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Waldemar A. Solf

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PROTECTION OF CIVILIANS AGAINST THE EFFECTS OF HOSTILITIES UNDER CUSTOMARY INTERNATIONAL LAW AND UNDER PROTOCOL I

Waldemar A. Solf*

INTRODUCTION

Humanitarian law is the outgrowth of centuries of warfare from which the rules and customs governing the conduct of hostilities have developed. Its development was stimulated by military men who recognized that violence and destruction, which are superfluous to actual military necessity, are not only immoral and wasteful of scarce resources, but are also counter-productive to the attainment of the political objectives for which military force is used.

The purpose of this presentation is to outline the historical development of restraints on the methods and means of warfare, their acceptance as customary law binding on all states, and the relation of customary law to the codifications of international law in the Hague Conventions of 1907,¹ the Geneva Conventions of 1949,² and the 1977

* Adjunct Professor of Law, Washington College of Law, The American University; Member, U.S. Delegation to the Diplomatic Conference on International Humanitarian Law, 1974-1977.

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1. Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2227, T.S. No. 539 [hereinafter cited as Hague Convention No. IV] and the annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2295 [hereinafter cited as Hague Regulations]; Hague Convention No. V of 18 October 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 36 Stat. 2310, T.S. No. 540 [hereinafter cited as Hague Convention No. V]; Hague Convention No. IX of 18 October 1907, Respecting Bombardment by Naval Forces in Time of War, 36 Stat. 2351, T.S. No. 542 [hereinafter cited as Hague Convention No. IX].

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as First Geneva Convention of 1949]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter cited as Second Geneva Convention of 1949]; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as Third Geneva Convention of 1949]; Geneva Convention Relative to the Protection of Civilian Persons

Protocol I additional to the Geneva Conventions.³

I. THE HISTORICAL DEVELOPMENT OF THE PRINCIPLES OF RESTRAINT ON THE METHODS AND MEANS OF WARFARE

Throughout history, men have preached about the restraints on the methods and means of warfare. As early as the fourth century B.C., Sun Tzu's classic, *The Art of War*, noted that there was an obligation to care for the wounded and prisoners of war.⁴ He observed that atrocities infuriated the enemy, stiffened their resistance and increased their fighting ability instead of paralyzing them with terror.⁵

In 634 A.D., Caliph Abu Bakr exhorted the first Moslem Arab Army invading Christian Syria to learn certain rules by heart:

Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives.⁶

Shakespeare quotes Henry V, instructing his army on the march to Agincourt in 1415: "[W]e give express charge, that in our marches through the country, there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language; for when lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner."⁷

In 1923, Admiral William L. Rodgers, an acute observer of war, wrote in a lead article in the *American Journal of International Law*:

It pleases us to call rules of war humanitarian, but really they fulfill a double object: as toward the individual enemy these restrictive rules are humane; as towards one's own organized forces these restrictives promote discipline and efficiency, and so help to shorten war through earlier and more complete victory over the hostile state . . . [T]hus these so called humane rules are advantageous

in Time of War of 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Fourth Geneva Convention of 1949] [all four hereinafter collectively cited as the Geneva Convention of 1949].

3. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, *reprinted in* THE LAWS OF ARMED CONFLICTS 551 (D. Schindler & J. Toman 2d rev. ed. 1981) [hereinafter cited as Protocol I].

4. SUN TZU, *THE ART OF WAR* 75-76 (S. Griffith trans. 1963).

5. *Id.*

6. M. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 102 (1955).

7. W. Shakespeare, *The Life of Henry the Fifth*, act III, sc. vi (1599).

simultaneously to both sides.⁸

Most of the early rules of war were in the form of orders issued by sovereign authorities for the regulation of their own armed forces. In time, various practices of civilized nations, all of whom imposed similar limitations on their own actions, became regarded as rules binding on them all.

The Catholic Church exercised significant influence in the development of restraints in war from the fourth century A.D. The early Christians were extreme pacifists who considered military service incompatible with Christian principles.⁹ As a minority and dissident sect with no responsibility for the security of the empire, they could savor their moral superiority and venerate their martyrs to the cause of pacifism.¹⁰ But when Caesar became a Christian, the Church, as an accommodation, developed the Just War Doctrine which accepted the necessity of going to war for a just cause.¹¹ The Just War Doctrine dealt primarily with the conditions justifying resort to war: the *jus ad bellum*; it also held that the conduct of the just war, *jus in bello*, must conform to the principles of discrimination and proportion.¹²

The principle of discrimination prescribed the immunity of the innocent from direct attack. Who are the innocent? Francisco de Vitoria, the noted theologian and jurist, included women, children, "harmless agricultural folk," "the rest of the peaceable civilian population," and "clerics and members of a religious order."¹³ Realizing that collateral casualties among the innocent must be expected, theologians recognized the rule of "double effect," distinguishing intended killing of combatants from unintended, accidental killing of civilians.¹⁴ The latter is excusable. But what about a situation where it is expected that there will be unintended killings? Vitoria concludes: "[I]t is never right to slay the guiltless, even as an indirect and unintended result, except when there is no other means of carrying on the operations of a just war" ¹⁵ In such a case the principle of proportion becomes dominant.¹⁶

8. Rodgers, *Suggestions as to Changes in the International Law for Maritime Warfare*, 17 AM. J. INT'L L. 1, 4 (1923).

9. S. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR 2 (1972).

10. *Id.* at 1-2.

11. *Id.* at 3-5.

12. *Id.* at 12.

13. F. DE VITORIA, DE INDIS ET DE IURE BELLI RELECTIONES 179 (J. Bate trans. 1917 of 1696 ed.).

14. *Id.* at 179; see also BAILEY, *supra* note 9, at 12-13.

15. VITORIA, *supra* note 13, at 179.

16. BAILEY, *supra* note 9, at 13-14. "For if little effect upon the ultimate issue of the

The principles of restraint and the influence of the natural law principles of discrimination and proportion virtually disappeared in the unrestrained savagery of the Thirty Years War from 1618-1648. The Peace of Westphalia¹⁷ also diminished the influence of the Church by recognizing the absolute sovereignty of princes, each of whom had a direct pipeline to God. In 1625, Hugo Grotius published his masterwork, *The Law of War and Peace*, in which he analyzed the practice of states over the centuries in order to outline systematically how that practice had hardened into the law of nations.¹⁸

The 18th century Age of Reason was an era of limited wars during which the restraints of the *jus in bello* became well known to the professional soldiers of the time. Armies were relatively small and very expensive; limited violence was an exercise of prudent self interest. Various nations entered into bilateral treaties, addressing in advance particular questions which might arise in the event of war between the parties. The subjects commonly covered were the rights of alien citizens, the rules of naval prizes, the status of diplomats, the limitations of legitimate military targets and the protection of prisoners of war.

The Napoleonic war and the French Revolution put an end to the era of limited warfare. Thereafter, wars were fought by nations in arms. The entire population was mobilized for the war effort, blurring the distinction between combatants and civilians, putting great strain on the customary law of war. As Winston Churchill commented: "When democracy forced itself upon the battlefield war ceased to be a gentleman's game."¹⁹ Nevertheless, the customary *jus in bello* survived, taking modest account of changed conditions of warfare. The mobilization of mass armies necessitated precise codified rules which would serve as instruction to citizen armies.

war is to be expected from the storming of a fortress or fortified town wherein are many innocent folk, it would not be right, for the purpose of assailing a few guilty, to slay the many innocent by use of . . . means likely to overwhelm indifferently both innocent and guilty." VITORIA, *supra* note 13, at 179. The principle of proportion also holds that it is forbidden to use weapons which would cause unnecessary suffering or superfluous injury. "The aim [of the this element of the modern rules] was not primarily to spare civilians, but to avoid causing suffering to combatants in excess of what is essential to place an adversary *hors de combat*." BAILEY, *supra* note 9, at 79-80. See also *infra* note 78 and accompanying text (discussing the rule of proportionality).

17. Treaty of Peace Between Sweden and the Empire, signed at Osnabruck (Peace of Westphalia I), 24 Oct. 1648, 1 Consol. Treaty Series 119; Treaty of Peace Between France and the Empire, signed at Munster (Peace of Westphalia II), 24 Oct. 1648, 1 Consol. Treaty Series 271.

18. H. GROTIUS, *DE JURE BELLI ET PACIS LIBRI TRES* (F. Kelsey trans. 1925 of 1625 ed.); BAILEY, *supra* note 9, at 25.

19. Winston Churchill, *quoted in* Ford, *Resistance Movements and International Law*, 8 INT'L REV. RED CROSS 43 (1968).

II. ACCEPTANCE AND CODIFICATION OF THE RESTRAINTS ON THE METHODS AND MEANS OF WARFARE

The first systematic codification of the restraints on the methods and means of warfare was the *Instructions for the Government of the Armies of the United States in the Field*, prepared by Professor Francis Lieber in 1863 during the American Civil War.²⁰ The Lieber Instructions took into account the needs of a nation in arms and the influence of the Industrial Revolution. Lieber's treatment of the principle of military necessity is significant: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and *which are lawful according to the modern law and usages of war*" (emphasis added).²¹ Lieber outlined in considerable detail those measures which were permitted and those which were prohibited by customary law. Among the measures prohibited was "any act of hostility which makes the return to peace unnecessarily difficult."²² To promote understanding, the Lieber Instructions stated the reasons for each rule. In this respect it was a fairly accurate reflection of the customary law of war as it was understood in 1863.

The Lieber Instructions stimulated efforts to codify the law applicable to armed conflict, culminating in the Brussels Conference of 1874,²³ which laid the groundwork for the Hague Conventions of 1899²⁴ and 1907.²⁵ The Hague Conventions were not as comprehensive as the Lieber Instructions. The Hague Conventions omitted the reasons for the rules,²⁶ and, with few exceptions, limited the text to prohibitions without stating what was permitted. This practice was based on the belief of humanitarian scholars that a humanitarian instrument should provide what is to be spared, and should not explicitly authorize violence.²⁷ Frequently, this restraint sacrificed clarity; military men

20. U.S. DEP'T OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS NO. 100 (1863) (Lieber Instructions), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (D. Schindler & J. Toman 2d rev. ed. 1981) [hereinafter cited as Lieber Instructions].

21. Lieber Instructions, *supra* note 20, at art. 14.

22. *Id.* at art. 16.

23. Project of an International Declaration Concerning the Laws & Customs of War, Brussels Conference of 1874, *reprinted in* 1 AM. J. INT'L L. Supp. 96-103 (1907).

24. Hague Convention No. II of 29 July 1899, with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, *reprinted in* 1 AM. J. INT'L L. Supp. 129-53 (1907).

25. Hague Convention No. IV, *supra* note 1.

26. Cf. Martens Clause, *infra* notes 28-29 and accompanying text.

27. In the debates concerning article 18 of the First Geneva Convention providing

tended to consider permissible any measure not expressly prohibited. This was in error, for customary law remained in full force, except to the extent modified by conventional law.

The preambles to the Hague Convention No. II of 1899 and the Hague Convention No. IV of 1907 each contain a Martens Clause²⁸ the latter of which states:

[T]he High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.²⁹

The rules of the 1907 Hague Regulations were negotiated with military necessity in mind, and cited necessity expressly to justify derogations from certain prohibitory rules.³⁰ Necessity, however, is not defined. The reluctance to express what is authorized under customary law made it necessary for military manuals to fill in the lacunae, including a statement as to the meaning and limitations of military necessity.

The First Geneva Convention of 1864³¹ became the first multilateral

for the role of the civilian population in collecting and caring for the wounded and sick, the drafting committee rejected a proposal that the civilian population could not withhold the wounded and sick they had collected from possible control by the military authorities. While recognizing that the authorities had the undoubted right to issue regulations establishing such control, the committee did not believe this should be mentioned in a humanitarian instrument. INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 190 (J. Pictet ed. 1952); see also M. BOTHE, K. PARTSCH & W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 322 (1982) (concerning objections voiced in the 1974-77 Diplomatic Conference about the departure from tradition in the definition of military objectives).

28. The Martens Clause is named after Fyodor Martens, the Russian diplomat and jurist who drafted it. A similar formula appears in each of the 1949 Geneva Conventions and in the 1977 Protocols. See First Geneva Convention of 1949, *supra* note 2, at art. 63(4); Second Geneva Convention of 1949, *supra* note 2, at art. 62(4); Third Geneva Convention of 1949, *supra* note 2, at art. 142(4); Fourth Geneva Convention of 1949, *supra* note 2, at art. 158(4); Protocol I, *supra* note 3, at art. 1(2); Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, preamble, *reprinted in* THE LAWS OF ARMED CONFLICTS 621 (D. Schindler & J. Toman 2d rev. ed. 1981).

29. See Hague Convention No. IV, *supra* note 1, at preamble (Martens Clause).

30. Hague Regulations, *supra* note 1, at art. 23(g).

31. Geneva Convention for the Amelioration of the Condition of the Wounded in

treaty governing land warfare. The resulting Law of Geneva protected wounded in armies in the field, medical personnel, units and transports. Through the stimulus of the International Committee of the Red Cross (ICRC),³² the Law of Geneva was updated in 1899,³³ 1906,³⁴ 1929,³⁵ 1949,³⁶ and 1977,³⁷ expanding its protection to additional victims of war. In particular, the Fourth Geneva Convention of 1949 extended protection to civilians under the control of the opposing party.³⁸

Although treaties, as contractual instruments, are binding only upon the contracting parties, the principles and rules of treaties which are declaratory of customary international law are also binding on non-parties. New development of principles of treaties, if widely practiced by parties and non-parties alike, may become customary international law. For example, the 1907 Hague Convention No. IV included a general participation clause which provided that its regulations were binding only if all participants to a war were parties to that Convention.³⁹ Thus, the 1907 Hague Convention, as a treaty, was not applicable in either World War because not all belligerent states were parties to the Convention. Similarly, the 1929 Geneva Prisoner of War Convention⁴⁰ was not applicable between Germany and the Soviet Union because the Soviet Union had never ratified it. But when the Nazi defendants in the Nuremberg trials raised the non-applicability of the Hague and Geneva Conventions as a matter of defense, the International Military Tribunal held that the general principles of these Conventions had passed into general international law and were thus binding on Germany.⁴¹ In *The High Command Case*,⁴² however, the International Military Tribunal

Armies in the Field of 22 August 1864, 22 Stat. 940, T.S. No. 377.

32. See INT'L COMM. OF THE RED CROSS, INTERNATIONAL RED CROSS HANDBOOK 407 (1983) (discussing the Statutes of the International Red Cross which set out the organizational structure of the Red Cross).

33. Hague Convention No. III for the Adaptation to Maritime Warfare of the Principles of the Geneva Conventions of 22 August 1864, 32 Stat. 1827, T.S. No. 453.

34. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 6 July 1906, 35 Stat. 1885, T.S. No. 464.

35. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 27 July 1929, 47 Stat. 2074, T.S. No. 847; Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929, 47 Stat. 2021, T.S. No. 846.

36. Geneva Conventions of 1949, *supra* note 2.

37. Protocol I, *supra* note 3.

38. Fourth Geneva Convention of 1949, *supra* note 2, at art. 4.

39. Hague Convention No. IV, *supra* note 1, at art. 2.

40. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343.

41. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 253 (1945).

42. United States v. Von Leeb (*The High Command Case*), *reprinted in* 11 TRIALS

stated that in holding "that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement."⁴³

At the present time, 161 states are parties to the 1949 Geneva Conventions.⁴⁴ In view of the universality of the Geneva Conventions, it may be concluded that their general principles, although not all the detailed rules implementing these principles, are now customary law binding on non-parties. As previously noted, the law relative to the protection of war victims has been updated periodically and has grown as a direct result of the patient and impartial work of the International Committee of the Red Cross through its dedication to the protection of individual victims of war against the abuse of authority and indifference to human suffering. The law of the Hague, however, was not updated from the turn of the century until 1977, with the exception of the Geneva Gas Protocol.⁴⁵ During this period, there was no agency like the International Committee of the Red Cross to ensure that the law of the Hague was respected and periodically updated.

While the 1949 Diplomatic Conference was putting the finishing touches on the four Geneva Conventions, the newly established United Nations International Law Commission (ILC) was asked to codify the law dealing with the conduct of hostilities. It declined the task reasoning that, "[w]ar having been outlawed, the regulation of its conduct has ceased to be relevant" and that undertaking such a project at the beginning of the ILC's existence would evince a lack of confidence in the efficacy of the U.N. Charter's means for maintaining peace.⁴⁶

In 1956, the International Red Cross made an effort to revise the badly outdated 1907 Hague Regulations.⁴⁷ This effort was met with enthusiasm by humanitarians and "Ban the Bomb" activists. Governments, however, reacted with polite inaction, most likely because the proposed drafts were too restrictive of air power. In 1968, the United

OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL 462 (1950).

43. *Id.* at 535.

44. 25 INT'L REV. RED CROSS 60 (1985).

45. Protocol for the Prohibition of the Use of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

46. Report of the International Law Commission to the General Assembly on the Work of the First Session, 1949 Y.B. INT'L L. COMM'N 281 (1950).

47. Int'l Comm. of the Red Cross, Draft Rules for the Limitation of the Danger Incurred by the Civilian Population in Time of War, (2d ed. Geneva 1958), *reprinted in* THE LAWS OF ARMED CONFLICTS 187-93 (D. Schindler & J. Toman 2d rev. ed. 1981).

Nations Conference on Human Rights,⁴⁸ meeting in the shadow of the Vietnam conflict, decided that updating the law of armed conflict was a suitable project for the United Nations' attention.

The interest of the United Nations human rights community stimulated the International Red Cross into action. The International Committee of the Red Cross began a process to update and clarify the four Geneva Conventions and to modernize the rules of methods and means of warfare.⁴⁹ The new instruments were designed to supplement rather than replace the existing Geneva Conventions, codifying the newly developed and emerging customary international law. The ICRC began a series of consultations and conferences with government and Red Cross experts. As a result of these consultations and conferences, the ICRC drafted two protocols, one on international armed conflict and another on internal armed conflict. These protocols formed the single negotiating text for a Diplomatic Conference convened by the Swiss Government in 1974. After four annual sessions in Geneva, attended by 135 States, the Conference adopted the two protocols on June 10, 1977.⁵⁰

III. THE CODIFICATION OF THE RULES FOR PROTECTION OF CIVILIANS AGAINST THE EFFECTS OF HOSTILITIES

The 1907 Hague Regulations dealing with the conduct of hostilities on land were designed to apply to the immediate combat zone where hostile land forces confront each other. To the extent that they protected civilians against the effects of hostilities, they contemplated

48. United Nations International Conference on Human Rights, Res. XXIII, 12 May 1968, *text published in* Final Act of the United Nations International Conference on Human Rights, U.N. Doc. A/Conf. 32/41, U.N. Sales No. E.68.XIV.2 (1968), *reprinted in* THE LAWS OF ARMED CONFLICTS 197-98 (D. Schindler & J. Toman 2d rev. ed. 1981); G.A. Res. 2444, 23 U.N. GAOR Supp. (No. 18) at 50-51, U.N. Doc. A/7218 (1968) [hereinafter referred to as U.N. General Assembly Resolution 2444].

49. See Baxter, *Perspective: The Evolving Laws of Armed Conflict*, 60 MIL. L. REV. 99 (1973) (discussing the International Red Cross' participation in drafting humanitarian law documents); *see also* XXIst International Conference of the Red Cross, Resolution XIII, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict, Istanbul, Turkey, 1969.

50. Protocol I, *supra* note 3; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, *reprinted in* THE LAWS OF ARMED CONFLICTS 619 (D. Schindler & J. Toman 2d rev. ed. 1981).

As of November, 1985, 51 states were parties to Protocol I and 44 states were parties to Protocol II. The People's Republic of China is the only permanent member of the Security Council to be a party to both Protocols. France is a party to Protocol II only and is the only State to be a party to Protocol II without also being a party to Protocol I. Cyprus, Vietnam, Zaire, Cuba, Mexico, Mozambique, Syria and Angola are parties to Protocol I but not to Protocol II. 25 INT'L REV. RED CROSS 61-62 (1985).

bombardment and sieges of defended cities and towns and required a warning — unless the element of surprise was necessary — so that civilians might leave or take shelter. Bombardment of undefended places, i.e., places open to occupation without resistance, was recognized as unnecessary and was thus prohibited. Pillage was prohibited, even after an assault of a besieged city. Although the emergence of air power was dimly recognized, air bombardment was thought to be feasible only for the close support of ground forces — a sort of supplement to artillery. In bombarding defended towns, precautions were required as to educational, scientific, religious and cultural objects, which were not to be attacked if properly marked.⁵¹ With the exception of military objectives in undefended ports, the hinterland was believed to be secure from the effects of hostilities. It was recognized, however, that military objectives located in undefended ports might be attacked by naval gunfire. The Hague Convention No. IX concerning Bombardment of Naval Forces recognized that collateral civilian casualties might result and urged that precautions be taken to avoid or minimize them.⁵² The Hague Conventions and the Hague Regulations applied through World Wars I and II, during which time air power shattered any illusion about the security of the hinterland.

The Fourth Geneva Convention of 1949, Part II, provided new rules for the protection of the civilian population of the countries in conflict. Articles 13 through 26, *inter alia*, specify that civilian hospitals, medical transports and medical personnel are immune from attack.⁵³ Articles 14 and 15 provide for the establishment of safe refuges to protect certain classes of civilians from the effects of war.⁵⁴ Article 14 contemplates the deliberate and preplanned establishment of hospital and safety zones in rear areas for military and civilian wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven. These zones may be established by unilateral action but agreement as to the mutual recognition of such zones is encouraged. Article 15 provides for the establishment by mutual agreement of neutralized zones in areas where fighting is taking place.⁵⁵

51. Hague Regulations, *supra* note 1, at arts. 25-28.

52. Hague Convention No. IX, *supra* note 1, at art. 2.

53. Fourth Geneva Convention of 1949, *supra* note 2, at arts. 13-26.

54. *Id.* at arts. 14-15.

55. *Id.* at art. 15. The 1982 Falkland Islands conflict presented an opportunity to test the efficacy of article 15. As the British drew close to Port Stanley-Puerto Argentino on the Falkland-Malvinas Islands, the Argentine and British authorities agreed, at the suggestion of the ICRC, to establish a neutralized zone in the center of town. The zone was never actually established, however, because active hostilities came to an end shortly after the agreement was concluded. S. JUNOD, PROTECTION OF THE VICTIMS OF

These zones serve as refuges for the wounded and sick and for civilians who take no part in the hostilities and who, while they reside in the zone, perform no work of a military nature.

By 1968, the development of air power and the increased destructiveness of modern weapons necessitated the formulation of new rules for the protection of civilian populations. The basic principles of customary law were expressed in the 1968 U.N. General Assembly Resolution 2444, *Respect for Human Rights in Armed Conflicts*:

- a. [T]he right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- b. [I]t is prohibited to launch attacks against the civilian population as such;
- c. [A] distinction must be made at all times between persons taking an active part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.⁵⁶

The statement of the first abstract principle requires some explanation of the layers of limitations on the choice of methods and means of warfare. First, there are specific prohibitions and restrictions as expressed in the "rules of international law applicable in armed conflict."⁵⁷ For example, there are specific prohibitions against the use of poison or poisoned weapons: the employment of weapons and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, perfidious killing, wounding or capturing of enemy combatants, denial of quarter, the murder of prisoners of war or other detained persons, attacks on civilians, attacks on specifically protected objects, and misuse of protective signs.⁵⁸

Next, there are conditional prohibitions against certain acts for which exceptions may be made in cases of urgent or imperative necessities of war. The most important of these is the prohibition against seizure or destruction of the enemy's property in the absence of urgent military necessity.⁵⁹

ARMED CONFLICT FALKLAND-MALVINAS ISLANDS (1982) 33-34 (1984).

56. U.N. General Assembly Resolution 2444, *supra* note 48. The 1968 resolution, adopted unanimously, borrowed its provisions from a 1965 International Red Cross Resolution. See 20th International Conference of the Red Cross, Resolution XXVIII, Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare, Vienna, Austria, 1965, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 3, at 195; Hague Regulations, *supra* note 1 (first provision reaffirming the well-established Hague principle embodied in article 22 of the Hague Regulations); Protocol I, *supra* note 3 (Article 35(1) of Protocol I also reaffirms the principle embodied in article 22 of the Hague Regulations).

57. Protocol I, *supra* note 3, at art. 2(b).

58. Hague Regulations, *supra* note 1; Protocol I, *supra* note 3, at arts. 37-42, 51-56.

59. Regulations, *supra* note 1, at art. 23(g); Fourth Geneva Convention of 1949, *supra* note 2, at art. 53.

Finally, there are prohibitions inherent in the complementary principles of necessity and humanity which underlie the law governing the conduct of hostilities. The principle of necessity justifies only those measures of military violence not forbidden by international law that are relevant and proportionate to securing the prompt submission of the enemy with the least possible expenditure of economic or human resources.⁶⁰ The principle of humanity complements the principle of necessity by forbidding those measures of violence that are not necessary, i.e., not relevant or proportionate to the achievement of a definite military advantage.⁶¹

Inherent in the principles we have discussed are the following elements: (1) there are limitations on the methods and means of warfare; (2) these limitations are expressed in binding international law; (3) loss of life and destruction of property must have some rational tendency to the prompt achievement of a definite military advantage; and (4) such casualties and damage must not be disproportionate or excessive in relation to the military advantage anticipated.⁶² Necessity, like its components of relevance and proportionality, is a relational concept. To speak of necessity, or the lack thereof, is to raise the question: necessary or unnecessary for what?⁶³

A. Analyzing the Components of Necessity: Relevance and Proportionality

Relevance means a rational tendency to the prompt achievement of a definite military advantage. Proportionality means not excessive in relation to the military advantage anticipated. When viewed from the standpoint of national-strategic planning, the necessity must be judged in relation to the attainment of the object for which the armed conflict is waged. From the viewpoint of the field commander and his tactical planners, necessity, relevance, and proportionality must be judged in relation to the attainment of a definite military advantage. Definite means concrete and perceptible, rather than hypothetical or speculative. It is in this sense that the term necessity is used in Protocol I in the articles dealing with the protection of the civilian population.⁶⁴

60. Lieber Instructions, *supra* note 20, at arts. 14-16; M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 525-30 (1961); M. BOTHE, K. PARTSCH & W. SOLF, *supra* note 27, at 194-95.

61. M. McDUGAL & F. FELICIANO, *supra* note 60, at 525.

62. M. BOTHE, K. PARTSCH & W. SOLF, *supra* note 27, at 195.

63. M. McDUGAL & F. FELICIANO, *supra* note 60, at 525.

64. Protocol I, *supra* note 3, at arts. 51(5)(b), 52(2), 57(2)(a)(iii).

B. Protecting the Civilian Population

Protocol I reaffirms and supports the customary principles that prohibit the attack on civilians and civilian objects, and that require that distinctions be made between the treatment of combatants and civilians. In furtherance of these principles, Protocol I includes detailed implementing rules, most of which reaffirm or clarify the customary rules designed to protect civilians against the effects of attacks.

The articles adopted in Protocol I utilize four different approaches to reinforce the customary norms. First, there are the provisions designed to revitalize and strengthen the distinction between military objectives and civilians/civilian objects. Second, are provisions which clarify the legal regulation of attacks. Particularly, these incorporate the rule of proportionality and a prohibition against indiscriminate attacks. Third, are a group of provisions which define in detail the precautionary steps that both the attackers and defenders must take to avoid or minimize civilian casualties and damage to civilian objects. Finally, in an effort to provide more objective legal protection for the civilian population, there are specific provisions that limit or prohibit attacks on particular objects and on specified areas.

1. Strengthening the Distinction Between Civilian and Military Objects

The provisions of Protocol I do not preclude attacks that may cause civilian casualties. The Protocol does, however, require that parties to the conflict direct their military operations only against military objectives. Accordingly, article 48 requires that a commander have some coherent military objective in mind when he decides upon an attack, and his plan of attack must be directed toward destroying, neutralizing or capturing that military objective.⁶⁵

Article 52 defines military objectives as those objects: which by their nature, location and use make an effective contribution to the enemy's military action; and (2) whose destruction, capture or neutralization, "*in the circumstances ruling at the time*, offer a definite military advantage."⁶⁶ For the first time, article 52 gives an explicit definition of military objectives, thus providing guidance in distinguishing civilian

65. Protocol I, *supra* note 3, at art. 48. See also U.N. General Assembly Resolution 2444, *supra* note 47 (Article 48 paraphrasing the basic rules stated in paragraphs 2-3 of the resolution).

66. Protocol I, *supra* note 3, at art. 52(2) (emphasis added).

objects from military objectives.⁶⁷ This distinction between civilian and military objects is further clarified through explicit definitions of civilians and the civilian population.⁶⁸ In addition, there are presumptions regarding the treatment of civilian houses, schools, places of worship and other objects normally dedicated to civilian use.⁶⁹ To the extent that Protocol I clarifies and implements the principle of civilian immunity and the principle of distinction, its provisions should be considered customary law.

2. Clarifying Regulations of Attacks

Further efforts to strengthen customary law are reflected in the provisions of Protocol I which clarify and develop the regulation of attacks. Article 51 prohibits making civilians the object of an attack, although civilians may lose such protection in event of their direct participation in the hostilities with the intent to cause physical harm to enemy personnel and objects.⁷⁰ Indiscriminate attacks are also prohibited and illustrated as including broad area-wide attacks on several clearly separated military objectives located among concentrations of civilians, and disproportionate attacks.⁷¹ Finally, reprisal attacks on civilians are prohibited.⁷² Additionally, these provisions place duties upon armed forces toward civilians under their control by prohibiting the use of civilians to shield military objectives or to shield, favor or impede military operations.⁷³ In general, article 51 reaffirms existing customary law prohibiting attacks against civilians as such.

It should be noted, however, that under article 52 civilian objects lose their protection if they are used to make an effective contribution

67. Earlier efforts to provide an explicit definition had failed, primarily because such definition was considered inappropriate in a humanitarian instrument. See *supra* notes 27-29 and accompanying text (discussing the lack of clear definitions of prohibited conduct). Article 52 overcomes the traditional objections in two ways. First, article 52 states the rule in the traditional prohibitory manner, and defines civilian objects in the negative as "all objects which are not military objectives as defined in paragraph 2." Second, article 52 limits attacks to objects that meet its two-pronged test. Protocol I, *supra* note 3, at art. 52.

68. Protocol I, *supra* note 3, at art. 50(1)-50(2).

69. *Id.* at art. 51(2)-51(3).

70. *Id.* at art. 51(4)-51(5).

71. *Id.*

72. *Id.* at art. 51(6). Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, taken as a last resort by one party to a conflict against enemy personnel or property in response to a manifest and serious violation of the law of armed conflict, for the sole purpose of enforcing compliance with the rules of that law. Reprisals must be proportionate to the accomplishment of their intended purpose, and must be halted when the enemy's unlawful conduct has ceased.

73. *Id.* at art. 51(7).

to enemy military action and if their destruction, capture, or neutralization offers a definite military advantage.⁷⁴ This is a lesser standard than that which causes loss of protection to civilian persons. Thus, while a civilian may not lose his protection against individualized attack while working in a munitions plant, he assumes the risk of collateral injury when he is in the vicinity of the munitions plant, although he continues to retain full protection while at home.

Articles 51 and 52 provide prohibitions against reprisals or retaliatory attacks against civilians and civilian objects.⁷⁵ These prohibitions break new ground and thus cannot be considered reaffirmation of customary law. The 1949 Geneva Conventions prohibit reprisals against the wounded, sick and shipwrecked, as well as against medical personnel, units and establishments and transports, prisoners of war, and protected civilians.⁷⁶ It should be noted that the term "protected persons" includes only civilians in the power of a party of which they are not nationals. Thus, the population of a party under the control of that party is not protected against reprisals.⁷⁷

Articles 51 and 57 contain the first codifications of the rule of proportionality. The rule prohibits attacks that may be expected to cause incidental civilian casualties or property damage which would be excessive in relation to the concrete and direct military advantage anticipated.⁷⁸ If viewed as a restatement of the basic principle of military necessity, i.e., relevance and proportionality, this would undoubtedly be considered a reaffirmation of customary law. Whether the other illustration, that demonstrating the prohibition against treating a number of clearly separated and distinct targets as a single military objective, constitutes a new development or a reaffirmation of existing law depends on how one construes the term "clearly separated." If it is construed as meaning separated at such a distance and under such circumstances that the military targets can be attacked separately, it is probably a reaffirmation of customary international law.

3. Emphasizing Precautionary Measures

Precautionary measures intended to avoid or minimize civilian casu-

74. *Id.* at art. 52(2).

75. *Id.* at arts. 51(6), 52(1).

76. First Geneva Convention, *supra* note 2, at art. 47; Second Geneva Convention, *supra* note 2, at art. 47; Third Geneva Convention, *supra* note 2, at art. 13(1); Fourth Geneva Convention, *supra* note 2, at art. 33(3).

77. *Id.* at art. 4; *see also* Convention for the Protection of Cultural Property, 14 May 1954 249 U.N.T.S. 340, art. 4 (prohibiting reprisals against cultural property).

78. Protocol I, *supra* note 3, at arts. 51(5)(b) and 57(2)(iii).

alties and damage to civilian property, which both the attacker and defender must take, are emphasized in articles 57 and 58, as well as in an extensive codification of rules pertaining to civil defense in articles 61-67.

Under the provisions of article 57, commanders and their planning staff are required to take all feasible measures to verify that targets of an attack are military objectives. Moreover, they are required to take all feasible precautions in the choice of methods and means of attack to avoid or minimize collateral injury to civilians or damage to civilian objects. They must refrain from launching any attack which may be expected to cause collateral civilian casualties or damage to civilian objects excessive in relation to the concrete and direct military advantage.⁷⁹ If it becomes apparent during an attack that the objective is not a military one or that disproportionate civilian casualties or damage to civilian property may result, the attack must be cancelled or suspended.⁸⁰ Furthermore, where an attack may affect the civilian population, advance warning is required unless the circumstances preclude such action by the necessity of surprise.⁸¹ To the greatest extent possible, the party controlling the civilian population should endeavor to evacuate civilians from the vicinity of military objectives, to avoid locating military objectives within or near densely populated areas, and to take any additional precautions, such as the provision of shelters and civilian defense programs, to protect the civilian population against the danger resulting from military operations.⁸²

4. Providing Special Legal Protection

Although the provisions on the regulation of attacks are more detailed than those of prior law, they remain to a large extent general principles which require subjective judgment in specific situations. Recognizing this subjectivity, the diplomatic conference developed the fourth approach to achieving improved protection for the civilian population, *viz.*, specific provisions regulating attacks on particular objects and specific areas.

Article 53 prohibits acts of hostilities against culturally important historic monuments, places of worship and works of art, and at the same time prohibits use of such objects to support the military effort.⁸³

79. *Id.* at art. 57 (2)(a)(iii).

80. *Id.* at art. 57(2)(b).

81. *Id.* at art. 57(2)(c).

82. *Id.* at art. 58.

83. *Id.* at arts. 53(a)-53(b).

Customary international law, as reflected in article 27 of the 1907 Hague Regulations, prohibits attacks on a variety of cultural and religious objects *provided* they are not used at the time for military purposes. The 1954 Hague Convention, however, which provides for the protection of cultural property, permits derogations, even in the case of very important cultural objects, where imperative military necessity demands such attacks.⁸⁴ As article 53 of Protocol I is made subject to both of these relevant conventions, it is not yet clear whether customary international law is as broad as article 53 seems to be.

By prohibiting the starvation of civilians as a method of warfare, article 54 establishes a substantially new principle which is not yet customary international law.⁸⁵ The customary practice, as illustrated by article 17 of the Lieber Instructions, declares that "war is not carried out by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy."⁸⁶ This principle was modified somewhat by article 23 of the 1907 Hague Regulations, but the prohibition was subject to derogation for military necessity.⁸⁷ As a policy, general devastation or a "scorched earth" was permitted if there was an honest belief that urgent military necessity required such action.⁸⁸ Article 23 of the Fourth Geneva Convention modified this principle modestly by requiring relief for only that portion of the civilian population presumed incapable of making a substantial contribution to their country's war effort, e.g., children under fifteen and expectant mothers.⁸⁹ Similarly, the provisions of Protocol I do not depart entirely from customary practice as the protections granted are not absolute. The specific prohibition against attack, destruction, removal or rendering objects useless under article 54 pertains only to action taken for the specific purpose of denial for its sustenance value, not for any collateral effect the action may have on the civilian population.⁹⁰

Articles 35 and 55 of Protocol I prohibit the use of methods and means of warfare which are intended or may be expected to cause

84. Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, arts. 4(2), 11, 249 U.N.T.S. 240, *reprinted in* THE LAW OF ARMED CONFLICTS 664 (D. Schindler & J. Toman 2d rev. ed. 1981).

85. Protocol I, *supra* note 3, at art. 54(1).

86. Lieber Instructions, *supra* note 20, at art. 17.

87. Hague Regulations, *supra* note 1, at art. 23(g).

88. United States v. List (The Hostage Case), *reported in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL 1230, 1233, 1295-97 (1950).

89. Fourth Geneva Convention of 1949, *supra* note 2, at art. 23.

90. Protocol I, *supra* note 3, at art. 54(2).

"widespread, long-term and severe" damage to the natural environment and thereby prejudice the health or survival of the population.⁹¹ It should be noted that the terms "widespread, long-term and severe" are in the conjunctive, whereas in the Environmental Modification Treaty (ENMOD Treaty)⁹² the comparable terms are in the disjunctive. Furthermore, the negotiating record of articles 35 and 55 of Protocol I demonstrates that "long-term" is construed to involve decades, whereas in the ENMOD treaty, "long-lasting" is construed to involve seasons.⁹³ Although the formulation is new, and the protections granted by Protocol I are greater, this prohibition is so basic that it must be construed as being inherent to a general principle of law and thus, general international law.

Special protection for dams, dikes and nuclear-electric generating stations is provided by article 56, which prohibits attacks on these works and installations, and on military objectives located in their vicinity if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.⁹⁴ Some limited exceptions to this protection exist. For example, the protection in article 56 does not apply when the installation or military objective is used in regular and direct support of military operations and if such attack is the only feasible way to terminate such support.⁹⁵ Yet even if the special protection is lost, the general protection of the Protocol and the rule of proportionality remain in effect. It would require an extraordinarily important target and a very significant military advantage to outweigh the severe civilian losses which might result from the dangerous forces released by the destruction of a dam, dike, or nuclear power station. The practice of states has previously indicated great restraint in the attacks of dams and dikes, the breach of which would cause such severe civilian losses. Article 56 thus differs little from customary international law.

91. *Id.* at arts. 35(3) and 55.

92. *See generally* Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, signed at Geneva May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 6839.

93. SWISS FED. POLITICAL DEP'T, *Berne Report of Committee III*, CDDH/215/Rev.1, ¶ 27 (1975); 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON HUMANITARIAN LAW 268 (1978); *Understandings Regarding the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, Report by Committee of the Conference on Disarmament 1976, reprinted in U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 197 (1982); M. BOTHE, K. PARTSCH & W. SOLF, *supra* note 27, at 346-48.

94. Protocol I, *supra* note 3, at art. 56.

95. *Id.* at art. 56(2).

Article 59 essentially clarifies and details the customary law prohibition of attacks on undefended places in the immediate combat zone which are open to occupation without resistance.⁹⁶ It is thus a clear declaration of well-established customary international law. By agreement, states may provide special protection for certain demilitarized zones under article 60; these are then declared off-limits to attacks and any other form of military operation, so long as the agreement remains in effect.⁹⁷

Among the group of articles discussed, the only sharp changes from customary international law are the prohibitions against reprisals in articles 51-56 and the prohibition against starvation of civilians as a method of warfare in article 54. The other changes merely clarify and refine existing restraints, most of which will be recognized as either emerging or established customary international law.

CONCLUSION

Protocol I accomplishes its purpose by modernizing and clarifying the 1907 Hague Regulations in response to the danger presented by modern warfare to the civilian population. The articles of Protocol I are very complex in comparison with the simple statements of principle in the Hague Regulations. Except for the prohibition of reprisal attacks, however, the new rules are generally reaffirmations of existing customary law which is itself complex. In reaffirming customary law, Protocol I defines such essential matters as military objectives and codifies the rule of proportionality. Although these matters add to the complexity of the text, they promote better understanding and simplify their application on the battlefield.

In general, Protocol I reflects the attitude of the International Committee of the Red Cross when it prepared the Draft Protocols:

In drawing up the Draft Protocol . . . the ICRC believes that it has remained steadfast to the spirit in which, since 1864, it has demanded, for the benefit of individuals, guarantees consistent with the dictates of humanity whilst bearing in mind the realities of national defense and security.⁹⁸

96. *Id.* at art. 59.

97. *Id.* at art. 60.

98. INT'L COMM. OF THE RED CROSS, DRAFT PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF ARMED CONFLICTS 2 (1973).