of national liberation is a step in the right direction.

Protocol II is also a disservice to armed conflicts of a non-international character because its high 'threshold' means that no law governs the conduct of hostilities until the conditions of Article 1 of the Protocol have been fulfilled. This is lawlessness in the name of the law and vindictiveness in the guise of legal rectitude. As far as the protection of civilians and civilian objects is concerned, which is what Protocol II is all about, the very existence of a problem of threshold contradicts with the very essence of the law of armed conflict and with the International Covenants on Human Rights. The law of armed conflicts, as far as the conduct of hostilites is concerned, is the law of military operations. It is generally recognized that military necessity has been taken into consideration in the formulation of rules governing the conduct of hostilities. In other words, the law of armed conflicts does not admit of any military necessity beyond its rules. To suggest that there are miltary operations which are not governed by the law of armed conflict until the insurgents have controlled a part of the national territory, is tantamount to saying that the unrestrained application of force is a privilege of governments and is in the interest of the people in whose name that force was applied to quell rebellion, which is nonsense.

The problem of threshold should vanish from the law of armed conflict and be replaced by the concept of 'public emergency', if it were to be consistent with the International Covenants on Human Rights. Staes may derogate from their obligations under these Covenants only in case of public emergency threatening the

life of the nations and the existence of which is officially proclaimed. Even then, the derogation is allowed only to the extent strictly required by the exigencies of the situation, which cannot conceivably exceed those allowed by the law of armed conflict. It is very significant that the law of armed conflict is now called the "international humanitarian law applicable in armed conflict." The significance of this name is that the law of armed conflict is but an international law of human rights, and it is of absolute importance that the two regimes of human rights be harmonized. Abolition of the distinction between international and non-international armed conflicts, at least as far as the protection of non-combatants is concerned, is thus an absolute necessity.

The prisoner-of-war status for captured combatants might be thought to require a distinction between international and non-international armed conflicts, allegedly to protect the right of the state to punish those who seek to change the law by violent means. But the very existence of an armed conflict in a state is in itself an irrefutable evidence that the punishment has lost its deterrent force, and that any more prosecutions for the sole reason of taking up arms against the established government would be counter-productive. One may wonder therefore whether the granting of prisoner-of-war status may not be worth trying as a counter-insurgency measure and as a measure for humanizing the armed conflict. In this writer's view, the prisoner-of-war status has a deterrent force of its own, for nothing is more disgraceful for a combatant than his conviction by a civilized court as a war criminal.

Protection of the civilian population, individual civilians

and civilian objects against effects of hostilities is a major theme elaborated in great detail in Chapters Four and Five of this thesis. The back-bone of this regulation of the conduct of hostilities is, of course, the distinction between combatants and non-combatants and between civilian objects and military objectives. But the plain reading of the detailed articles in Protocol I, Part IV, Section I, let apart discussing them in detail, gives the impression that the principle of distinction is on the brink of becoming extinct. It is probably no exaggeration to suggest that the whole regulation of the conduct of hostilities, may roughly be reduced to two rules: the rule that the civilian population and individual civilians should not be made the object of attacks directed exclusively against them; and the so-called proportionality rule. According to the proportionality rule, "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", is to be considered as indiscriminate, and therefore is prohibited.[1] This rule has been rightly criticised at the time on the ground that it calls for a comparison between things that cannot conceivably be compared. Moreover, the fact that the rule speaks of "concrete and direct military advantage anticipated", not of concrete and direct military advantage actually obtained from the attack, makes the whole concept of indiscriminate attacks unverifiable.

However, the proportionality rule is not the only weakness

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1. Article 51, para. 5 (b), of Protocol I.

in the regulation of the conduct of hostilities. The inroads on the protection of objects indispensable to the survival of the civilian population are particularly alarming. and no less alarming is the meagre protection of the natural environment.

All in all, the Diplomatic Conference of Geneva (1974-1977) seems to have achieved very little in the direction of a better protection of the civilian population, individual civilians and civilian objects. In this writer's view, nothing short of the abolition of the 'right' to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, would improve the protection of civilians and civilian objects. It exceeds the purpose of this Chapter to suggest a detailed regulation of the responsibility for causing 'incidental civilian losses' in both, interstate and non-interstate armed conflicts. It is time for international lawyers to direct their attention to this matter, for only then, the law of armed conflict would be put in the service of peace and peaceful change.

Finally, one may wonder whether international law-making conferences of the sort held in Geneva in 1949 and 1974-1977, are really capable of producing a better law of armed conflicts. The huge differences among states in military power, military strategies and interests suggest that such law-making conferences can only produce formal and vague compromises that paper over differences and present them as agreements. One therefore wonders whether bilateral and regional treaties on the law of armed conflicts would not produce a more humanitarian and effective law of armed conflicts.

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