Determining Customary International Law Relative to the Conduct of Hostilities in Non-international Armed Conflicts

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ARTICLES

THE SIXTH ANNUAL AMERICAN RED CROSS-WASHINGTON COLLEGE OF LAW CONFERENCE ON INTERNATIONAL HUMANITARIAN LAW: A WORKSHOP ON CUSTOMARY INTERNATIONAL LAW AND THE 1977 PROTOCOLS ADDITIONAL TO THE 1949 GENEVA CONVENTIONS

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In 1987, the American Red Cross and the Washington College of Law International Legal Studies Program convened a Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions. The Workshop was composed of four sessions: 1) the United States position concerning customary international law relative to the Protocols; 2) the formation of general international law; 3) customary international law relative to the conduct of hostilities in non-international armed conflicts; and 4) customary international law relative to the conduct of hostilities and the protection of the civilian population in international armed conflicts.

Although the primary objective of the Workshop was to define the parts of the Protocols that are considered customary international law, the participants discussed many other important international legal issues. Some of these issues included determining the international principles that bind all states; establish-

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ing which parts of customary international law apply to the employment of weapons of mass destruction; ascertaining how customary international law is developed; determining the evidence that constitutes state practice or opinio juris; and determining whether the methods of establishing Hague law as customary law are different than the methods of establishing Geneva law as customary law.

Many distinguished scholars and practitioners attended the Workshop to discuss these important issues. Included among these individuals were representatives from the Reagan administration and the United States Department of State. Individuals from the United States and Canadian armed forces, the International Committee of the Red Cross, and the American Red Cross also participated in the Workshop.

OPENING REMARKS

The Chairman, Mr. Raymond Geraldson, convened the Workshop at 9:00 a.m., January 22, 1987.

Mr. Geraldson noted that the severe snow storm that had blanketed the Washington, D.C. area on that morning had delayed several scheduled participants. He suggested that the Workshop should start without them, using substitutes where necessary. He then introduced Professor Claudio Grossman, representing the Washington College of Law.

Professor Grossman extended a welcome on behalf of the Washington College of Law to the Workshop participants. He emphasized the long-standing commitment of the law school to international law in general and to humanitarian law in particular. This Workshop is the sixth in a series, beginning in 1982, and represents a tradition at the Washington College of Law that will hopefully continue into the future.

The Chairman next introduced Mr. Pierre Keller, member of the International Committee of the Red Cross (ICRC). On behalf of the ICRC, Mr. Keller thanked both the American Red Cross Society and the Washington College of Law for conducting this Workshop. He noted that the ICRC advocates that all states ratify Protocols I and II,Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for
so that the "Law of 1977" becomes universally accepted in its written form, as treaty law. He pointed out that sixty-six states had become party to Protocol I and sixty to Protocol II. Mr. Keller stated that these figures indicate that many members of the international community are already accepting the two Protocols. The ICRC will continue to encourage governments to ratify both Protocols. He urged the United States to ratify both Protocols, despite reluctance to accept parts of Protocol I.

Mr. Keller further noted that the objective of this Workshop, which is to define the parts of the Protocols that are customary international law, remains important, even though many countries have already accepted the two Protocols as treaty law. Mr. Keller indicated that he wanted this Workshop to show that the two Protocols, especially Protocol I, are not merely artificial constructions developed by either over-zealous bureaucrats or hopeless idealists, but rather are rules with a solid basis in long-established law. In addition, Mr. Keller noted that the discussions should indicate to what extent written rules find their origin in customary law. He indicated that through this clarification the Workshop will establish the main features characterizing these two instruments. Much of the written "Law of 1977" is complicated, whereas the rules of customary international law are more general in character and, therefore, easier to understand.

Mr. Keller indicated that, by identifying rules that are customary in nature, this Workshop would also help single out those rules that bind all states, including states that have not yet ratified the Protocols. Thus, the Workshop could help in establishing those rules of the law concerning the conduct of hostilities that are also applicable to the em-


ployment of weapons of mass destruction.

Mr. Keller explained that although not all of the rules of Protocols I and II have the nature of customary international law, the two treaties will have a great influence on the development of the law. Countries have negotiated the Protocols over a long period of time, and the world community assembled in the Diplomatic Conference in Geneva has accepted them by consensus. The Protocols, therefore, are evidence of what government representatives world-wide thought should become binding law. As a result, Mr. Keller concluded that the two Protocols are a fitting point of departure in the search for customary law.

The Chairman next introduced Mr. Joseph Carniglia, representing the American Red Cross Society. Mr. Carniglia expressed the hearty greetings of the Society and welcomed the participants to the Workshop. He noted that the histories of both the American Red Cross Society and the Washington College of Law have been related since the founder of the American Red Cross Society, Clara Barton, retained Ellen Spencer Mussey, cofounder and first Dean of the Washington College of Law, as legal counsel to the Society. The collaboration between the two institutions most recently has manifested itself in a series of jointly sponsored conferences, workshops, and seminars on international humanitarian law.

Mr. Carniglia expressed his belief that the proceedings of this Workshop, together with the proceedings of the two previous conferences published in the *American University Law Review*, will make another valuable contribution to the increasing body of scholarly opinion and discourse on international humanitarian law in academic and governmental circles.

After welcoming the participants to the Workshop, the Chairman thanked the sponsors and the ICRC for their help and cooperation. He then introduced the moderator for the first session, Professor Louis B. Sohn, who expressed the position of the United States on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions.

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5. Director (retired), International Services for the American Red Cross.
7. Woodruff Professor of International Law, University of Georgia School of Law.
SESSION ONE: THE UNITED STATES POSITION ON THE RELATION OF CUSTOMARY INTERNATIONAL LAW TO THE 1977 PROTOCOLS ADDITIONAL TO THE 1949 GENEVA CONVENTIONS

REMARKS OF MICHAEL J. MATHESON

I appreciate the opportunity to offer this distinguished group a presentation on the United States position concerning the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions. This question is not an academic one, but has considerable practical importance under present circumstances. As you may well know, the executive branch has now completed an extensive review of the Additional Protocols, both from the viewpoint of military considerations and from the viewpoint of national policy. The result of that review has been a recommendation that Protocol II, which deals with non-international conflicts, be submitted to the Senate for advice and consent to ratification with appropriate understandings and reservations, but that Protocol I, which deals with international conflicts, not be submitted to the Senate.

Judge Sofaer, the State Department Legal Adviser, will describe the reasons for those conclusions. Let me not get into those reasons, but simply note the effect this fact has upon the subject that we are dealing with today. I agree entirely with the

8. Deputy Legal Adviser, United States Department of State. These remarks are a combination of Mr. Matheson's prepared text and his substantive modifications to that text as presented at the Workshop, supplemented with footnotes where necessary.

9. See supra note 4 (referring to Protocol I which relates to the protection of victims of international armed conflicts, and Protocol II, which relates to victims of non-international armed conflicts).

10. Reagan, President's Message to the Senate Transmitting the Protocol, 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987) [hereinafter President's Message]. The President stated that the United States objective for codification of the Additional Protocols is to assure the greatest protection to victims of conflicts while satisfying legitimate military requirements. Id. He stated that ratification of Protocol II should also allow the United States to continue its leadership in the international community. Id.

11. Id. The President transmitted Protocol II to the Senate for its advice, consent, and ratification. Id. The administration views Protocol II as an expansion of the fundamental humanitarian provisions contained in the 1949 Geneva Conventions with respect to non-international armed conflicts, including humane treatment and basic due process for detained persons, protection of wounded, sick, medical units, and noncombatants. Id. The President concluded that the United States cannot ratify Protocol I because it is "fundamentally flawed." Id. Provisions that undermine humanitarian law include treating wars of national liberation as international conflicts and granting irregular forces combatant status even if they do not distinguish themselves from civilians. Id.

12. See infra text accompanying notes 114-56 (presenting Judge Sofaer's discussion of the rationale behind the position of the United States Department of State on the Protocols).
distinguished representative of the ICRC that those topics are of considerable importance now, although we may have somewhat different reasons for saying so.

With respect to Protocol I, several important facts flow from this situation. First, the United States will consider itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law, either now or as it may develop in the future. Therefore, legal advisors within the United States Government will have to make a judgment on this, if they are to advise policy makers and commanders as to what legal constraints will apply to United States military options in the course of present or future conflicts. This, of course, is not a new problem, in that Protocol I has now been in existence for almost ten years without United States ratification, but the administration's decision not to submit Protocol I to the Senate puts the question in clearer focus and makes clear that it will not go away. To the extent that other governments follow the lead of the United States in this regard, it will pose the same questions for them.

Second, Protocol I now cannot serve in itself as the baseline for the establishment of common rules to govern the operations of military alliances in which United States forces participate. To establish a basis for such common rules, the United States and its friends must now decide which of the rules in Protocol I either reflect current customary law or should be adhered to by free world forces as a predicate for their ultimate recognition as customary law.

Third, Protocol I cannot now be looked to by actual or potential adversaries of the United States or its allies as a definitive indication of the rules that United States forces will observe in the event of armed conflict and will expect its adversaries to observe. To fill this gap, the United States and its friends would have to give some alternative clear indication of which rules they consider binding or otherwise propose to observe.

Finally, Protocol I now will not be universally seen as the next stage in the development of humanitarian law for international armed conflict, particularly if other governments follow the lead of the United States in rejecting the Protocol. It follows from this that those who want to advance the codification and development of international humanitarian law will need to know what elements of Protocol I still com-

13. See supra notes 10-11 (referring to the President's recommendation that the new rules governing the conduct of the United States and its allies should include the positive provisions of Protocol I that relate to customary international law).
mand the support of the United States and other like-minded governments, and therefore hopefully constitute a common foundation for the development and observance of rules which improve upon the 1949 Geneva Conventions and other generally recognized statements of law in this field. 14

For all these reasons, it is important for both the United States government and the United States scholarly community to devote attention to determining which elements in Protocol I deserve recognition as customary international law, either now or in the future. This Workshop, therefore, is an important and timely exercise, particularly for those of us who must help to decide where the United States government and its friends should go from here.

The executive branch is well aware of the need to make decisions and to take action on these issues. We know from our conversations with our allies that there is a shared perception, particularly among North Atlantic Treaty Organization (NATO) countries, of a strong military need for common rules to govern allied operations and a political need for common principles to demonstrate our mutual commitment to humanitarian values. We recognize that certain provisions of Protocol I reflect customary international law or are positive new developments, which should in time become part of that law.

We therefore intend to consult with our allies to develop appropriate methods of incorporating these provisions into rules that govern our military operations, with the intention that they will in time win recognition as customary international law. One obvious possible way of doing this is to develop common principles that might be incorporated into or serve as the framework for individual national military manuals. There may be other means of accomplishing the same objectives. The United States is not wedded to any particular approach and intends to listen to all reasonable suggestions.

Having described the reasons why I believe that the topic of this Workshop is important and very relevant to decisions currently being taken with respect to Protocol I in the United States and other governments, it is of course much more difficult to say exactly which of the rules contained in the Protocol currently are in fact a part of customary law. As I am sure you all appreciate quite well, there is no clear line drawn in the dust for all to see between those principles that are now customary law and those which have not yet attained the degree of

14. See President’s Message, supra note 10 (stating that the Reagan administration is consulting with its allies to devise an alternative reference for the positive provisions of Protocol I).
acceptance and observance that might make them customary law. Instead, there are degrees of acceptance and degrees of observance, and the judgment as to what degree of each is sufficient for establishment as customary law is inherently subjective and hard to define precisely. In addition, it may be possible in many cases to say that a general principle is an accepted part of customary law, but to have considerable disagreement as to the precise statement of that general principle.

In terms of our dealings with our alliance partners, it would typically be difficult if not impossible to achieve a complete consensus among various governments, even those with similar interests and outlooks, on precisely which of the many rules in the Protocol have at any given time passed over the line into customary law and which have not. Even within the NATO Alliance, there are substantial differences in the general readiness of government lawyers to recognize that a new rule of warfare has come into customary law, quite apart from the substance of the rule in question.

As a result, in our discussions with our allies to date we have not attempted to reach an agreement on which rules are presently customary law, but instead have focused on which principles are in our common interests and therefore should be observed and in due course recognized as customary law, whether they are presently part of that law or not. Apart from being easier to deal with, this approach has the added advantage of focusing attention on the substantive merits of the various rules, as opposed to their precise current legal status.

Of course, this process itself can have a substantial influence on the creation of customary law. The United States and other governments, particularly those with significant military forces, can advance the process of recognition of principles as customary law by stating that they are prepared to observe them in armed conflict and desire them to be recognized in due course as customary law. Such statements could also serve as a basis for future work in codifying rules in future negotiations on law of war agreements.

With that background, let me then review the principles that we believe should be observed and in due course recognized as customary law, even if they have not already achieved that status and their relationship to the provisions of the Protocol. Although I will not be stating in each case whether the executive branch believes a principle to have already become customary law, the other executive branch participants in this Workshop will no doubt be getting into that later in these proceedings. Usually this sort of analysis is done by parsing each of the articles and paragraphs of the Protocol and indicating one's view of each in turn. For the sake of variety and perhaps comprehensibility, I
would like instead to list the main principles we support and indicate briefly how each relates to the provisions of the Protocol. Because of the limits of time and human endurance, I will be speaking on the level of general principles for the most part, but during the course of this Workshop, no doubt we will be going into various principles in much greater detail.

Let me start with the protection of the wounded, sick, and shipwrecked, an area in which the Protocol does contain some useful codifications or improvements of existing rules. We support the principle that all the wounded, sick, and shipwrecked be respected and protected, and not be made the object of attacks or reprisals, regardless of the party to the conflict to which they belong, as well as the principle that when such persons are given medical treatment, no distinction among them be based on any grounds other than medical ones. These principles are contained in article 10 of Protocol I.

We support the principle reflected in article 11 that the physical or mental health and integrity of persons under the control of a party to the conflict not be endangered by any unjustified act or omission and not be subjected to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards. This principle is reflected in article 11. We also support the principle that medical units, including properly authorized civilian medical units, be respected and protected at all times and not be the object of attacks or reprisals, as well as the principle that civilian medical and religious personnel likewise be respected and protected. These principles can be found, of course with considerable elaboration, in articles 12 through 20 of the Protocol.

Further, we support the principle that the relevant provisions of the 1949 Geneva Conventions be applied to all properly authorized medical vehicles, hospital ships, and other medical ships and craft, regardless of the identity of the wounded, sick, and shipwrecked that they serve. This is, in effect, a distillation of much of what appears in articles 18 through 23. We support the principle that known medical aircraft be respected and protected when performing their humanitarian

15. Protocol I, *supra* note 4, arts. 8, 10(1), (2).
16. *Id.* art. 10(1), (2).
17. *Id.* arts. 12-13.
18. *Id.* art. 20.
19. *Id.* art. 15.
20. *Id.* art. 21.
21. *Id.* art. 22.
functions. That is a rather general statement of what is reflected in many, but not all, aspects of the detailed rules in articles 24 through 31, which include some of the more useful innovations in the Protocol.

Next, let me turn to the treatment of the missing and remains of the dead. Again, this is an area in which the Protocol includes some useful innovations. We support the principles that families have a right to know the fate of their relatives and that each party to a conflict should search areas under its control for persons reported missing, when circumstances permit, and at the latest from the end of active hostilities. These useful principles are reflected in articles 32 and 33 of the Protocol.

We likewise support the principles that each party to a conflict permit teams to search for, identify, and recover the dead from battlefield areas, and that the remains of the dead be respected, maintained, and marked. We support the principle that as soon as circumstances permit, arrangements be made to facilitate access to grave sites by relatives, to protect and maintain such sites permanently, and to facilitate the return of the remains when requested. These principles can be found in article 34.

Thus far, the general principles I have stated more or less parallel the general content of the Protocol. In the next sections, however, you will observe significant differences or omissions, reflecting the fact that the executive branch has serious problems with a number of items in the next sections of the Protocol. As I mentioned earlier, Judge Sofaer will be commenting on many of these problems in his remarks.

With respect to methods and means of warfare, we support the principle that the permissible means of injuring the enemy are not unlimited and that parties to a conflict not use weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. These principles are contained in article 35. We, however, consider that another principle in article 35, which also appears later in the Protocol, namely that the prohibition of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment, is too broad and ambiguous and is not a part of customary law.

22. Id. art. 24.
23. Id. arts. 32-34.
24. Id. art. 34(1).
25. See infra text accompanying notes 114-56 (discussing the complications revolving around the Protocols).
26. Protocol I, supra note 4, part III.
27. Id. art. 35(3).
We support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy, and that internationally recognized protective emblems, such as the red cross, not be improperly used. Those principles are reflected in articles 37 and 38. But we do not support the prohibition in article 39 of the use of enemy emblems and uniforms during military operations.

We support the principle that no order be given that there shall be no survivors nor an adversary be threatened with such an order or hostilities be conducted on that basis. This is contained in article 40. We also support the principle that persons, other than airborne troops, parachuting from an aircraft in distress, not be made the object of attack. This is, of course, contained in article 42.

Next, with respect to combatant and prisoner-of-war status, we support the principle that persons entitled to combatant status be treated as prisoners of war in accordance with the 1949 Geneva Conventions, as well as the principle that combatant personnel distinguish themselves from the civilian populations while engaged in military operations. These statements are, of course, related to but different from the content of articles 44 and 45, which relax the requirements of the Fourth Geneva Convention concerning prisoner-of-war treatment for irregulars, and, in particular, include a special dispensation allowing individuals who are said to be unable to observe this rule in some circumstances to retain combatant status, if they carry their arms openly during engagements and deployments preceding the launching of attacks. As Judge Sofaer will explain, the executive branch regards this provision as highly undesirable and potentially dangerous to the civilian population and of course does not recognize it as customary law or deserving of such status.

It probably goes without saying that we likewise do not favor the provision of article 1(4) of Protocol I concerning wars of national liberation and do not accept it as customary law.

On the other hand, we do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the

28. *Id.* art. 37.
29. *Id.* art. 44.
30. See infra text accompanying notes 124-56 (presenting the viewpoint of the State Department on the problems contained in Protocol I).
31. Protocol I, *supra* note 4, art. 1(4). This provision provides that the Protocol shall apply to armed conflicts in which people are fighting against colonial domination and alien occupation, as well as against racist regimes in the exercise of their rights of self-determination. *Id.*
power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Those principles are found in article 45. We do not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of article 47 to be part of current customary law.

The next section of the Protocol deals with the critical subject of the protection of the civilian population, which was the focus of much of the work of the Diplomatic Conference. Here again, much of this part of the Protocol is useful and deserving of treatment as customary law, although certain provisions present serious problems and do not merit such treatment. We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them, and that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage. These fundamental principles can be found in article 51.

We also support the principle that the civilian population not be used to shield military objectives or operations from attack, and that immunity not be extended to civilians who are taking part in hostilities. This corresponds to provisions in articles 51 and 52. On the other hand, we do not support the prohibition on reprisals in article 51 and subsequent articles, again for reasons that Judge Sofaer will explain later, and do not consider it a part of customary law.

We support the principle that starvation of civilians not be used as a method of warfare, and subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged. These principles can be found, though in a somewhat different form, in articles 54 and 70. We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and

32. See id. part IV (asserting the protections of cultural and religious objects and the protections against the effects of hostilities on the civilian population, which prohibit parties to a conflict from directing their activities against the civilian population, attacking civilians indiscriminately, or engaging in reprisals against civilians).

33. See id. arts. 52-56 (listing civilian objects that according to the Protocol are not subject to attacks or reprisals, in particular the protections of works and installations containing dangerous forces).

34. See infra text accompanying notes 146-52 (discussing the problems inherent in article 51).
damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit. We also support the principle that attacks not be made against appropriately declared or agreed non-defended localities or agreed demilitarized zones. These various principles are reflected in articles 57 through 60. On the other hand, we do not support the provisions of article 56, concerning dams, dykes, and nuclear power stations, for reasons that again Judge Sofaer will discuss, nor do we consider them to be customary law.

Turning now to the field of civil defense, we support the principle that civilian civil defense organizations and their personnel be respected and protected as civilians and be permitted to perform their civil defense tasks except in cases of imperative military necessity. We also support the principle that in occupied territories, civilians receive from the appropriate authorities, as practicable, the facilities necessary for the performance of their tasks. These principles reflect, in general terms, many of the detailed provisions in articles 62 and 63.

Moving next to the subject of persons in the power of a party to the conflict, we support the principle that persons who were considered as refugees or stateless persons before the beginning of hostilities nonetheless be treated as protected persons under the Fourth Geneva Convention, and that states facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and encourage, in particular, the work of humanitarian organizations engaged in this task. These rules are found in articles 73 and 74.

We support in particular the fundamental guarantees contained in article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction based upon race, sex, language, religion or belief, political or other opinion, national or social origin, or any similar criteria.

We support the principle that these persons not be subjected to violence to life, health, or physical or mental well-being, outrages upon personal dignity, the taking of hostages, or collective punishments, and that no sentence be passed and no penalty executed except pursuant to

35. See infra text accompanying notes 146-50 (stating the reasons why Judge Sofaer is not in favor of article 56).
36. Protocol I, supra note 4, arts. 72-79.
38. Protocol I, supra note 4, art. 75(1).
conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.\textsuperscript{39}

Likewise, we support the principle that women and children be the object of special respect and protection, that women be protected against rape and indecent assault, and that all feasible measures be taken in order that children under the age of fifteen do not take a direct part in hostilities.\textsuperscript{40} We support the principle that no state arrange for the evacuation of children except for temporary evacuation where compelling reasons of the health or medical treatment of the children or their safety, except in occupied territory, so require. These principles are contained in articles 76, 77, and 78. We also support the principle that journalists be protected as civilians under the Conventions, provided they take no action adversely affecting such status. This principle can be found in article 79.

The final part of Protocol I deals with the implementation of the Conventions and the Protocol. Although many of these provisions are procedural in character,\textsuperscript{41} certain of the principles contained in this part also merit acceptance as customary law. We support the principle that all necessary measures for the implementation of the rules of humanitarian law be taken without delay, and that the ICRC and the relevant Red Cross or Red Crescent organizations be granted all necessary facilities and access to enable them to carry out their humanitarian functions.\textsuperscript{42} Likewise, we support the principle that legal advisors be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles, and that their study be included in programs of military instruction.\textsuperscript{43} These principles are found in articles 80 through 85.

We support the principle that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, take all appropriate steps to bring to justice any persons who have willfully committed such acts, and make good faith efforts to cooperate with one another in this regard. These principles are contained, though of course in more detailed form, in articles 85 through 89.

Finally, we strongly support the principle that Protecting Powers be

\textsuperscript{39} Id. art. 75(2), (4).
\textsuperscript{40} Id. arts. 75(5), 76-77.
\textsuperscript{41} See id. arts. 78-89 (addressing the measures for the execution of obligations and the repression of breaches of the Conventions and the Protocol).
\textsuperscript{42} Id. art. 81.
\textsuperscript{43} Id. arts. 82-83(1).
designated and accepted without delay from the beginning of any conflict. This principle is contained in article 5, but with the important difference that as stated in that article, it is not unequivocal and is still subject, in the last instance, to refusal by the state in question.

Turning now to Protocol II, the situation is of course somewhat different. Because the executive branch intends to submit this Protocol to the Senate for advice and consent to ratification, with certain understandings and reservations, it will in due course define the legal obligations of the United States with respect to non-international armed conflicts. Our friends can look to it as a common baseline defining the minimum standards of conduct that will be observed in cooperative military operations that are subject to the Protocol. Potential adversaries can look to it as a clear indication of the minimum rules that United States forces expect to observe and to be observed by our opponents. The international community hopefully can look to the Protocol as the accepted baseline for future improvements in the law of non-international conflict. This does not mean, however, that it is simply an academic exercise to inquire as to which parts of Protocol II currently constitute, or should in the future constitute, customary international law. This remains a practical question for several reasons.

First, it is not clear whether Protocol II will achieve the same sort of universal adherence that the 1949 Geneva Conventions have achieved over the years. Already, a number of Third World governments that have ratified Protocol I have at the same time declined to ratify Protocol II, apparently for fear that this could in some fashion give legal or at least political legitimacy to current or future insurgent or secessionist movements within their territories or perhaps be used to justify outside intervention on behalf of such movements. This perception is of course contrary to the express terms of the Protocol, which state that nothing in the Protocol can be invoked to affect the national sovereignty or authority of any state or to justify external intervention. Nonetheless, there may, in the end, be a number of States that decline to become party to Protocol II. To judge the legality of the conduct of these states in non INTERNATIONAL conflicts and hopefully to influence

44. See President's Message, supra note 10, at 91 (noting the objectives of the administration in codifying Protocol II).


46. Protocol II, supra note 4, art. 3.
their behavior, it is necessary to determine which parts of the Protocol are binding on them as a matter of customary law.

Second, as finally adopted, Protocol II does not cover all non-international conflicts as traditionally understood and applied in common article 3 of the four 1949 Geneva Conventions. Specifically, it applies by its terms only to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of national territory as to carry out sustained and concerted military operations. This is a narrower scope than we and other Western delegations would have desired and it has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. In addition, because Protocol II by its own terms excludes conflicts covered by Protocol I, technically it does not apply to the category of so-called wars of national liberation that are covered by article 1(4) of Protocol I.

Because of these limitations, we have recommended that United States ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by common article 3 of the 1949 Conventions, thus including all non-international armed conflicts as traditionally defined. We will likewise encourage other states to take the same step. Nonetheless, we of course cannot unilaterally bind others to apply the Protocol to all such conflicts. Therefore, it will be important to decide, with respect to such conflicts that are not technically within the scope of the Protocol, which of its provisions are nonetheless binding as a matter of customary law.

Third, there are other situations of internal violence that even fall below the threshold of common article 3. These are referred to in Protocol II as "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 unclear to what extent some of the principles or concepts contained in Protocol II should apply to such situations. In any attempt to further develop and codify the law that might apply in such cases, however, it would be very useful to know, as a possible starting point, which of the provisions of Protocol II already apply to internal armed conflicts as a matter of customary law.

The executive branch has not attempted to evaluate which provisions of Protocol II are part of current customary law to the same degree that it has done with respect to Protocol I. The basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Conventions and

47. Protocol II, supra note 4, art. 1(2).
therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence toward persons taking no active part in hostilities, hostagetaking, degrading treatment, and punishment without due process. On the other hand, certain parts of Protocol II are obviously new to the law of non-international armed conflict, although they are generally meritorious and hopefully will in due course become part of customary law. We in the executive branch will be listening with considerable interest to the discussion of the customary law content of Protocol II that is scheduled for later in this Workshop.

That is the end of my prepared comments. I know it would be impossible to discuss all of the aspects of the areas that I have briefly covered, but I am sure that later in the Workshop the details will be explored at considerable length. Some general discussion about the approach the United States is taking would be useful now, and I certainly invite your comments, criticisms, and questions. Thank you.

**DISCUSSION**

Opening the discussion, Professor Covey T. Oliver asked Mr. Matheson whether the Reagan administration had proposed ratification of Protocol II with understandings or reservations. Mr. Matheson replied that the administration was recommending both understandings and reservations. Major General George S. Prugh asked whether the government planned to publish the military review mentioned in Mr. Matheson's remarks. Mr. Matheson responded that he was referring to an extensive classified military review the Joint Chiefs of Staff conducted. The materials that the administration plans to submit to the Senate will include an extensive explanation of the position of the Joint Chiefs of Staff and will set forth those positions during the course of testimony in ratification hearings. The administration will communicate the substance of that study, designated unclassified, although it is unlikely they will publish the study.

Professor Howard S. Levi noted that Mr. Matheson had mentioned only the administration's position on Protocol II to the Senate and wondered if the Reagan administration planned to release the reasons why the Joint Chiefs of Staff opposed ratification of Protocol I.

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49. Major General (retired), former Judge Advocate General of the United States Army and Delegate to the Diplomatic Conference.
50. See supra notes 10-11 and accompanying text (describing the executive branch's review of the Protocols).
51. Professor of Law Emeritus, Saint Louis University School of Law.
Mr. Matheson replied that the State Department intended to send to the Senate information covering the positions of the Joint Chiefs of Staff on Protocol I and Protocol II. Commander William J. Fenrick, referring to Mr. Matheson's statement on the interest of the United States in sharing with its allies a common position on Protocol II, asked Mr. Matheson whether the United States envisages any situations where Protocol II will apply outside the boundaries of the United States. Mr. Matheson replied that this situation might arise where a friendly foreign government, engaged in an internal, non-international armed conflict, has requested and received various kinds of support, such as training or material, from the United States. In such a case, if the other government were a party to Protocol II, the United States would want to encourage respect for its provisions. Therefore, knowing the content of those rules as well as gaining the support of the United States for those rules is useful to the world and especially the adversarial nations involved.

Professor Theodor Meron found two of Mr. Matheson's points extremely important. First, Professor Meron noted Mr. Matheson's statement that the United States basically supports the principles and fundamental guarantees articulated in article 75 of Protocol I. This statement is of major significance because article 75 contains a minicatalogue of some of the major tenets of the basic human rights norms that the United States has not yet ratified in any of the human rights instruments to which it is a party. By recognizing this catalogue as a part of customary international law, the United States government could help develop both humanitarian and human rights law.

Second, Professor Meron found the Reagan administration's approach to the threshold of applicability of Protocol II quite important. Protocol II, under article 1, is supposed to follow the principles of applicability stated in common article 3 of the Geneva Conventions of 1949. On closer inspection, however, Protocol II raises the threshold of applicability of the system of norms with regard to internal armed conflicts to a higher level than common article 3. Thus, while there is a considerable improvement in the applicable norms themselves, the rais-

52. Commander and Director of Law — International, Office of the Judge Advocate General, Canadian Armed Forces.
53. See supra text accompanying notes 44-48 (discussing the United States position on Protocol II in relation to co-operative military operations).
54. Professor of Law, New York University School of Law.
55. See supra text accompanying notes 38-40 (discussing the position of the United States on Protocol I, article 75).
56. See supra notes 10-11 (discussing the Reagan administration's position on the applicability of Protocol II); see infra text accompanying notes 115-23 (same).
ing the applicability threshold renders the prospect of states’ actual application of those improved norms improbable. The Reagan administration’s proposal to apply unilaterally Protocol II in all common article 3 situations should become a model for all countries, especially developing countries, to follow.

Mr. MATHESON, agreeing with Professor Meron’s statement, noted that it is useful to know what is now recognized as customary international law in internal conflicts as a starting point for the future development of principles below these existing thresholds. Captain J. ASHLEY ROACH57 asked Mr. Matheson what the position of the United States would be if an alliance conflict erupted where Protocol I bound some members of the alliance and not others. Mr. MATHESON admitted that this question raised a serious problem and was the focus of much discussion within the NATO alliance. He indicated that such a case exemplifies the need for a common baseline of principles and rules that everyone must observe in the conduct of military operations. Some members of the NATO alliance, of course, will have ratified Protocol I and may thus have incurred some additional obligations. Mr. MATHESON recognized, however, that this point is not a serious impediment to military cooperation. The United States and the NATO alliance are currently studying the issue in light of the necessity for a mutual understanding of which rules each country will observe.

Professor SOHN then presented a hypothetical situation related to Mr. Matheson’s explanation. Noting that the United States has objected to the reprisal provisions of the Protocol,58 Professor SOHN wondered what would happen if Italy, which has ratified the Protocol, refused to participate in certain reprisals that the United States wants to take. Mr. MATHESON replied that the United States has looked at the reprisal question primarily in terms of determining the extent that the United States should reserve concerning the option of responding to attacks on allied civilian populations. He further stated that the ability of the United States to take a reprisal action depends on the existence of a request by an actual ally to take such an action on its behalf. Additionally, the ally making the request must legally have the opportunity to take reprisal action itself. Some members of the NATO alliance believe that they may call upon the United States to help with a reprisal and others do not.

Captain ROACH asked Mr. Matheson to explain the position of the

57. Captain, Office of the Judge Advocate General, United States Navy.
58. Protocol I, supra note 4, arts. 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4) (prohibiting reprisals against civilian targets).
United States regarding irregulars in the territory of a state that has ratified Protocol I. Mr. Matheson explained that this issue is not a practical problem because it presupposes that the movement of the irregulars satisfies all the standards under article 1(4), which is unlikely.

Professor Hamilton DeSauussure asked for an explanation of the apparent inconsistency between the United States rejection of the provisions in article 56 of Protocol I, relating to dams and dykes, and the simultaneous acceptance of article 15 of Protocol II, which contains similar provisions. Mr. Matheson replied that the United States military based its objections on a pragmatic, real-world estimation of the difference between the two situations. The military perceives that in international conflicts, many situations may arise where it is important to attack and destroy parts of an electric power grid, such as a nuclear or hydroelectric generating station. In internal conflicts, on the other hand, such a significant real-world need will not exist. Preserving the military option in international conflicts where such facilities are more likely to become an object of military attack, therefore, is very important.

Professor Sohn interjected that there is a difference between dams and dykes, on the one hand, and electric power generating stations, particularly nuclear ones, on the other. He asked Mr. Matheson how the United States could possibly reserve the option to destroy nuclear power plants when the repercussions might occur all over the world and not just locally, as the Chernobyl disaster aptly demonstrated.

Mr. Matheson responded that all other rules of war designed for the protection of civilian populations, such as the rule of proportionality and the rule of reasonable precautions apply and advanced warning, govern these attacks. The United States maintains the position that it cannot accept the almost total prohibition on such attacks contained in article 56. In any case, in situations where the United States military targets a part of the power grid connected to a hydroelectric or nuclear facility, the United States would have to consider the possible effects on the civilian population and strive to obtain its military objective in ways that would not inflict drastic effects on that population.

Mr. Dieter Fleck asked Mr. Matheson for a clarification of whether the United States held the position that the general rule of proportionality would govern attacks on dams, dykes, and nuclear generating stations in any given situation. Mr. Matheson concluded that

59. Professor of Law, University of Akron, School of Law.
60. Leiter Des Völkerrechtsreferat, Bundesministerium Der Verteidigung, Bonn, Federal Republic of Germany.
the rule does not apply where the military advantages are not proportionate to the risk to the civilian population. Professor Sohn then asked if the rule of proportionality would forbid an attack on a dam above a valley that would kill many people in the valley. Mr. Matheson agreed that the risks to civilians would outweigh the military advantage in that case if the dam were contributing little electrical power, such as when the dam was either shutdown or malfunctioning.

Professor Waldemar A. Solf found it difficult to reconcile the United States objections to article 39 of Protocol I, which restricts the use of enemy uniforms in military operations, with the United States objections to article 44(3), which gives irregulars protection even though they are not in uniform. He found the objections of conventional military combatants to article 44(3) understandable in that the civilian population is thereby more protected because the article prevents the use of civilian disguise to achieve surprise. He therefore focused his question on why the United States allows the use of enemy uniforms to achieve surprise.

Mr. Matheson replied that it was a question of priority. The United States military contends that there are certain adversarial forces that would use enemy uniforms in their operations in any case; therefore, it is important from the beginning to preserve that option for the United States as well. At the same time, the need to protect the civilian population from the dangers associated with irregulars who fight among that population, without distinguishing themselves, mandates the opposition to article 44(3).

Major General Prugh asked for an explanation of the reasons why the Reagan administration objects to article 44(3) in view of the established policy that Edward W. Haughney and he had assisted in formulating. He explained that this policy extended the prisoner of war status "to the little kid in black pants down at the end of the trail who might have had a gun in his hand a few minutes ago."

Mr. Matheson responded that the administration believes that the civilian population is at a considerable risk if irregulars operate among them without distinguishing themselves, except in very extreme situations when they are actually conducting their operations. He pointed out that the kinds of organizations operating in this fashion are typically perceived as unlikely to adhere to the rules of warfare. Under

61. Adjunct Professor of Law and Senior Fellow, Washington College of Law Institute; Member, United States Delegation to the Diplomatic Conference on International Humanitarian Law, 1974-1977 (deceased).
62. Professor of Law, Dickinson School of Law.
present conditions, the balance swings away from the positions taken during the Vietnam War. Mr. MATHESON, thus, concluded that the decision is largely a matter of historical development and an appreciation of the current world situation.

Mr. HANS-PETER GASSER concluded the discussion portion of session one with a question regarding the position of the United States on the new rules protecting civilian and cultural objects as well as the environment. Mr. MATHESON replied that the application of the major rules, such as the rule of proportionality and the rule against attack, would include civilian and cultural objects. He indicated that the United States has no great concern over the new definition of "military objective" set forth in article 52(2) of Protocol I. The United States, however, considers the rule on the protection of the environment contained in article 55 of Protocol I as too broad and too ambiguous for effective use in military operations. He concluded that the means and methods of warfare that have such a severe effect on the natural environment so as to endanger the civilian population may be inconsistent with the other general principles, such as the rule of proportionality.

SESSION TWO: THE FORMULATION OF GENERAL INTERNATIONAL LAW: HOW IS IT GENERATED? HOW IS THE EXISTENCE OF ITS NORMS ASCERTAINED?

Professor LOUIS B. SOHN, the moderator for session two, asked Mr. Gasser to give a short overview of the current official status of the Geneva Conventions and the Protocols. Mr. GASSER reported that 165 states were party to all four Geneva Conventions of 1949. In addition, 102 states signed the Final Act of the 1977 Diplomatic Conference. Sixty-two states signed Protocol I, and fifty-eight states signed Protocol II within the one year period open for signature, under article 92 of Protocol I and article 20 of Protocol II, respectively. Sixty-six states have ratified Protocol I, and sixty have ratified Protocol II as of the

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63. Legal Advisor to the Directorate, International Committee of the Red Cross.
64. See States Parties to the Geneva Convention of 12 August 1949, States Parties to the Protocols of 8 June 1977, 256 INT'L REV. RED CROSS 110, 111 (Jan.-Feb. 1987) [hereinafter States Parties] (listing the states that have become parties to the Convention since 1981, thus bringing the total to 165 states).
Some NATO allies have ratified both protocols. These include Italy, Belgium, Norway, and Denmark. The United States, Canada, Australia, New Zealand, and the United Kingdom are also working toward ratification in their executive departments. It is the ICRC's understanding that the Reagan administration is trying to convince some of its allies to adopt a position similar to that of the United States on Protocol I. The People's Republic of China has ratified both Protocols, while the USSR has indicated that it accepts both texts as good law, but is withholding formal ratification until all five Permanent Members of the Security Council agree to ratify both texts. The Soviet response in effect acknowledges that it will not ratify until the United States does so.

**Remarks of the Moderator**

Thank you Mr. Gasser for your report. I would like to begin by making a few remarks about the substance of session two. The Workshop must envisage the formulation of international law in light of the three legal systems involved: the law of the United Nations, the law of the Hague, and the law of Geneva.

The Charter of the United Nations contains several important provisions regarding the use of force. The United Nations has implemented these provisions through several documents, including the Declaration of Principles of International Law Concerning Friendly Relations, the Definitions of Aggression, other documents on the impermissibility of intervention in the internal affairs of other states, and more than fifty documents on human rights, which are relevant to humanitarian law. The law of the Hague includes the conventions of 1899 and 1907, to
which the majority of the influential states are parties. Finally, states now generally accept the law of Geneva, expressed in the Conventions of 1929 and 1949, as a part of customary international law, regardless of whether they have ratified these conventions.

With regard to the sources of international law, in my opinion only one source of international law exists: the common will of the states of the world. This "common will" is expressed in many ways: explicitly and implicitly, by action or inaction, or by the practice of some states and the acquiescence of others. The crucial point in any particular case is whether states generally accept a rule as the standard. Therefore, a large number of states, rather than every state, must accept the rule. Persistent objectors cannot stop new rules from developing, but they can prevent application of those rules to themselves.

I also hope this Workshop will focus on what is the best evidence of the existence of a rule of customary international law, particularly in the humanitarian law field. If, for example, one of the Protocol I rules

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is similar to the rules of the 1949 Geneva Conventions or the Hague Conventions, then that rule is most likely a binding rule. On the other hand, if that rule departs too much from the existing law, it is probably not a binding rule of customary international law.

In the past we relied principally on the correspondence of governments to determine the rules of customary international law. Learned scholars would delve into the archives, read the international law claims of one government and the replies of the other, deduce a new rule of international law, and write an article or treatise stating that rule. Many other authors would copy the rule from the first, thereby leading jurists to agree that this general unanimity evidenced a new rule, which everyone would then accept. Of course, this rule was not only based on the scholars having said it was a rule; it was supposedly derived from the practice of states.

The decisions of domestic and international tribunals were added to this process in the nineteenth century. Scholars started to collect and generalize these decisions into rules binding upon not only the parties to the specific cases but upon the whole community of states as well. Scholars could also generalize the concurrent domestic legislation and the executive department proclamations of states into binding rules. There are two United States executive proclamations that act as examples in this regard. In 1945, President Truman declared that a continental shelf existed for the United States. Many other states followed this great encroachment on the freedom of the seas, and no state objected. States considered it a customary rule within a few years, until the United Nations finally codified it in the 1958 Law of the Sea Convention. More recently, in 1983, President Reagan issued a Proclamation and Ocean Policy Statement accepting ninety percent of the Third United Nations Law of the Sea Convention as an expression of

72. Proclamation 2667, 10 Fed. Reg. 12,303 (1945) (codified at 3 C.F.R. 67 (1943-1948 Compilation)) (providing the policy of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf); Executive Order 9633, 10 Fed. Reg. 12,303 (1945) (codified at 3 C.F.R. 437 (1943-1948 Compilation)) (reserving and placing certain resources of the continental shelf under the control and jurisdiction of the Secretary of the Interior).


generally agreed upon international law. States now generally accept these provisions as binding rules.

At the beginning of this century a new development — multiparty conventions — was added to the process. According to Sir Frederick Pollock, multilateral treaties are distinguished from bilateral treaties, which are only binding upon the parties to them. He noted the “increasing frequency and importance [of] . . . agreement[s] [and] declaration[s] . . . made . . . by a considerable proportion, in number and power, of civilized states at large, for the regulation of matters of general and permanent interest . . . [adopted at] congresses or conferences held for that purpose.”76 This would include, in his view, the Hague Conventions of 1899. He had no doubt that when all or most of the great powers have deliberately agreed to certain rules of general application, the rules they approved had very great weight in practice even among states that had never expressly consented to them. Declarations and conventions of this kind may be expected to become part of the universally received law of nations within a moderate time, in the absence of prompt and effective dissent by some power of the first rank.77

The International Court of Justice stated in almost verbatim language the same principle in the North Sea Continental Shelf case.78 These rules become part of the corpus juris gentium. The court has relied upon “emergent rules,” thereby crystallizing rules from conventions that are not yet ratified. The court applied the Vienna Convention on the Law of Treaties13 years before it came into force and the Law of the Sea Convention even as it was barely being born. This is a new era — unratiﬁed international agreements, if they represent a consensus among states at the time of signing, are binding as customary rules of international law. This is true even if some states dissent. Dissenting states that rely on the rule expressed in the Anglo-Norwegian Fisheries case, that a dissenter is not bound by the rule, may be bound anyway if the rule has become a jus cogens norm. For example, it does not matter if some new state wants to dissent from the

76. Pollock, The Sources of International Law, 2 Colum. L. Rev. 511, 511-12 (1902) (stating that the increased frequency and importance of these agreements stems from the congresses or conferences held for that purpose).
77. Id. at 512 (stating that general consent determines the law of nations).
United Nations Charter, that state is still bound.

REMARKS OF PROFESSOR COVEY T. OLIVER

I shall build upon three issues presented earlier: one from Mr. Keller's presentation this morning, another addressed in Professor Almond's paper distributed before the meeting, and the third distilled from Professor Sohn's observations as to the various sources of customary international law that might reasonably be relied upon. With these issues in mind, I shall deal with four points, taking Mr. Matheson's presentation as background.

The first point is to note with satisfaction that at long last in this conference we of the general international law field, including human rights, and our colleagues in the humanitarian law field now converge to face a common problem. I hope that as we face this common problem, the convergence will be improved along the lines that my colleague appearing shortly has called for. So I welcome this convergence because basically, as we all realize, the aims of human rights law as it has developed in general international law and humanitarian law are the same: to deal with human problems, human needs, and human dangers. We share the common problem of how far we can go with customary law as a substitute for what we all desire and realize is better if we can get it: explicit, positive, universal law.

My second point is that we must agree that customary law is present more in the world today than it was in the world of centuries past, when it existed only as a last and poor resort. The real problem for humanitarian law is that customary law is even more uncertain and more disadvantageous in this field than in general international law, for the simple reason that judges and scholars are not making the real decisions involving human beings. These people may do a "post mortem" as judges, but the real decisions have to be made by responsible field commanders, and they have to be made on the basis of as much certainty and as much authority as possible.

My third point requires me to disagree mildly with the view of Professors Buergenthal and Maier in their excellent *Nutshell on Public International Law* that domestic versions of international law are unsailable in municipal proceedings. There should not be a national or domestic international law in the United States. That is to say, the judge or scholar in the United States who is stating customary law

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82. See T. BUERGENTHAL & H. MAIER, PUBLIC INTERNATIONAL LAW 202-04 (1985) (stating that the United States recognizes the existence of customary international law).
should be charged with finding universal law by appropriate proof, not an American version of international law made up by judges using analogy to the general law maritime.

For example, Professors Buergenthal and Maier state that it is for the most part irrelevant whether the individual invoking international law in an American court is a subject of international law. I dissent, and I think they do as well in their treatment of the *Filartiga* and *Tel-Oren* cases.

My final point concerns what is to be done if uniform, positive law, such as the rule in Protocol I or a substitute, cannot be achieved. One approach I am sure we would reject out of hand is the Soviet selective choice approach, so well remembered as a part of their effort to establish principles of coexistence. Are we in the United States in danger of establishing our own version of coexistence by the process in which we assert preferences as to what the law should be? That is one danger I think we should avoid.

Given the present circumstances and considering the urgency of human needs in comparison with the political situation, I do agree that we need "positivization" by informal, international acquiescence or agreement. I wish "positivization" were not something we had to explore, but I think it worthy of exploration on the merits. We must explore it, despite the problems of American national constitutional law involved in this process of informal, nonexecutive agreement and non-treaty law that will be developed as a norm the United States will be authorized to follow.

Finally, I challenge all of us, including myself, to think of other alternatives. Perhaps a *transnational* restatement of international law by my colleagues and friends who did the excellent *Restatement (Revised) of Foreign Relations Law*. In many ways, the current *Restatement (Revised)* is, to a considerable degree, international law and useful positive law. Perhaps we should think in such terms transnationally, at least as an alternative to the highly informal and not yet clearly worked-out accommodation between "friends" Mr. Matheson proposed this morning.

83. *See id.* at 115 (stating that because the individual is the subject of human rights, nationality is irrelevant).
84. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
86. *See T. BUERGENTHAL & H. MAIER, supra* note 82, at 205 (discussing the *Filartiga* and *Tel-Oren* cases).
Shall we attempt these “positivization” efforts only with our friends and allies? Should efforts be made across the Iron Curtain as to what common principles are required if the Protocols are not universally accepted? Regrettably, I believe that striving for the less-than-best is justifiable under the circumstances. We must at the same time be mindful of the difficulties and problems this approach presents. Not the least of which is that this less-than-best, easier approach may in the long-run have the effect of deflecting attention from what is really needed: an up-to-date, effective, positive law of human treatment for all mankind.

**Remarks of Professor Theodor Meron**

I am delighted that Professor Oliver referred to the common goals that exist between human rights and humanitarian law. For far too long, humanitarian law and humanitarian experts have been orphans of international law from the perspective of the human person. In times of violence or in times of serenity, the label is not important; it is the protections that count. During the last few years, I have tried to bring these two disciplines — these two systems of protection — closer together, and I believe that the exercise in which we are engaged today brings this approach forward. This approach, which is of course traditional, can be characterized perhaps by the fact that the recent draft *Restatement (Revised) of Foreign Relations Law* does not address basic questions pertaining to the Geneva Conventions. I do hope that when we have our next Restatement, this gap between human rights and humanitarian law will no longer be there.

The first question that I would like to address is perhaps somewhat provocative. Why was it necessary to have our roundtable this morning discussing general questions of formation of customary international law? Why not start right away with the Protocols? I think that perhaps there are some good reasons for following this format. We have to address these questions because of the special difficulties involved in the ascertainment of state practice in international and internal armed conflicts and because of the frequency of violations or conduct which is not consistent with the norms. Our object this morning is to create some kind of a conceptual framework for the more specific roundtable discussions that will follow during this Workshop.

I would like to refer briefly to five principal questions. First, why is the question of customary law important in humanitarian law in the
context of the Protocols? Second, where do we turn for the evidence of state practice and opinio juris? Third, what can we learn from the judicial precedents or antecedents that we can find? Fourth, what are the characteristics of lawmaking in the field of humanitarian law? Last, what weight should we attach to violations?

First, what is the importance of the customary law character of certain norms stated in the Protocols? Obviously, customary law norms also bind states that do not become parties to a particular instrument. This is very important for the Protocols because they have been adopted by roughly one-third of the international community. The question is somewhat less important for the Geneva Conventions, which fortunately have obtained virtually universal ratification. There are, however, additional reasons why the question of the customary law nature of certain norms of humanitarian law may be important both in the context of the Geneva Conventions and in the context of the Protocols.

First, in some countries the question has significant internal law consequences. This is especially true in countries where customary law is part of the law of the land, but treaties require implementing legislation to be a part of the law of the land and necessary implementing legislation has not been adopted. Numerous countries following the British system of public law fall into this category. Lest you think that this question is academic, I would like to mention that my very tentative perusal of previously collected documents from the ICRC on the subject suggest that between one-third and one-half of states parties to the Geneva Conventions have adopted the necessary implementing legislation. In other words, there are many states that have not carried out their international obligation to adopt the necessary domestic legislation.

Second, if a norm reflects customary law, states cannot terminate their obligations by withdrawal. This method is addressed to a certain extent by the "denunciation article" common to the four Geneva Conventions, and perhaps to a lesser extent, by article 99 of Protocol I and article 25 of Protocol II.

Third, reservations to treaty provisions would not affect the obligations of the parties with regard to provisions reflecting customary law to which the states concerned would be subject independent of their treaty commitments. As customary law, the norms reflected in interna-

89. First Geneva Convention of 1949, supra note 4, art. 63; Second Geneva Convention of 1949, supra note 4, art. 62; Third Geneva Convention of 1949, supra note 4, art. 142; Fourth Geneva Convention of 1949, supra note 4, art. 158.
tional humanitarian instruments, such as the Protocols, might also be subject to a process of interpretation different than the process of treaty interpretation.

Finally, invocation of a norm as both conventional and customary adds at least a rhetorical strength to the strongly emphasized claim of the International Court of Justice in the Hostages case that the obligations in question that Iran breached were not merely contractual, but were also obligations under general international law.\(^9\) This is particularly important in the humanitarian law area because here some of the norms are not merely customary, but may also have the special character of preemptory, *jus cogens* norms. We already know that the international community frequently invokes *jus cogens* norms as an important moral and legal barrier to violations of and derogations from fundamental principles.

The customary law nature of certain provisions is also very important in the context of writing new manuals of military law. Although the question of whether a norm is customary will not be the exclusive consideration for the incorporation of a certain norm in a manual of military law, it is an important one and should be taken into account.

My second major area of concern is where to look for the practice of *opinio juris* in the area of humanitarian law. The special difficulties I have already mentioned lie in the fact that there is little significant state practice by non-parties or even by parties. Moreover, an important portion of that state practice may be inconsistent with the norm and reflect violations of the norm.

This Workshop should address the following questions. What acts constitute good evidence of state practice with regard to the content of the Protocols? What acts or statements demonstrate the existence of *opinio juris* with regard to the content of the Protocols? Are the methods of establishing the customary law character of the contents of the Protocols, which are rooted in the law of Geneva, different from those which are rooted in the law of the Hague? Because many provisions of humanitarian instruments such as the Protocols reflect important and even compelling principles of humanity, should the burden to be discharged in demonstrating the customary law character of certain norms be lighter than in other areas of international law? Should the type of evidence be different? Analogies to human rights norms, for example, may suggest the possibility of a positive answer to this question. Where an examination of a particular norm included in the Proto-

cols leads to a tentative conclusion that it was regarded at the time of the adoption as declaratory of international law, what significance should attach to the inconsistent practice of states since the adoption of the Protocols?

**Remarks of Professor Harry Almond**

Professor Sohn remarked earlier that bilateral treaties are not really a source of international law, or at least compared with multilateral treaties, they are not of the same nature. We have to bear in mind, however, that in today's world there are certain countries doing things that must be judged against the interest and the expectations of the larger global community. I am referring here largely to the arms control agreements between the United States and the Soviet Union. They may not be lawmaking in the usual sense. The agreements may not even reflect customary international law in the usual sense. Because they involve the process of coercion, they create expectations that we associate or identify with the emergence of customary international law. Treaties dealing with areas as important as arms control will ultimately result in a convergence of global expectations with respect to such agreements. This convergence is likely to occur because arms control is part of coercion control and it has as its objective control over nuclear aggression.

With respect to the convergence of human rights and humanitarian law, we have to bear in mind the distinctions between these two areas of law. The distinctions are primarily procedural because human rights are those rights invoked by an individual against a state. Humanitarian law is not at present enforced against a state by individuals. It seems to reflect the larger responsibilities and duties of nation states toward the individual. What happens when an individual is denied these humanitarian treatments under, for example, article 3 of the Geneva Conventions? Has he any claim that he can raise against the country denying him that treatment? We must bear in mind these significant differences when we discuss these issues.

We need a frame of inquiry into the evolution of customary international law and an in-depth approach to the emergence of customary international law. If we turn to the International Court of Justice, we see today, particularly as a result of the *Paramilitary Activities* case,²

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91. Professor of Law, National Defense University, The National War College.
that it is very unlikely that customary international law will ever be invoked again in cases of that nature by any country of consequence. Although I doubt that issues of that kind will ever again be raised in that court in our lifetime, they will be raised, and they must be raised in the global community context.

Customary international law among states with substantially competing ideologies is the subject of a challenge between contending public orders. When you look at Soviet writings, actions, and activities, their views are so different from ours that you can find differences at every stage in which we have either a use, invocation, or application of the law. Therefore, if a rule is invoked among states for their own public policy, we have then contending claims as to what customary international law is all about. The Brezhnev Doctrine, for example, differs from anything we have. It provides a different basis, a communist totalitarianism basis, for customary international law. In view of the severe competition among states today, we must agree with Lenin that a military struggle of the communist and democratic states may be a final struggle. But even short of a military struggle, ideological struggle is such that the possibility of coexistence of social systems, one favoring totalitarian, and the other favoring democratic values, is unlikely to have more than a short period of coexistence.

There are some factors with respect to customary international law that I think we ought to consider in our discussion. We need to determine the extent to which customary international law and its specific rules are invoked, applied, or recommended among states. This is largely a task of taking an inventory with respect to that law. We have to find out among ourselves exactly what we are saying and what it is we are sharing, and what we mean by customary international law. My own reaction is that there are areas of major ambiguity because much of customary international law is in a formative stage. We do not know what it will look like when it has emerged as rule or directive. But during the formative stage, the process in which the law is shaped raises disputes concerning even the existence of such law.

The effectiveness of customary international law also has to be assessed. We have to determine the extent to which states enforce that law and the extent to which they respect it in terms of its enforcement. We are aware of such problems in the law of war and in humanitarian law for the purpose of the conceptual framework of this Workshop. We have customary international law evolving in outer space, with the law of the sea, again with the law of war, and, although some would differ, with respect to arms control and disarmament. By drawing on this larger context, we can develop that frame of inquiry which I think you
The subject we are addressing today, how customary international law is developed, is somewhat deceptive in its apparent familiarity. Any college of international lawyers will agree on how to identify what is customary law. We agree that laws are expectations shared by politically relevant actors, that they are attended by authority symbols that indicate we are confronting law and by some sanction components that indicate that the people who are committed to a particular law are going to make it effective. It is not terribly hard to apply these criteria to a flow of behavior and to try to identify the expectations of law among those who are politically relevant.

The problem we are faced with here is not so much "what is the law," but "which law." International, constitutional or "constitutive" revolutions have radically changed the process of lawmaking. We have reached the point where we have to choose which law to use whenever we address a major area of international law, for there are at least two laws. One of the results is that the international legal system has become like a camera, every shot of which is a double exposure. This has policy implications for those who want to improve the law of war as well as implications for the democracies that may be called upon from time to time to use force in international politics.

In the past thirty years, elite groups, largely from the Third World, have become a dominant force in parliamentary arenas. These are arenas that are characterized by the doctrine of "one state, one vote." Although there is no correlation between their particular numerical power and actual political power, these arenas also control key symbols of authority. Thus, we have a curious situation in which much that purports to be new law has emerged that is heavily characterized by the appropriate authority symbols of international law but does not have the control component—the sanction component—because many of the more powerful states have serious reservations about, or completely oppose, it. These more powerful states contend that the law that continues to be enforced is the older, traditional, customary international law. This older law, in contrast, has a controlling component and a sanction or effective control component, but in terms of the new symbolism of authority, it lacks the authority component. Thus we have two claimed versions of law for many key problems. I will give you

93. Wesley N. Hohfeld Professor of Jurisprudence, Yale Law School.
examples of them and show you how they have been applied most recently by the International Court of Justice in the *Paramilitary Activities* case. The point I would like to make at the very beginning of this is that with this bifurcation of international law, the preliminary question, again, is not "what is the law," but "which law."

In 1945, the victors of the Second World War, who were the dominant figures in international politics, established the United Nations. They created an organization in which they reserved the critical power through the institution of the Security Council; the other 45 original members essentially had an advisory or recommendatory power. Many of those smaller states were dissatisfied. Because it served United States policy during the early years of the United Nations, the power of the General Assembly gradually expanded with our encouragement. The "Little Assembly," and at a later stage, the Uniting for Peace Resolution, transferred in a contingent fashion certain Security Council powers to the Assembly. By the early 1960s, as the process of decolonization accelerated, many new states came into the United Nations. They sought to expand this transfer of power even further.

Because there had already been a fair amount of speculation among scholarly writers about the lawmaking capacity of the General Assembly, because there were some general references to this in the Charter and because the International Court of Justice had given its blessing in the *Reparations* and later in the *Certain Expenses of the United Nations* cases, it was not particularly difficult for this new majority to begin to view itself as a lawmaking body. Over a period of time, an interesting psycho-legal transformation took place. This large group began to view itself and its majority votes, if not as international law, at least as "evidence" of international law. After 1974, the International Court of Justice began to lend its support to that general view.

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95. See Coster, The Interim Committee of the United Nations, 3 INT'L ORG. 444 (1949) (detailing the history, role, and functions of the Interim Committee of the United Nations General Assembly, also known as the "Little Assembly," and evaluating its progress); Austin, *Role of the Little Assembly in Promoting International Policy*, DEPT ST. BULL., Oct. 24, 1949 (describing the work of the Interim Committee of the United Nations General Assembly in the promotion of international cooperation in the political field).
The efforts of what we might call the enlarged international parliamentary arena have been broad. Almost every aspect of international law has received its imprint. At first, the numerical power of this majority overran the wishes of politically powerful dissenting states. Parliamentary organizations, such as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations General Assembly in the 1960s, ground out international law that, at least on paper, revised the world legal system, but in effect did nothing. The leaders of the new majority appreciated this, and with the agreement of the First and Second worlds, a new doctrine of consensus was established. Consensus is a technique whereby votes are suspended until the key interests of the different groups are determined. Only after a draft that adequately reflects those interests is agreed upon is the matter then affirmed by an actual vote.

Even consensus ultimately failed to solve every issue. For many matters, no consensus could be achieved because they involved issues on which the Third World is passionate and uncompromising, such as decolonization, selective self-determinations, and perhaps certain other property and economic matters. There are some matters on which the General Assembly or other expanded parliament might discriminate in favor of one of the superpowers. But even when there was no consensus, the sheer weight of numbers meant that the majority could determine the agenda, and they could determine the personnel of the conference committee. The resultant disparity between the law that was customary and the new parliamentary law with regard to the use of force was hardly unique.

I would like to talk very briefly about the right to use force in general and then, about how force is to be used, for that is the major subject of our meeting. The textual universe of the United Nations Charter is fairly explicit on how force is to be used. Force is not to be used unilaterally. The use of force was in fact rendered unnecessary as the Security Council would do the job for you. The only exception to this non-user regime was for a party that was a victim of an armed attack to take defensive measures, until the Security Council acted. The regime that was established in the Charter was also essentially neutral and conservatory. The language of article 39 speaks in terms of threats to the peace, breaches of the peace and acts of aggression. All unilateral efforts to change the status quo by force are unlawful.

This textual version has been changed over a period of time in some very interesting ways. In 1970, the Declaration of Friendly Relations,99

which was strongly supported by the Western states as a way of block-
ing the peaceful coexistence principles being promoted by the Soviet
Union, said in part:

By virtue of the principle of equal rights and self-determination of peoples en-
shrined 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 re-
spect this right in accordance with the provisions of the Charter.100

Five paragraphs later, the operational section stated:

Every state has the duty to refrain from any forcible action which deprives peo-
oples . . . of their right to self-determination and freedom and independence. In
their actions 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
to receive support in accordance with the purposes and principles of the
Charter.101

You will note here the beginning of an inversion from the old neutral
and essentially conservatory position. Members of a group have the
right to resist when a state forcibly impedes their rights to self-determi-
nation, freedom, and independence. The state against which groups are
operating is by its obduracy in violation of law, and groups that are
trying to change that state are entitled to international support.

The inversion may, in the minds of some of the drafters, have been
limited to certain historical atavisms. Western drafters may have
thought it referred only to South Africa and perhaps to the Portuguese
territories in Africa. It is very clear, however, that many people
thought they were voting about Israel, and others may have been voting
about things like Sendero Luminoso (Shining Path), the Sandinistas,
the IRA, or other groups. The words “groups struggling for freedom
and independence,” have no historical limitation. If you want to know
what they mean, you do not look to the travaux; you count noses in the
General Assembly, for the meaning will change as the General Assem-
by moves to a set of values different from those of the politically pow-
erful states.

You find the same issues raised within the Protocols. Protocol I, arti-
cle 1(4) reinforces what the Declaration said in the above-quoted pas-
sage regarding self-determination. Articles 43 and 44 further discrimi-
nate in favor of the type of struggle contemplated in the Declaration.
Article 1(4), at the same time, but in a reverse fashion, discriminates

100. Id. at 123.
101. Id. at 124.
against states that react by severely impeding the right of reprisal. The basic law of war, regarding both the right to use force and the way force is used, is shifted here from a fairly value-neutral system, which tried to mediate between different actors, to one that tends to discriminate in favor of a particular group.

The current struggle in southern Africa illustrates this new pattern. My remarks now are not a commentary on the virtues of the ANC or the iniquity of the South African government. This is simply an effort to expose two chiastic legal paradigms. On May 19, 1986, the South Africans mounted raids in Zambia, Botswana, and Zimbabwe. The matter went to the Security Council and the South African representative said:

South Africa will not tolerate activities endangering our security... [W]e will not hesitate to take whatever action may be appropriate for the defense and security of our own people and for the elimination of terrorist elements who are intent on sowing death and destruction in our country and in our region.\(^{102}\)

The Organization of African Unity (OAU) took the opposite position in regard to Namibia and called upon all progressive and peace-loving countries to render, increase, and sustain support in material, financial, military, and other assistance to the South West Africa Peoples Organization (SWAPO) to facilitate the intensification of its legitimate armed struggle.

There are two innovations in cases like these. The first is the inversion of customary law and the creation of a discriminatory pattern in favor of the group that is fighting for its "freedom and independence," as defined by the majority of the relevant parliamentary arena. The second is a revision of the basic notion of self-defense, which has had an impact on the United States and Central America.

There has been a great deal of discussion about the definition of an "armed attack" because the definition determines the legal contingency for the right of self-defense.\(^{103}\) The General Assembly, in the Definition of Aggression, in article 3(g), said that the "sending, by or on behalf of a state, of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to an armed attack is an armed attack."\(^{104}\) This seems to say that the mere fact that armed bands from another state engage in in-


\(^{103}\) U.N. CHARTER art. 51.

cursions is not enough. Such incursions are not an armed attack that provide a right of self-defense until the incursions exceed a certain quantitative threshold.

The implications of this particular holding were made very clear in June 1986, when the International Court of Justice rendered its merits decision in the *Paramilitary Activities* case. The court did two things. First, while stating that the two types of law are not exactly identical, it recognized that customary law and Charter law with regard to this particular problem are similar; therefore, it is proper to look at the productions of the new parliamentary arenas. Second, the court, looking to the parliamentary arenas, concluded that armed attack no longer includes many of the elements of low-level and protracted conflict. The court by definition excluded from the category of armed attack assistance to rebels in the form of provisions of weapons or logistical or other support. Henceforth, this can be viewed as a threat to the peace which entitles the victim to go to the Security Council, but it does not entitle it to use self-defense in a unilateral fashion. This version of law is quite different from customary law and, at least according to the court, it trumps it.

The classic debate about how we determine what is the law is likely to miss the point in cases like these. If we had sent a team of lawyers to argue the merits phase of the *Paramilitary Activities* case in the International Court of Justice and it had not made the distinction between parliamentary and customary law and not taken account of the fact that the court was going to resonate to the Assembly’s system, it would have been quite hopeless. The formal institutions of the parliamentary system are superordinating the new version of law in their decisions.

As Mr. Almond said earlier, law to be law has got to be effective. Much of the new law is just law on paper, desirable as some of it may be. But it is a confusing situation with a number of policy consequences. Because of the double exposure problem, the effectiveness of law in restraining savagery in the use of force is going to be reduced. The democratic polities are going to find it much harder to react and proact with force while totalitarian polities will probably find it easier to benefit from this particular ambiguity.

Those who identify with Western Europe, the United States, and other democratic states have two tasks. One task is to work out ar-

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106. Id. para. 181.
107. Id. para. 195.
rangements about the use of force that are satisfactory to our minimum requirements and are as humane as possible. The second task is to try to address the law-making process that created the double exposure problem. Neither of these tasks is easy. It is very hard to persuade people to surrender the favorable tilt that has been built into the law of war. It is very hard to ask people who are against apartheid or people who want a national home for Palestinians to give up whatever they think is going to serve their purpose in favor of something nebulous like a neutral law of war. But unless this is done, we are going to find a law on the books that has less and less effect in reducing the savagery of war.

The constitutive and structural problem is also not easy to solve. I do not think we can expect more consensus, and we may discover that it is necessary to move into restrictive-access arenas, such as the Organization for Economic Co-operation and Development (OECD) or the Afro-Asian Consultative Committee. In such arenas, like-minded states establish certain membership requirements and prescribe common law among themselves that they will apply and make public, in so far as it is appropriate. Hopefully, its cogency and fairness will attract some support from others. The other possibility is simply to proceed in a somewhat individual and homologous fashion, as the Supreme Court discusses in the *Scotia* case. This possibility seems to me to be very slow.

The old customary route of prescription that Professor Meron referred to raises other problems. As he concluded, customary law requires a period of time for experimentation and gradual inference by scholars of what the law is. The law of war, to be effective, should be known ahead of time so it can be incorporated into training and planning. It should not be law only for *post hoc* appraisal. It should limit the savagery of action on the ground. Custom here may not be an appropriate primary method.

**DISCUSSION**

Professor Meron began the discussion with a further elaboration of Professor Reisman's statements and a review of international developments with respect to both judicial and parliamentary law making. One striking feature of the decision of the International Court of Justice in the *Paramilitary Activities* case, is that the Court regarded common

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articles 1 and 3 of the 1949 Geneva Conventions as customary law\textsuperscript{109} without any further inquiry into the process or rationale for that finding. A review of international judicial decisions following the Second World War shows a clear trend toward disregarding state practice and making certain desirable humanitarian rules a part of customary law through \textit{opinio juris sive necessitatus}. The actions of the International Court of Justice in the \textit{Paramilitary Activities} case reflect this trend.

Professor REISMAN next pointed out that a fairly similar phenomenon arises in legislative law making in humanitarian law. In humanitarian law, international law-making conferences do not attempt to codify the existing state of the law. Instead, the conferences try to establish rules that the majority of conference participants regard as more advanced, more desirable, and more humanitarian. In both of these contexts, therefore, lawmakers are less concerned about the actual practice of states.

Professor REISMAN then elaborated that the International Court of Justice's suggested criteria in the \textit{Paramilitary Activities} case regarding violations follow the same trend. The court stated that when it reviews violations of the law and discovers that a state justifies its failure to follow the international rule of conduct by emphasizing exceptions contained within the rule rather than by frontally challenging the rule itself, the effect is to confirm the rule of law rather than weaken it.\textsuperscript{110} Because these various norms contain humanitarian elements, international public opinion will construe them as constituting customary rules of law even though the norms lack traditional ingredients for the formation of customary law.

Professor ALMOND stated that Professor Reisman's double-exposure theory of the development of customary law is an important distinction, especially if the United States invokes it before the International Court of Justice again. Professor ALMOND indicated that the United States will not turn to the International Court of Justice at any time in the foreseeable future in light of the Nicaraguan matter. In his opinion, the court handed down an inadequate opinion in the \textit{Paramilitary Activities} case that reflected the inability of the court to deal with certain issues.


\textsuperscript{110} Id. (showing that the United States rather than challenging prohibitions against the use of force attempted to prove that it fell within various exceptions to the prohibition).
Professor Sohn, in response to Professor Almond's statement, stated that the International Court of Justice may have a chance to develop the law in this area further because Costa Rica, unlike the United States, has decided to contest Nicaragua on the merits. Costa Rica believes it can persuade the court that it made some mistakes in its prior decisions. Professor Sohn noted that international lawyers have a duty to write on the Nicaragua question rather than ignore the issue, so Costa Rica can use those articles as references in its case against Nicaragua.

Professor Oliver, responding to Professor Sohn, stated that it is too late to condemn the United States for contesting the decision of the International Court of Justice, thereby passing up an opportunity to contribute to positive multiparty treaty law and instead attempting to elicit a general understanding among its friends on how to address certain problems. He noted that although such an understanding is better than nothing, it does present a number of problems. One problem he recognized involves the level of authorization needed to comply with the United States Constitution upon entering such arrangements. Another problem he noticed relates to the definition of "friends." He indicated that the rules in humanitarian law should reflect a more universal view, although plural systems are inevitable, given the reality of the situation.

Professor Sohn agreed with Professor Oliver, stating that it was easier to think only about problems faced by military powers, especially those involving the great powers, namely the United States, the Soviet Union, and a few of their friends. Professor Sohn noted that Professor Oliver recently reminded the panel to consider the situation in the Third and the Fourth Worlds. If the United States truly believes in democracy, then those Third or Fourth World countries should have a voice, even if they are smaller and less important to the power structure. Professor Sohn indicated that domestically, we abandoned long ago the idea that only the rich and the powerful should make decisions regarding the manner in which the country is run, and that human dignity requires that all four billion people have a voice in the political process involving them.

Mr. Matheson responded that the decision of the United States regarding the accepted rules of Protocol I has a number of objectives. The first most immediate objective is simply the maintenance of present and future military alliances and the need to know which rules will govern our common military operations. That objective is in part an application of what we may perceive as law — customary law — or agreements to which we are party. He pointed out that other questions,
such as what we want to do or not to do as a matter of policy, and what makes sense in terms of military deployments and operations are also objectives of this decision. He concluded that all of these are factors; therefore, the military manuals resulting from this process will in part reflect law and will in part reflect these other objectives.

Mr. Matheson also commented that the NATO rules of engagement or other NATO procedures are not predominantly dictated by law. Rather, some NATO matters represent decisions the military and political authorities of the various countries within NATO made on how to deploy their forces, what scope of authority is extended to their commanders, and which matters they want to reserve for political decisions. This process will produce things that are not law and decisions that are based on things other than legal considerations.

Mr. Matheson remarked that those decisions do not suggest disparagement of the desirability of a universal, legally binding regime for humanitarian law that is acceptable to everyone. The Diplomatic Conference, in his opinion, did not produce such a regime, even though the administration wished it had. He indicated that in the future, the administration does not intend to dismiss that as the overall objective. If it is possible over time to influence other governments to accept beliefs of what are the appropriate norms, he suggested these norms be reflected in customary law. He indicated that the administration advocates a multifaceted, step-by-step approach without abandoning what is obviously the most ideal solution. At present, the administration cannot reach that point, and Mr. Matheson noted that it will work toward that goal over the years, but in the meantime, has a number of other issues it must work on as well.

As to the issue Professor Oliver raised about the Constitution presenting a barrier in some areas, Mr. Matheson responded that United States military and political authorities do enter into arrangements that are not necessarily legally binding or that the law dictates, but that govern their relations with other military establishments and the deployment of forces without any constitutional problems arising.

In response to Professor Meron, Professor Reisman stated that it is useless to talk about law, unless people believe that those laws are right and comply with them because others are willing to sustain those laws or raise the cost for violating them. If that is the case, a political factor always exists to restrain how far one can go. Professor Reisman noted further that one cannot go farther than those with effective power in the particular legal system and ability to lend their resources allow.

Professor Reisman questioned why the International Court of Justice should be reasonable when it is not subject to such a political restraint.
He theorized that the court could imagine itself as a philosopher in an ivory tower and create the best of all worlds. If power is a variable that has real political effect in human life, we have to restrict our use of the term "law" so that it addresses communications that have authority and control. Control in the international system is much more complex than in a domestic system. Congress generally has control because its decisions are effective, unless there is massive resistance from the public. Professor REISMAN noted, however, that international decisions do not have the same impact; therefore, large states or concentrations of large states must often be looked to for control. He concluded that this approach is inconsistent with notions of state equality, democracy, and universality, but does recognize political reality.

Professor REISMAN commented that when you create law that does not have control, people who are not deterred when presented with the legal symbol ignore it because they are the "bad men" in Holmes's definition, and because the law provides no sanction. He noted that those governments that the legal symbol deters, particularly those that have populations that are acculturated to respond to that symbol, find that their behavior is somewhat more limited, leading to asymmetrical results and problems of pluralistic international law, which are unsatisfactory. He indicated that one cannot use law effectively as a lawyer advising clients or as a judge making decisions if two, three, or even four versions of a law are available; therefore, the law fails to contribute much to society and ultimately depreciates the legal symbol.

Professor REISMAN recognized that the United States is not abandoning the International Court of Justice, and that no one should characterize what the United States did in the Paramilitary Activities case as an abandonment of the court. He indicated that the United States has submitted to the court in another case, and noted further that although the United States has legally withdrawn from article 36(2) of the International Court of Justice Statute, it has not withdrawn its judge nor has it denounced the statute. He indicated that the court remains a potentially useful instrument, and the United States should use it efficiently. He noted, however, that the court does present certain problems, and that its role may need revision. Professor REISMAN raised one reservation with regard to Mr. Matheson's remarks. He recognized that if a group of individuals have sufficient effective power, their behavior can shape law and overcome the problem of pluralism.

Professor MERON provided a historical perspective on the processes under review. He noted that the Court in the Paramilitary Activities

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case did not examine the traditional components of customary law to reach certain conclusions on whether the Geneva Conventions are customary norms. He recognized that this judgment is not very exceptional in terms of techniques the judicial bodies use. He observed that the 1946 High Command case\textsuperscript{112} had an even greater absence of discussion of actual state practice. The tribunal regarded the Geneva Prisoner of War Convention of 1929\textsuperscript{113} largely as declaratory of international law by 1941, only twelve years after its signing. In that proceeding, the tribunal counted 35 provisions of that Convention, even some that are quite esoteric, as being declaratory of customary law. Professor MERON noted that many scholars' statements that were then disputed, perhaps rightly so, are now cited as authoritative sources of international law. In addition, the accumulation of judicial opinions produces a certain effectiveness, and if those judgments are widely perceived as reflecting desirable humanitarian principles, even though they initially are not effective, we should consider their effectiveness through this process of public perception in the long run.

Professor MERON recognized that when the military writes its next manual of military law, it will become impossible to write it as a practical matter if the military were to focus exclusively on the rules already crystallized as customary law. He added that the armed forces must have a comprehensive set of rules that it can apply in combat situations. The only way to achieve such a set of rules is to combine rules that are already viewed as effective international law with those principles or norms that are acceptable as guidelines for United States forces. Professor MERON suggested that the military include them in such a manual, otherwise the military will be left with no effective rules of combat.

Professor GROSSMAN asked Professor Reisman whether the deterioration of the regime outlawing the threat or use of force in article 2(4) of the United Nations Charter represented a complex phenomenon, rather than just an attempt to introduce the notion of "just war" by those who claim legal justification for the struggle of their people. For example, there were early claims that article 2(4) did not prohibit humanitarian intervention if force was used proportionately and met certain criteria. Regional organizations exercise independent powers under an interpretation of article 52 that permits them to operate without explicit ap-


approval of either the Security Council or the General Assembly under
the Uniting for Peace Resolution. If we really want to control the use
of force, Professor Grossman advised that perhaps we should consider
actors, motives, and rationalizations other than just the process of dete-
rioration that took place via the introduction of the notions of self-de-
fense and war.

Professor Reisman agreed with Professor Grossman that it is much
more complex, and that the examples cited illustrate that the general
deterioration of the regime established in 1945, which had a certain
conservative thrust, has been changed since 1970. Portions of the Char-
ter support the new approach; other provisions have also changed.

Professor Reisman concluded that we must remember not to study
the law of war as if it were alone in a closed universe. He stated fur-
thermore that if we want to use generative logic, we can take several
isolated decisions and gradually build up a relatively beautiful system
for protection in times of war. If what the actual combatants out in the
field are doing is inconsistent with this system, however, there is no
point in calling that system “law.”

THE POSITION OF THE UNITED STATES ON CURRENT
LAW OF WAR AGREEMENTS: REMARKS OF JUDGE
ABRAHAM D. SOFAER, LEGAL ADVISER, UNITED STATES
DEPARTMENT OF STATE, JANUARY 22, 1987114

It is a pleasure to appear before this distinguished group to describe
the position of the United States government on a matter that has oc-
cupied a great deal of my personal time and attention during the past
year. The executive branch has been engaged in a detailed review of
the two 1977 Additional Protocols to the 1949 Geneva Conventions and
has considered at great length how best to further the goal of promot-
ing widespread acceptance of the highest achievable standards for hu-
manitarian law in armed conflict.

As you know, the United States has traditionally been in the fore-
front of efforts to codify and improve international law in this field,
with the objective of giving the greatest possible protection to victims of
armed conflicts, consistent with legitimate military requirements. The
Geneva Diplomatic Conference that produced the 1977 Protocols pro-
vided an important opportunity to the world community to take a great
step forward toward this objective. In our view, that conference was

114. Judge Sofaer was unable to attend the Workshop and deliver this speech. What follows is his prepared text supplemented with footnotes where necessary.
partially successful, but unfortunately yielded in important respects to the efforts of many delegations to politicize humanitarian law to the benefit of organizations with terrorist aims or tactics.

In particular, the executive branch has concluded that the United States should ratify Additional Protocol II, which deals with non-international armed conflicts, but not Additional Protocol I, which deals with international armed conflicts.

Protocol II was designed to expand and refine the basic humanitarian provisions contained in common article 3 of the Four 1949 Geneva Conventions with respect to non-international conflicts. While the Protocol does not, and should not, attempt to apply to such conflicts all the protections prescribed by the Conventions for international armed conflicts, such as prisoner-of-war treatment for captured combatants, it does attempt to guarantee that certain fundamental protections be observed. These include:

1. Humane treatment for detained persons, such as protection from violence, torture, and collective punishment;\footnote{115. Protocol II, supra note 4, arts. 4, 5 (prescribing standards of treatment for persons deprived of their liberty and persons not participating in hostilities).}
2. Protection from intentional attack, hostage taking, and acts of terrorism of persons who take no part in hostilities;\footnote{116. Id. art. 4.}
3. Special protection for children to provide for their safety and education and to preclude their participation in hostilities;\footnote{117. Id. art. 4(3) (mandating steps required for the special needs of children).}
4. Fundamental due process for persons against whom sentences are to be passed or penalties executed;\footnote{118. Id. art. 6 (prescribing guidelines for the penal prosecution of persons charged with crimes related to an armed conflict).}
5. Protection and appropriate care for the sick and wounded, and medical units which assist them;\footnote{119. Id. arts. 7-12.}
6. Protection of the civilian population from military attack, acts of terror, deliberate starvation, and attacks against installations containing dangerous forces.\footnote{120. Id. arts. 13-18.}

In each case, Protocol II expands and makes more specific the basic guarantees of common article 3 of the 1949 Conventions.\footnote{121. Compare Geneva Conventions of 1949, supra note 4, common art. 3 (stating the “basic” guarantees) with Protocol II, supra note 4, arts. 4-18 (stating the more specific “new” guarantees).} For the most part, the obligations contained in Protocol II are no more than a restatement of the rules of conduct with which United States military
forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency. These obligations are not uniformly observed by other states, however, and their universal observance would mitigate many of the worst human tragedies of the type that have occurred in internal conflicts of the present and recent past.

Therefore, I expect that Protocol II will be submitted to the Senate for its advice and consent to ratification with certain understandings and reservations. With our support, I expect that in due course the Protocol will be ratified by the great majority of our friends as well as a substantial preponderance of other states.

In one important respect, the Protocol did not meet the desires of the United States and other Western delegations. It only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations.\(^{122}\) This is a narrower scope than we would have desired and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area.\(^{123}\) I believe that the United States should make clear when it ratifies Protocol II that it will apply the Protocol to all conflicts covered by common article 3 of the 1949 Geneva Conventions, and only such conflicts, which will include all non-international armed conflicts as traditionally defined, but of course not internal disturbances, riots, or sporadic acts of violence.

The executive branch has also conducted a thorough review of Additional Protocol I,\(^ {124}\) which deals with international armed conflicts. This Protocol was the main object of the work of the Geneva Diplomatic Conference that concluded in 1977, and represented an attempt to revise and update in a comprehensive manner the 1949 Geneva Conventions on the Protection of War Victims,\(^ {125}\) the 1907 Hague Conven-

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122. Protocol II, supra note 4, art. 1(1).
123. Compare id. art. 1 (providing the narrower, final language that the Diplomatic Conference adopted) with Draft Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, reprinted in INT'L COMM. OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 33 (1973) [hereinafter DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949] (giving the broader language the ICRC drafted after the Conference of Government Experts and used as a negotiating text for the Diplomatic Conference).
124. See supra text accompanying notes 11-43 (discussing the executive branch's review of Additional Protocol I).
tions on Means and Methods of Warfare, and customary international law on the same subjects.

Our extensive interagency review of Protocol I has, however, led us to conclude that the Protocol suffers from fundamental shortcomings that cannot be remedied through reservations or understandings. It is therefore unlikely that Protocol I will be submitted to the Senate.

In key respects, Protocol I would undermine humanitarian law and endanger civilians in war. Certain provisions would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law. Protocol I also elevates the international legal status of self-described "national liberation" groups that make a practice of terrorism. This would undermine the principle that the rights and duties of international law attach principally to entities that have those elements of sovereignty that allow them to be held accountable for their actions and the resources to fulfill their obligations.

Equally troubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to "national liberation" movements in general, but in particular to the inhumane tactics of many of them. Article 44(3) grants combatant status to armed irregulars, even in cases where they do not distinguish themselves from noncombatants, with the result that there will be increased risk to the civilian population within which such irregulars often attempt to hide.

The reasons for these regrettable aspects of Protocol I are apparent from an examination of the actions of the Diplomatic Conference which produced it. The Geneva Diplomatic Conference on the Reaffirmation of International Humanitarian Law Applicable in Armed Conflict, which sat between 1974 and 1977, was convened under the auspices of the ICRC, to improve the laws of war set forth in the Geneva Conventions of 1949.


127. See President's Message, supra note 10 (transmitting Protocol II but not Protocol I to the Senate for advice and consent to ratification).


The ICRC and the Conference developed many constructive ideas to help minimize the suffering of combatants and noncombatants in armed conflict. But from the beginning of the Conference, an effort began to extend the law of international armed conflict to cover the Palestine Liberation Organization (PLO) and other radical groups, many of whom were accorded observer status.\textsuperscript{130}

The first substantive address, after election of the Conference president, urged the Conference to recognize “certain values and elementary rights which went beyond the Universal Declaration of Human Rights,” because millions were “still under colonial oppression in the African continent, while international Zionism had placed the Palestinian population in an impossible situation.”\textsuperscript{131} The speaker asked the Conference to consider not only effects, but causes as well, and to recognize “there were such things as just wars.”\textsuperscript{132} He said, “It was quite obvious that it was the Zionists who wanted to throw the Arabs into the sea . . . , [and that] national liberation movements did not want to shed blood, only to secure recognition of their rights.”\textsuperscript{133}

The Conference adopted in committee during its first session what is now article 1(4) of Protocol I.\textsuperscript{134} This article makes the laws of international armed conflict applicable to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination.”\textsuperscript{135} Never before has the applicability of the laws of war been

\begin{footnotesize}
\textsuperscript{130} Rule 58, \textit{supra} note 128; Final Act, \textit{supra} note 129, para. 3. The Final Act recognized the following national liberation movements as observers: African National Congress (South Africa), African National Council of Zimbabwe (Rhodesia), Angola National Liberation Front, Mozambique Liberation Front, Palestine Liberation Organization, Pan-Africanist Congress (South Africa), People's Movement for the Liberation of Angola, Seychelles People's United Party, South West Africa People's Organization (Namibia), Zimbabwe African National Union, and Zimbabwe African People's Union. \textit{Id.; see also 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, supra note 65, CDDH/SR.6-7, at 56-65} (discussing the issue of invitations to national liberation organizations to participate in the Diplomatic Conference as observers).

\textsuperscript{131} 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, \textit{supra} note 65, CDDH/SR.1 para. 29, at 12-13 (providing the statement of Mr. Ould Dada, President of the Islamic Republic of Mauritania).

\textsuperscript{132} \textit{Id.} CDDH/SR.1 para. 30, at 13.

\textsuperscript{133} \textit{Id.} CDDH/SR.1 paras. 31-32, at 13.

\textsuperscript{134} CDDH Res. 53, \textit{adopted id.} CDDH/SR.22 para. 21, at 229. The Conference adopted the report of Committee I at the twenty-second plenary meeting of the First Session on 29 March 1974. The language of the Committee's draft is substantially the same as the language finally adopted in the Fourth Session. \textit{Compare} Report of Committee I, 10 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, \textit{supra} note 65, CDDH/48/Rev. 1 para. 14, at 3, 7 (giving the language for article 1 that Committee I adopted) \textit{with} Protocol I, \textit{supra} note 4, art. 1 (providing the language that was finally adopted).

\textsuperscript{135} Protocol I, \textit{supra} note 4, art. 1(4).
\end{footnotesize}
made to turn on the purported aims of a conflict. Moreover, this provision obliterated the traditional distinction between international and non-international armed conflicts. Any group within a national boundary, claiming to be fighting against colonial domination, alien occupation, or a racist regime, can now argue that it is protected by the laws of war, and that its members are entitled to POW status for their otherwise criminal acts. Members of radical groups in the United States have already done so in our own federal courts.  

The ICRC and most Western nations expressed no admiration for article 1(4). Some contend, however, that as a result of the new rule, humanitarian law now governs the actions of national liberation groups. While the PLO and other “freedom fighters” may now claim the benefits of the laws of war, they thereby become bound to obey these rules. This, in some eyes, is seen as an advance for humanitarian law.

In fact, radical groups rarely have the resources and facilities to provide the protections for prisoners of war required by the laws of war. Even if they had the resources, no reason exists to believe they have the inclination to provide them, or to abide by the law’s limitations on the actions they may take, particularly against civilians. In fact, no doubt recognizing that the PLO and other “freedom fighters” have concentrated their guns, bombs, and rockets on civilian noncombatants, the supporters of article 1(4) obtained at the Conference an additional protection for these groups. Article 44(2) provides that once a group quali-

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136. See, e.g., United States v. Shakur, 817 F.2d 189 (2d Cir. 1987) (denying release from pretrial detention on charges of armed robbery, flight from prosecution, racketeering, armed kidnapping, and the murder of a member of the “New Afrikan People’s Organization” and self-proclaimed “prisoner of war”); United States v. Torres, 383 F. Supp. 86 (N.D. Ill. 1984) (noting the denial of defendant members of the Fuerzas Armadas de Liberacion Nacional Puertorriquena (FALN) motion to dismiss on the grounds that the court should treat them as prisoners of war); United States v. Lopez, No. 80 CR 736-4 (N.D. Ill. July 14, 1981) (LEXIS, Genfed library, Dist file) (denying the defendant Puerto Rican nationalist’s oral motion to dismiss an indictment on the grounds that he was a “prisoner of war”).

137. See, e.g., 8 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, supra note 65, CDDH/I/SR.6 para. 30, at 49 (stating the views of Mr. Marting, the ICRC representative); id. CDDH/I/SR.2 paras. 50-52, at 14 (providing the statement of George Prugh, representative of the United States); id. CDDH/I/SR.2 para. 49, at 14 (providing the statement of Mr. Girard, representative of France); id. CDDH/I/SR.2 paras. 44-48, at 13, 14 (recording the statement of Mr. Draper, representative of the United Kingdom).

138. 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, supra note 65, CDDH/SR.36 paras. 72-75, at 44-45 (citing the statement of Mr. Ullrich, representative of the German Democratic Republic); id. CDDH/SR.36 para. 79, at 45-46 (noting the statement of Mr. Herczegh, representative of Hungary); id. CDDH/SR.36 paras. 89-90, at 47-48 (giving the statement of Mr. Clark, representative of Nigeria).
fies as a national liberation movement protected by article 1(4), no conduct by members of the group can lead to the loss of its status as a protected organization. The rationale for this rule is that individuals can be punished separately for their conduct. The effect is to preserve the right of such organizations to be treated as combatants, even though they are almost exclusively engaged in terrorizing civilians.

The Conference went even further in accommodating the needs of terrorist groups at the expense of the civilian population that humanitarian law is intended to protect. A fundamental premise of the Geneva Conventions has been that to earn the right to protection as military fighters, soldiers must distinguish themselves from civilians by wearing uniforms and carrying their weapons openly. Thus, under the 1949 Geneva Conventions, irregular forces achieve combatant (and, if captured, POW) status, when they (1) are commanded by a person responsible for subordinates; (2) wear a fixed, distinctive insignia recognizable from a distance; (3) carry weapons openly; and (4) conduct their operations in accordance with the laws and customs of war.\textsuperscript{139} Fighters who attempt to take advantage of civilians by hiding among them in civilian dress, with their weapons out of view, lose their claim to be treated as soldiers. The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeopardy.

The terrorist groups that attended the Conference had no intention to modify their conduct to satisfy these traditional rules of engagement. Terrorists are not soldiers. They do not wear uniforms. They hide among civilians, and after striking, they try to escape once again into civilian groups. Instead of modifying their conduct, they succeeded in modifying the law. Article 44(3) of Protocol I recognizes that “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.”\textsuperscript{140} But the provision goes on to state “that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself.”\textsuperscript{141} In such situations, “he shall retain his status as a combatant, provided . . . he carries his arms openly: (a) during each military engagement, and (b) during each time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack.

\textsuperscript{139} First Geneva Convention of 1949, supra note 4, art. 13(2); Second Geneva Convention of 1949, supra note 4, art. 13(2); Third Geneva Convention of 1949, supra note 4, art. 4(2).
\textsuperscript{140} Protocol I, supra note 4, art. 44(3).
\textsuperscript{141} Id.
in which he is to participate.""142 Furthermore, the section provides that "acts which comply with the requirements of this paragraph shall not be considered as perfidious."143

These changes undermine the notion that the Protocol has secured an advantage for humanitarian law by granting terrorist groups protection as combatants. Under the Geneva Conventions, a terrorist could not hide among civilians until just before an attack. Under Protocol I, he may do so; he need only carry his arms openly while he is visibly engaged in a deployment or while he is in an actual engagement.

The significance of Protocol I to terrorist organizations is not a matter of hypothetical speculation. They were at the Conference and lobbied hard for these provisions. The degree of their success is not in doubt. After the vote on Protocol I, the PLO's representative "expressed his deep satisfaction at the result of the vote, by which the international community had re-confirmed the legitimacy of the struggles of peoples exercising their right to self-determination."144 Turning to article 1(4), he explained its significance as authority for the PLO's actions:

The Arab people of Palestine fell within all three of the categories mentioned in paragraph 4: they were under colonial domination; their territory was under foreign occupation, despite the assertions of the terrorist Begin; and they were suffering under a racist regime, since Zionism had been recognized in a United Nations resolution as a form of racism. He wished to express his gratitude to the justice- and peace-loving peoples who had given their support to the struggles of all peoples fighting for self-determination.145

In addition to these fundamental problems, Protocol I presents serious problems as well for United States military operations. At the conclusion of the Conference, President Carter decided to sign the Protocol along with Protocol II. The Joint Chiefs of Staff did not object to this decision, but reserved their ultimate judgment on the military acceptability of the Protocol and indicated the need for a thorough study of its military implications before a decision could be made on United States ratification. The Joint Chiefs of Staff did conduct such a thorough and detailed study, including consultation with the major United States military commands and special war games and simulations.

The study concluded that Protocol I is militarily unacceptable for

142. Id.
143. Id.
144. 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, supra note 65, CDDH/SR.36 para. 113, at 53 (1978) (giving the statement of Mr. Armali, observer of the Palestine Liberation Organization).
145. Id. para. 114.
many reasons. Among these are that the Protocol unreasonably restricts attacks against certain objects that traditionally have been considered legitimate military targets. It fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those conventions. On the whole, it was judged to be too ambiguous and complicated to use as a practical guide for military operations.

A few examples of these military problems will illustrate the point. Article 56 of Protocol I is designed to protect dams, dikes, and nuclear power plants against attacks that could result in “severe” civilian losses. As its negotiating history indicates, this article would protect objects that would be considered legitimate military objectives under customary international law.\textsuperscript{146}

Attacks on such military objectives would be prohibited if “severe” civilian casualties might result from flooding or release of radiation.\textsuperscript{147} The negotiating history throws little light on what level of civilian losses would be “severe.” It is clear, however, that under this article, civilian losses are not to be balanced against the military value of the target. If severe losses would result, then the attack is forbidden, no matter how important the target. It also appears that article 56 forbids any attack that raises the possibility of severe civilian losses, even though considerable care is taken to avoid them.

Paragraph 2 of article 56 provides for termination of protection, but only in limited circumstances. If it is once conceded that a particular dam, dike, or nuclear power station is entitled to protection under article 56, that protection can only end if it is used “in regular, significant, and direct support of military operations.”\textsuperscript{148} In the case of a nuclear power plant, this support must be in the form of “electric power.”\textsuperscript{149} The negotiating history refers to electric power for “production of arms, ammunition, and military equipment” as removing a power plant’s protection, but not “production of civilian goods which may also be used by the armed forces.”\textsuperscript{150} The Diplomatic Conference thus neglected the nature of modern integrated power grids, where it is impossible to say that electricity from a particular plant goes to a particular

\textsuperscript{146}. Protocol I, supra note 4, art. 56; see also 14 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, supra note 65, CDDH/III/SR.18 para. 39, at 158 (statement of Mr. Mazza, United States) (stating the differences between current international law and the proposed article).

\textsuperscript{147}. Protocol I, supra note 4, art. 56(1).

\textsuperscript{148}. Id. art. 56(2)(a)-(e).

\textsuperscript{149}. Id. art. 56(2)(b).

\textsuperscript{150}. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, supra note 45, at 672.
customer. It is also unreasonable for article 56 to terminate the protection of nuclear power plants only on the basis of the use of their electric power. Under this provision, a nuclear power plant that is being used to produce plutonium for nuclear weapons purposes would not lose its protection.

To take another example, article 51 of Protocol I prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy’s own violations of the law and are intended to deter future violations. Historically, reciprocity has been the major sanction underlying the laws of war. If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.

For a third example, article 47 of Protocol I provides that “a mercenary shall not have the right to be a combatant or a prisoner of war.” This article was included in the Protocol not for humanitarian reasons, but purely to make the political point that mercenary activity in the Third World is unwelcome. In doing so, this article disregards one of the fundamental principles of international humanitarian law by defining the right to combatant status, at least in part, on the basis of the personal or political motivations of the individual in question. This politicizing of the rules of warfare is contrary to Western interests and the interests of humanitarian law itself.

At the same time, the Conference that produced Protocol I failed to meet one of the basic objectives of the United States and other Western countries, that is, to bring about a major improvement in the mechanisms for enforcement of international humanitarian law. In particular, the United States sought to strengthen the institution of the “protecting power.” Under this concept, a neutral state assumes the responsibility for protecting a country’s citizens who are in the custody or control of a particular enemy power, whether as prisoners of war, civilian internees, or inhabitants of occupied territory. This practice has only rarely worked since 1945, largely because of the refusal of com-

151. Protocol I, supra note 4, art. 47(1).
152. Id. art. 47(2).
Communist governments to allow a neutral power to inspect either their prisoner of war or internment camps.

The Eastern Bloc countries likewise strongly resisted all efforts at the Diplomatic Conference to require third-party supervision of compliance with Protocol I and the Geneva Conventions. The results of the effort to strengthen the compliance mechanisms of the Conventions were, therefore, meager. Article 5 of Protocol I describes in detail the procedures to be used in appointing a neutral protecting power. It does not, however, expressly require that a state holding enemy prisoners of war or civilians accept such a power. On the contrary, it expressly refers to the requirement that a protecting power be accepted by the detaining power. There is no reason to believe that these provisions will be more successful than comparable provisions in the 1949 Geneva Conventions.

Similarly, one major innovation of Protocol I is the creation of a permanent fifteen-member international fact-finding commission to investigate alleged serious violations of the Protocols and the Geneva Conventions and to facilitate resumption of compliance through the use of its good offices. However, the Commission cannot act without the consent of the parties to the dispute, which can be given either on a permanent one-time basis or an ad hoc basis for a particular dispute. Given the persistence of Soviet refusal to allow third-party supervision of the Geneva Conventions, it is extremely unlikely that either the Soviet Union or any of its allies or clients would consent to the activities of the Commission.

In our view, Protocol I cannot be made acceptable through the taking of reservations or understandings at the time of United States ratification. The defects in Protocol I are so fundamental that we should be unwilling to associate ourselves with it, irrespective of any reservation. To ratify the Protocol would signal to the world that it is the document that sets the governing standards for military conduct in international conflicts, replacing the 1949 Geneva Conventions. The filing of technically effective reservations would fail to prevent the unacceptable aspects of the Protocol from gaining enormously in prestige. Our position would be deemed the “minority” view — the “imperialist” or “racist” position — as compared to the “accepted” and “humanitarian” view.

Furthermore, any attempt by reservation to cure even the most important of the defects in the Protocol would require the filing of many, perhaps dozens, of reservations, some taking fundamental exception to

153. *Id.* art. 5(2).
154. *Id.* art. 90.
central parts of the Protocol. The number and types of reservations necessary for this purpose would probably be regarded by many as incompatible with the object and purpose of the Protocol, and we would be accused of ratifying in bad faith.

We recognize that certain provisions of Protocol I reflect customary international law, and others appear to be positive, new developments. For example, the Protocol provisions on the protection of medical aircraft and on the missing and the dead are useful changes in current law, even though by themselves they will not solve the problems demonstrated in recent conflicts. We want to preserve these new developments and encourage their universal acceptance and observance in time.

We therefore intend to consult with our allies to develop appropriate methods for incorporating these provisions into rules that govern our military operations, with the intention that they shall in time win recognition as customary international law separate from their presence in Protocol I. In this way, we would hope to salvage the positive aspects of the Protocol, while rejecting attempts to impose unacceptable conditions on the acceptance of such improvements in international humanitarian law.

I believe that United States ratification of Protocol II will advance the development of reasonable standards of international humanitarian law that are consistent with essential military requirements. The same is not true with respect to Protocol I, and this agreement should, in my view, not be ratified. We will attempt in our consultations with allies and through other means, however, to press forward with the improvement of the rules of international humanitarian law in international armed conflict, without accepting as the price for such improvements a debasement of our values and of humanitarian law itself.

Taken as a whole, these actions will demonstrate that the United States strongly supports humanitarian principles, is eager to improve on existing international law consistent with those principles, and will reject revisions of international law that undermine those principles.

DETERMINING CUSTOMARY INTERNATIONAL LAW RELATIVE TO THE CONDUCT OF HOSTILITIES IN NON-INTERNATIONAL ARMED CONFLICTS

Professor Grossman convened the afternoon session at 1:00 p.m.,

155. *Id.* arts. 24-31.
156. *Id.* arts. 32-34.

OPENING REMARKS OF THE MODERATOR

Professor Grossman noted the particular significance of this discussion in light of the recent announcement that the United States might ratify Protocol II.157

REMARKS OF DEAN JAMES E. BOND158

After reviewing the literature written in the field during the last ten years, I have concluded that some parts of the Hague Regulations169 and common article 3 of the 1949 Geneva Conventions constitute the only customary law that is applicable to non-international armed conflicts. I reject any notion that Protocol II embodies customary international law. Whether at some distant point in time it might be seen as evidence consistent with evolving state practice is, I think at best, speculation. The major point I wish to make is that we cannot expect the formal, treaty law in this area to go much beyond the kind of general provisions that are found in the Hague Regulations and common article 3.

Such provisions are admittedly so general that they might more fairly be characterized as principles rather than rules because these provisions apply to situations where it is unreasonable to expect the parties to the conflict to observe detailed rules with respect to both engagement and other parties of the conflict. Typically, these conflicts occur in less developed countries. These countries have neither the resources nor the institutional infrastructure to comply with the types of detailed provisions found in the Geneva Conventions or in Protocol II. It may well be that a country like the United States, on the other hand, can contemplate good faith in the adoption of Protocol II because the United States is a country that at least has the resources and institutional infrastructure to comply with the detailed provisions. It is extremely naive, however, to expect that insurgents or guerrillas or even the nominal governments found in some Third World countries would be able to do so. The most one can hope for in this area is an attempt to comply with some general principles. The specifics of compliance must by necessity be left to the parties and the particular circumstances of the conflict. If there is any more particularized law applica-

157. President’s Message, supra note 10.
158. Dean, University of Puget Sound School of Law.
ble to these conflicts, it will be found, not in sources such as Protocol II, but rather in the field training manuals of the various armed forces.

When I was the most junior officer at the Judge Advocate Generals School in the early 1960s, I was assigned the task of revising the army-wide instruction in the law of war. The Department of the Army had decided in the wake of the disclosures of My Lai that our troops needed to be advised, not of their rights as prisoners of war, but rather of their obligations when taking persons into their custody.

With very little knowledge and no supervision, I set about the task. Because there was great pressure to have something done, I simply adopted the Geneva Conventions, virtually without modification. I have no idea whether this instruction is still given to raw recruits across the United States. I would be surprised if it was still given because among the provisions included in that instruction were several paragraphs on the obligation to disobey superior orders. That is not the kind of instruction one normally associates with the armed forces training.

I do think that in the context of army training manuals, you may find some more particularized evidence of what the law of war is in this area. Moreover, in this area, you will find no distinction in the rules as they apply to an international armed conflict or non-international armed conflict. One simply cannot expect grunts or even captains to distinguish between the niceties of the rules they must obey when they are in an international armed conflict as opposed to a non-international armed conflict. At that level, the distinction is in fact nonexistent.

Remarks of Commander W. J. Fenrick

In discussing this topic, it might be a useful exercise to examine Protocol II and see if much of it fits into current customary international law. One of the problems with customary law in a non-international armed conflict, however, is that states are perhaps better known for violating the law than for complying with it. In addition, it is very difficult to identify customary law for non-international armed conflicts that is not rooted in treaty law. For that matter, Protocol II itself presents certain very substantial difficulties if we try to argue that it constitutes, either in its entirety or in part, customary law.

Many of the states that negotiated Protocol II, particularly the Third World states, were displeased with the idea of having a Protocol II that dealt with non-international armed conflicts. This dissatisfaction became especially pronounced after the issue of colonial, alien, and racist regimes was adequately addressed by article 1(4) of Protocol I. In fact, in the closing days of the Diplomatic Conference on the Additional
Protocols, it appeared for some time that Protocol II would not be forthcoming. The salvage operation that was conducted, and which subsequently ensured that the Conference did adopt a Protocol II, resulted in the rejection of many of the provisions that were a part of the draft of Protocol II. Furthermore, the normal incentive device for compliance with the law of war is the recognition of combatant and prisoner of war status under certain circumstances. Neither common article 3 nor Protocol II, however, provides for such recognition. I suspect that any international lawyer has a constitutional predisposition toward optimism, and perhaps some people might even view me as euphorically optimistic in this particular case. Nonetheless, I am going to examine Protocol II briefly and try to determine how many of its provisions reflect existing customary law.

Protocol II provisions that merely restate portions of common article 3 are part of customary law. In addition, Protocol II provisions that are unrelated to common article 3, but are of a sufficient level of generality may also be supportable for inclusion in customary law through state practice. Most of Protocol II is concerned with the law of Geneva, including the protection of victims of war in areas under enemy control. Articles 4 and 5 may be used as examples. Article 4 is concerned with fundamental guarantees. Paragraphs 1 and 2 restate or amplify portions of common article 3 of the 1949 Geneva Conventions. I would suggest that these paragraphs already constitute customary international law. Paragraph 3, which provides for the care of children, is new but might eventually become customary law. Article 5, which is concerned with persons whose liberty has been restricted, is also new but might be suitable for eventual incorporation into customary law. Article 6, paragraph 2, which is concerned with penal prosecutions, may already constitute customary law because it is essentially only a modest elaboration upon common article 3.

The remaining paragraphs are new. Once again, they might be suitable for inclusion in customary law in due course. Moreover, articles 7 and 8, which concern the protection, care, and search for the wounded, sick, and shipwrecked, are modest amplifications of common article 3. I suggest, therefore, that they are already customary law. Finally, although articles 9, 10, 11, and 12 are concerned essentially with protection of medical personnel, the provisions concerning distinctive emblems, and protection of medical transports are new. They are, however, logical corollaries of the obligation to protect and care for the

160. Protocol I, supra note 4, art. 18.
161. Id. arts. 21-27.
wounded, sick, and shipwrecked. Therefore, I hope these provisions will be included in customary law through state practice.

Articles 13, 14, 15, and 16, on the other hand, tend to address Hague law matters such as targeting. For example, article 13 is concerned with the general protection of the civilian population. Paragraph 2 of article 13 prohibits both attacks on and attempts to terrorize the civilian population. If we adopt the approach that I believe Professor Bond outlined for us earlier, an approach suggesting that there was in fact some Hague law component in the law applicable to non-international armed conflicts, then arguably, parts of article 13 are a logical extension of the humane treatment provision of common article 3.

The remaining provisions similar to Hague law, articles 14, 15, and 16, which are concerned with protection of objects indispensable to the survival of the civilian population, works and installations containing dangerous forces, and cultural objects in places of worship, respectively, are, however, all modifications of Protocol I provisions. Presently, these articles quite clearly are new law, although eventually they might also become customary law through state practice.

Finally, article 17 prohibits the forced movement of civilians. This provision is linked somewhat tenuously to the humane treatment provision of common article 3 and much more clearly to article 49 of the fourth Geneva Convention. On balance, I suggest again that this provision constitutes new law.

Protocol II, simply put, is a sadly flawed document; it is little more than a grab bag. It has a rather peculiar scope of application that is clearly more restrictive than that of common article 3. It is difficult to picture a conflict in which Protocol II would be applied, unless one makes some kind of a statement upon ratification, as Mr. Matheson indicated this morning, whereby the state would apply Protocol II to all common article 3 situations.

The second issue I wish to address is the extent to which article 1(4) of Protocol I constitutes customary international law, thereby moving certain conflicts from the non-international to the international conflict category. The 1949 Geneva Conventions apply to traditional international or interstate conflicts. In contrast, article 1(4) expands the traditional definition of international armed conflicts to include “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes.” To say the least, this provision is pejorative and imprecise. It has been criticized, both during and after the Diplomatic Conference, for politicizing the law of armed conflict. Obviously, one can ask what exactly constitutes “a people,” and, furthermore, what state would ever admit that it was fighting in
favor of colonial domination, or alien occupation, or a racist regime. As
the Israeli representative pointed out when explaining his vote, article
1(4) has within it a built-in nonapplicability clause that would ensure
that no state would ever apply it voluntarily.

As way of background, the precursors of article 1(4) are a series of
United Nations General Assembly resolutions proclaiming that wars of
national liberation are to be treated as international conflicts, with the
consequence that freedom fighters are treated as lawful combatants.
The ICRC draft of Protocol I originally did not contain a provision
similar to article 1(4). A provision was subsequently inserted at the
1974 session of the Diplomatic Conference at the encouragement of
Third World and East bloc delegations, despite the vigorous objections
of Western delegations. Indeed, the first time there was a vote on this
particular provision virtually all of the Western countries voted against
or abstained on the vote, with the exception of Norway. Three years
later, however, in 1977, article 1(4) was accepted in Plenary Session by
a vote of 87 in favor, 1 opposed (Israel) and 11 abstentions (including
the United Kingdom, the United States, Canada, and Japan). Prior
to the vote, the delegation from the United States attempted to have
the provision accepted by consensus.

This negotiating history, combined with the United Nations General
Assembly resolutions discussed previously, is used by some to argue
that article 1(4) is a new international legal norm that developed dur-
ing the course of the Diplomatic Conference. The one author who relies
particularly on this argument, Professor Cassese, however, concedes
that the primary targets of the provision, Israel and South Africa, are
not bound by the new norm. Israel is not bound because it persists in
its objections to the article. South Africa is not bound because it only
participated in the first session of the conference. Obviously, however,
one can question the utility of a norm of international law that does not
apply to the countries to which it was designed to apply and that
utilizes such pejorative language that no state would willingly apply it
within its own boundaries regardless of its application to these particu-
lar countries.

I am inclined to think that those who favor article 1(4) as part of
customary law read much more into the negotiating history than it can
legitimately bear. My lack of criticism does not necessarily mean en-

162. 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, supra note 65,
thusiastic acquiescence. Whether or not article 1(4) constitutes a codification of a developing norm depends on an assessment of state practice, the negotiating history, and the legal weight assigned to United Nations General Assembly resolutions. If one is reluctant to assign much weight to General Assembly resolutions, and I must concede that I myself am reluctant to do so, then one is unlikely to conclude that article 1(4) can bind non-parties to Protocol I.

**REMARKS OF HANS-PETER GASSER**

The search for customary law relative to the conduct of hostilities in non-international armed conflict is especially important because little treaty law exists on this subject. Prior to Protocol II, there was no set of written laws applicable to non-international armed conflict resembling Hague law, and Protocol II is not yet generally accepted. Of course, there is the institution of recognition of belligerency, which would make the whole set of law that is applicable to international armed conflict also applicable to those types of conflicts. For several reasons, however, it is today improbable that any recognition of belligerency would occur again. We also know that the participants of the 1974-1977 Diplomatic Conference were unwilling to codify significant parts of the law relating to the conduct of hostilities in non-international armed conflicts. That this reluctance to create new law in the field will disappear in the foreseeable future, thereby making way for new initiatives, is highly improbable.

Mr. Chairman, I would like to continue with a few words on the difficulty of finding evidence of the existence of customary law in this field. It is generally accepted that the existence of a rule of customary law presupposes state practice combined with *opinio juris sive necessitas*, which is the requirement that governments consistently behave in a certain way with the belief that this practice is rendered obligatory by the existence of a rule of law. A particular question that arises in the case of Protocol II is whether the practice and the *opinio juris* of insurgent groups in a civil war carry any significance in the creation and ascertainment of customary law. In any case, it is very difficult to obtain evidence not only of state practice in armed conflicts, but also of *opinio juris* relating to that practice. Military manuals and other instructions relative to the law of armed conflicts, however, may provide some help for the ascertainment of customary law. In any case, they

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164. Legal Advisor to the Director for General Affairs, International Committee of the Red Cross.
must be consulted.

In general, military manuals provide rules that governments consider binding not only for their own armed forces, but also for those of the other side. One may assume that by issuing instructions to its armed forces, a government expresses its conviction that respect for those rules is obligatory. We may, therefore, accept the hypothesis that the parts of military manuals not devoted to treaty law are, as a rule, evidence of customary law.

Analysis of the manuals and instructions that were at our disposal in Geneva revealed that none of them refer specifically to the conduct of military operations in internal armed conflicts. The parts of the manuals that reflect Hague law are geared to international armed conflicts. At the very most, manuals refer to common article 3 of the 1949 Geneva Conventions. Article 3 is limited to expressing the fundamental rules for the treatment of persons who no longer take part or never took part in the hostilities and thus are protected by Geneva law. This article, therefore, is not concerned with Hague law at all.

How does one understand this embarrassing silence concerning the way military operations should be conducted in a civil war? Do governments believe that there are no rules in this field, and that there are no international constraints on the conduct of military operations in civil wars, or on the contrary, do they imply that their armed forces have to observe the same standards in all kinds of military operations whether they be in the context of an international or non-international armed conflict? This question remains open.

A rather curious way of dealing with the issue is found in the 1956 United States Department of the Army Field Manual, which under the title of "Customary Law" states in paragraph 11(a), "[t]he customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents." If you interpret this text literally, it means that only upon the recognition of belligerency would any rule of customary law of war become applicable to the non-international armed conflict. This interpretation is obviously incorrect.

Other military texts also serve as evidence of the existence of customary law, especially in non-international armed conflicts. The first important category of such texts are codes of conduct. One example is the operational code of conduct for the Nigerian Army that the Federal Government of Nigeria issued in July 1967. This instruction was drafted for the civil war arising out of the secession of the Biafra prov-

ince and includes several provisions relating to the conduct of hostilities which take the form of commands to the members of the armed forces. It seems to be a fair assumption that the Nigerian government acted with the expectation that the insurgent side would follow and respect the same rules. The issuance of the code was not merely an internal action of one side in the civil war. This code is, therefore, an interesting example of a source which must also be consulted when looking for customary law.

There are other texts of this kind. For instance, in 1947, Mao Tse Tung issued a proclamation to his armed forces commanding them to respect some fundamental humanitarian rules. The government of El Salvador as well has recently put out such a code of conduct for its armed forces, and even the insurgent democratic forces of Nicaragua have drafted a code and given it to their soldiers in the field. All of this material either can help us find already existing customary law or can add to the formation of customary law in this domain.

We find evidence of customary law in the field on another level as well. Indeed, the United Nations General Assembly adopted in 1968 Resolution 2444 by consensus.\textsuperscript{166} Under the title of “Respect for Human Rights in Armed Conflicts,” that resolution states three basic principles “for observance by all governmental and other authorities responsible for action in armed conflicts”\textsuperscript{167} without qualifying which type of armed conflict these principles were meant to apply. The resolution further states the proposition that “the right of parties to a conflict regarding means of injuring the enemy is not unlimited”\textsuperscript{168} and goes on to reaffirm both the prohibition on attack of civilians and the distinction to be made between civilians and military objectives.\textsuperscript{169} It is not the purpose of this exposé to explore deeply the legal significance of the General Assembly resolutions, but it can be said without hesitation that this resolution expresses customary law. It is also of some interest to see that in 1956, the ICRC issued its \textit{Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Times of War}.\textsuperscript{170}


\textsuperscript{167} G.A. Res. 2444, \textit{supra} note 166.

\textsuperscript{168} Id.

\textsuperscript{169} Id.

\textsuperscript{170} These draft rules are explained in \textit{Draft Additional Protocols to the Geneva Conventions of August 12, 1949}. \textit{Draft Additional Protocols to the Geneva Conventions of 12 August 1949}, \textit{supra} note 123; see also Int’l Comm. of the Red
ICRC expressly recommended that these rules should be applicable to both international and non-international armed conflicts.

Mr. Chairman, I will now review the law of non-international armed conflict and briefly give my opinion as to which provisions thereof can be properly considered customary law. I will not confine myself to the written law of Protocol II. I think the first rule to be considered is also the basic rule of the law of war for internal conflicts: the proposition that the right to choose methods and means of warfare is not unlimited. General Assembly Resolution 2444 is good evidence of its legal value. We can even say that without this rule no law of war would exist.

It can also be argued that the Hague rule that prohibits the use of arms, projectiles, materials, or methods of warfare that cause superfluous injury or unnecessary suffering is customary law. It is, however, doubtful whether there are any specific rules of customary law that make the general principles operational.

The prohibition contained in Protocol II against ordering that there shall be no survivors is also part of customary law. Interestingly, this rule is the only one based on Hague law that survived the Diplomatic Conference. A conviction that this was already customary, binding law must have existed among the participants in the Conference. Another rule in the same context is the prohibition against attacking persons who have surrendered and who are recognized as hors de combat. This rule is one of those basic rules which belong to jus cogens.

The prohibition against resorting to perfidious means in warfare is not contained in Protocol II. Protocol II is, therefore, no evidence for the existence of such a prohibition as part of customary law. Can we imagine, however, that it should be considered acceptable to fight with perfidious means in an internal war, whereas perfidy is prohibited in international armed conflict? Arguably not. It is, however, beyond any doubt that the rule prohibiting perfidious use of the protective emblems of the Red Cross or Red Crescent is of customary law character.

Experience shows that these emblems are fairly well respected, also in non-international armed conflicts. Their potential has never been contested as a matter of principle. One can assume that the obligation to respect the emblems and the concomitant prohibition of its abuse are both parts of customary law.

The general rule prohibiting the attack of the civilian population is also of a customary law character. Again, Resolution 2444 seems to be sufficient evidence of this proposition. I must, however, agree with

Commander Fenrick that those rules which specify the general prohibition are probably not customary law.

One rule that Commander Fenrick did not address is article 18, concerning relief operations. Is there an obligation based on customary law to accept a relief operation in favor of the civilian population in general or in favor of some especially vulnerable groups, such as the sick or wounded, women, children, and elderly? The tough negotiations at the Diplomatic Conference on this subject suggest that the answer to this question is not self-evident. Indeed, the rule adopted by the Conference in article 18, paragraph 2 states that the obligation to organize a relief operation is "subject to the consent of the High Contracting party concerned."

In its recent judgment on the merits of the Paramilitary Activities case, the International Court of Justice said, "There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law." This interpretation is a somewhat broad statement of the law. The experience of the ICRC with its own relief actions shows, however, that in practice governments and insurgents do accept such relief actions. Furthermore, governments usually do not object to relief operations in favor of civilians in rebel-held territory. There is, therefore, considerable state practice relating to the acceptance by governments, and also by insurgents, of relief operations on behalf of the needy populations undertaken according to the criteria of the ICRC. It is not clear, however, whether governments feel obliged to comply owing to a rule of international law or for other considerations.

Mr. Chairman, I have come to the conclusion that there is quite a considerable body of customary law in our field. There may be difficulties in proving the existence of a rule, or of its content, but that does not mean that the rule does not exist.

**Remarks of Professor Waldemar Solf**

I am very encouraged to hear all of these ideas advocating the view that customary international law does apply to non-international armed conflicts, that at least common article 3 is customary international law, and also that a good part of the law of the Hague, at least in principle,

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171. See Commentary on the Additional Protocols of 8 June 1977, supra note 45, at 805-09.
is customary international law. I do not wish to quarrel with that.

I also want to state that if these questions had been posed at Columbia University Law School in 1887, the response would have been that although Professor Lieber drafted the instructions for use in the United States Civil War, the instructions apply to international armed conflicts as well.\textsuperscript{173} Some might disagree, however, and argue that the Lieber Code only applies to recognized belligerence. The holding of the Supreme Court of the United States in the \textit{Prize Cases}\textsuperscript{174} followed the latter view, although Professor Lieber himself never did. Professor Lieber wrote a very comprehensive code for the conduct of war, including among other things, the conduct of hostilities and the use of starvation as a legal method for inducing surrender. Professor Lieber, of course, wrote his code for the respective governments of the United States armies then engaged in a civil war.

Near the end of the Lieber Code, however, there are a few instructions, also referred to briefly in common article 3, that the application of these principles does not change the legal character of the parties to the conflict. For example, they still remain amenable to treason law. As a pragmatic suggestion, Professor Lieber does not rely on foreign states' recognition of the belligerency or the independence of the belligerency or any other recognized legal status for justification of the status of the rebels. Professor Lieber alternatively suggests that the ultimate decision is that of victory in the battlefield. This brings to mind a previous pragmatic gentleman by the name of Harrington, writing in about 1607, who said treason never prospers.\textsuperscript{175} What is the reason? If it prospers, none dare to call it treason.

I think we owe it to Professor Reisman and others who made the point that no matter what we professors, academics, and diplomats say, it is governments that really make international law, regardless of whether you call it state practice or state nonpractice. I wish to remind everybody working in this area, that we ought to consider what the governments really had in mind while gathered in Geneva for four years writing the Protocols.

First of all, they took the position that there was no custom and that nothing you could call the law of nations or international law had any relevance whatsoever to non-international armed conflicts. Their agree-


\textsuperscript{174} The \textit{Prize Cases}, 67 U.S. (2 Black) 635 (1862).

ments rather pointedly upheld this belief. They inserted a de Martens Clause into their preamble. Every comprehensive international treaty on humanitarian law since 1899 has had a de Martens Clause. Professor Theodore de Martens of the Russian delegation at the Brussels Conference of 1874 proposed such a clause to assuage the liberation movements of that day, namely the small countries, who were unhappy because there was no explicit provision giving combatant status and prisoner of war entitlement to resistance movements, guerrillas, and partisans.

The small countries were able to delete from the drafts proposed by the major powers any explicit reference to the effect that it is a violation of international law for individuals to engage in combat activities without distinguishing themselves, without carrying their arms openly, by being a part-time combatant, or by carrying out a levée en masse in occupied territory. The original draft made it a violation of international law for partisans or guerrillas to do any of these things. The small countries argued that only a few circumstances exist when these rules would be applicable, but the large powers resisted. Professor de Martens finally came up with a compromise, which became the clause bearing his name. The de Martens Clause provides that in cases not covered by the articles as to who is a privileged combatant, the population and the combatants remain either under the protection of the government or the rules of law of nations as they were derived from established custom, from the principles of humanity and the dictates of public conscience. If anybody had asked Professor de Martens what he meant by that, I am sure he would have responded that all of these established customs have an influence in making binding international law, but that they must be accepted in the practice of the states. He might have even mentioned opinio juris.

This formula appears in all of the Geneva Conventions and in Protocol I. The drafters of Protocol II, however, pointedly omit the rules of international law derived from established custom. The Conference participants apparently believed that there were no rules of international law in this field, and that there were merely principles of humanity and dictates of public conscience. The latter could perhaps be equated to some sort of emerging customary international law.

Of course, the Diplomatic Conference was wrong, because all of us, as well as the International Court of Justice, agree that common article 3, which deals with protection of persons who are not engaged in the conflict but who are in the power of a party to the conflict, is custom-
ary international law. In fact, we consider it *jus cogens*. Hague law, however, is contained in articles 13 through 18 of Protocol II, primarily in the form of general principles. Protocol II contains little in the way of actual rules, except for some oddities which I can explain on another occasion. For example, article 13, which deals with the immunity of the civilian population from direct attack and provides that civilians who participate in hostilities lose their protection, duplicates article 51, paragraphs 1, 2, and 3 of Protocol I almost verbatim. There is one difference, however, in that article 51 (Protocol I) contains a provision stating that these rules are additional to other applicable rules of international law that the drafters of article 13 (Protocol II) deliberately omitted. The participants at the Conference said that they deliberately omitted it because as far as they were concerned the only conventional law on the subject was common article 3.\textsuperscript{177} I do not know why they forgot article 19 of the Hague Cultural Convention.\textsuperscript{178} They did remember it later.

The drafters argued that common article 3 has no relevance to the subject of the conduct of hostilities. They reasoned that common article 3 cannot be read as being broader in scope than the Geneva Conventions, except to the extent that the Geneva Conventions deal with protection of the wounded, sick, and shipwrecked. Common article 3 does not deal with either battles or bombardments of areas under the control of adverse parties.

There is a complete omission of the obligation to respect and ensure respect of the laws of war in Protocol II. Many of us make a great deal out of this obligation. I, however, do not think this obligation adds a thing to *pacta sunt servanda* which I think we all agree is a binding principle in the maxims of international law.

In conclusion, my caveat is not intended to discourage efforts to identify emerging and settled general international law in this area. Rather, I only suggest that while we are in the process of doing this we should at least contemplate what effect, if any, the express provisions of the report of the Diplomatic Conference have on certain signals within the text of Protocol II.

\textsuperscript{177} Commentary on the Additional Protocols of 8 June 1977, *supra* note 45, at 1451.

REMARKS OF LIEUTENANT COLONEL BURRUS CARNAHAN

The Joint Chiefs of Staff are by statute the primary military advisors to the Secretary of Defense, the President, and the National Security Council. It was as a Joint Chiefs of Staff officer that I became involved with Protocols I and II. The Joint Chiefs of Staff were asked to give their military advice on whether or not the United States should ratify Protocols I and II. My role as a Joint Chiefs of Staff officer is similar to that of a military law clerk because the Joint Chiefs of Staff are a collegial body similar to the Supreme Court or the International Court of Justice. The Chiefs of Staff of the four armed forces of the United States reach their decisions as a group. The staff officer's job is to come up with a draft opinion like a law clerk, to circulate it among the justices, or in this case among the Generals and their subordinates, and to assume that they have the votes of the four services.

The Joint Chiefs of Staff recommended against ratification of Protocol I, but did not object to the ratification of Protocol II. I think we had no objection to the ratification of Protocol II because we could not think of any possible way that it would apply to us. That is not really true, of course, as there is an additional situation in which Protocol II might be applied beside the unlikely possibility of civil war breaking out again. General Pearle faced such a situation in the mid-1960s, in which the United States Armed Forces were in some way aiding the government of a state facing an insurgency or an internal armed conflict.

Naturally, the question arose as to the extent to which our armed forces, aiding a state government in that type of situation, are bound by Protocol II. We looked to the text of Protocol II, article 1 and found that it was ambiguous. It states that the Protocol applies to armed conflicts between the armed forces of a government and other armed forces. It, however, does not say "only" between those two armed forces. The text of the Protocol itself, therefore, leaves open a "grey area" between clearly an international armed conflict between states and clearly an internal armed conflict. In this grey area lies the situation in which you have the regular armed forces of another state participating in what otherwise would be a purely internal armed conflict. We also concluded that a political decision would determine whether Protocol II would bind the United States Armed Forces in such a situation. The president would have to decide this if the armed forces were

179. Lieutenant Colonel, Organization of the Joint Chiefs of Staff, United States Air Force.
sent into an area.

The next question to arise was whether the United States could live with Protocol II rules. The Joint Chiefs of Staff decided that there was no military objection to ratification of Protocol II. Let me expand on this. In doing so, however, I want to stress that throughout this I am speaking purely in my private capacity. I know there are other lawyers in the armed forces who are going to disagree with what I am going to say from this point on.

I personally believe that there is a substantial likelihood that in the future, situations will arise in which Protocol II will be applied in internal armed conflicts involving intervention by an outside armed force. You would either have to consider that situation to remain an internal armed conflict, governed by Protocol II, or consider it to be an international armed conflict, which would fall under Protocol I. I think that combatants faced with a situation in which they could choose to conduct their operations either under Protocol I or Protocol II are more likely to choose Protocol II. Therefore, I think we may very well have a situation where Protocol II may form the basis for new customary law governing this type of “grey area” situation. I think it is going to be an attractive option in such situations. This, I emphasize once again, is purely my own opinion.

I, however, would add one caveat to that. I have real doubts as to the viability of article 15 of Protocol II. That article provides protection to dams, dikes, and certain nuclear power stations. This type of rule may well make more sense in a civil war situation than it does in an international armed conflict because often in civil war, both parties have an interest in preserving the economic infrastructure of the country that they are both fighting to control. Hence, article 15 may have a better chance of application in an internal armed conflict than it would in an international armed conflict. Even so, I cannot believe that if the conflict becomes an intense conflict, article 15 is going to survive for very long. The items listed in that article are traditionally thought of as legitimate military targets in wartime. I suspect that article 15 is a house of cards that will be blown over by the first few violations in an internal armed conflict.

I just wanted to try to touch briefly on the grey area between purely internal armed conflict and purely international armed conflict and indicate that, perhaps because of my pessimism on the future of Protocol I, I am guardedly optimistic that Protocol II may well form the basis of a new customary law both for internal armed conflicts and perhaps for this grey area between internal and international armed conflict.
Dean Bond disagreed that Protocol II has a narrower scope of application than common article 3 because common article 3 is scarcely self-defining in terms of the circumstances where it might reasonably apply. Dean Bond explained that the criteria suggested in Protocol II for its application are the same criteria that one would most likely use in deciding whether common article 3 applied. He did not disagree that some provisions of Protocol II are consistent with customary international law applicable to non-international conflict, but said it was merely a coincidence. He indicated that those provisions are not customary international law simply because they are found in Protocol II; they are customary international law for reasons independent of Protocol II. He noted that it is wrong to cite the Protocols as evidence that those particular provisions are customary international law.

Another participant strongly agreed with Commander Fenrick on the scope of Protocol II. He viewed it as somewhat narrower in scope than common article 3 largely because Protocol II requires some sort of control over territory. He likened it to recognition of belligerent status under the old style of law.

This participant also commented on the almost reverential references to manuals in the presentations. He was involved in drafting manuals, and to a considerable extent, these manuals merely represent one person's point of view regarding the international law of war that hopefully other people will support.

This participant conceded that there is an effort to make manuals as authoritative as possible. He warned, however, that they should not become classified as stating the law as such. It was his experience that a number of scholars tend to look to these manuals as almost binding regulations, although most of the manuals have an explicit provision close to the beginning stating that the manual is actually only an interpretation of the international law of war. Such provisions typically state that the manuals are as accurate as possible in their interpretation, but if wrong, the reader should not view the manual as any kind of binding regulation.

This participant also stressed the importance of history in this field. He said that there are not many studies of state practice in internal armed conflicts or in international armed conflicts to determine the actual practice of states. This participant pointed out that any attempt to state the law abstracted from state practice often appears unrealistic to the people who actually apply the law.

Mr. Gasser defended Protocol II. He said that everyone would like
to produce the perfect text of laws applicable to internal armed conflict. What we have now, he pointed out, is not perfect but it is an unacceptable compromise between military and security considerations on the one hand and humanitarian concerns on the other. That text has the advantage of being acceptable to Third World countries although they initially rejected the idea of such a Protocol. Mr. GASSER also noted that the new law is more complex than simply having two circles, one containing customary law and the other representing written law imposed by the “automatic majority.” Much of Protocol II, for example, was made against the initial wish of this “automatic voting majority.”

Mr. GASSER also suggested that perhaps Protocol II should not be considered that bad because a stronger text would probably remain unacceptable to many governments. He added that Protocol II may be a suitable basis for a further development of international humanitarian law.

With regard to the applicability of Protocol II, Mr. GASSER said there was little doubt that its scope is narrower than the scope of common article 3 of the Geneva Conventions. He stated that the authors of the ICRC Commentaries to the Convention as well as many other experts would reject the contention that the control of territory is a criteria for the applicability of article 3. It is a new criteria that makes the scope of application of Protocol II narrower than that of article 3.

Lieutenant Colonel CARNAHAN returned to the observation made earlier that military manuals tend not to give much guidance for conduct in internal conflicts or civil wars. Lieutenant Colonel CARNAHAN suggested that this silence results from guidance that is difficult to formulate, thereby causing one of the problems associated with military manuals. As with any other government document, often the hard questions tend to remain unanswered in military manuals. A consensus on such policies within that agency is necessary, unless every particular item is sent to the head of the agency for approval. If this method were followed, Lieutenant Colonel CARNAHAN suggested, it would not survive for a long time in any bureaucracy. Instead, a consensus within the agency regarding what the document will say is needed. If two different agency bureaus are at loggerheads over a rule, Lieutenant Colonel CARNAHAN suggested the natural solution is simply to leave out any mention of that problem. He thus concluded that one problem with government manuals is that they tend to deal only with clear-cut, easy cases.

Lieutenant Colonel CARNAHAN then commented on the problem of translating the information provided in these manuals into combat behavior. He said people often forget that the problem with the law of
war is not convincing law professors, diplomats, or judges sitting with the International Court of Justice, but rather convincing soldiers that they should behave in a certain way. He gave the example that if one told an infantry rifle platoon leader that the right to injure the enemy is not unlimited, the infantry leader would probably give an unprintable reaction.

Lieutenant Colonel Carnahan said he worked for an army chemical corps officer, not a lawyer, and remarked that one can imagine what the officer thinks of the law of war. In the view of many people, the law of war does not recognize the existence of the profession of his boss. The officer's boss was a navy commodore who came from the submarine service. He remembers the law of war during the World Wars as requiring submarines to surface, signal a merchant ship to lower its lifeboats, sink the merchant ship with naval shellfire, and then tow the lifeboats to safety. Lieutenant Colonel Carnahan thus cautioned that even though the rules are very humane and agreeable with fellow diplomats, they must be credible for soldiers to follow them.

Mr. Surbeck took exception to Dean Bond's assertion that Protocol II is unrealistic. First, arguably one could apply his assertion to practically all the laws of war. In examining the history of the laws of war, the Hague law of war, and the Geneva Conventions all faced at one time a fair degree of suspicion if not outright skepticism. He pointed out that despite this history, these laws survived and proved their validity after enough time had elapsed.

Mr. Gasser disagreed with Dean Bond also on another ground. Using El Salvador as an example, he noted that Protocol II has reached a fair degree of implementation. Complete respect of the rules is rarely achieved, but both sides appeared to put these provisions into practice. Mr. Surbeck added that the ICRC dedicates a great deal of time teaching and convincing the belligerents on both sides of a conflict that these provisions are valid and have already proven extremely useful.

Dean Bond replied that he would not dispute that the existence of Protocol II and other kinds of humanitarian law enables outside groups, such as the International Red Cross and foreign governments, to pressure combatants into complying with those provisions. Indeed, he thought that this pressure is one of the most useful functions that such documents perform. He noted, however, that it is one thing for combatants to acquiesce to particular kinds of conduct because they are required to do so, but quite another to acquiesce for reasons independent of those beliefs. Dean Bond said such acquiescence did not prove that

these rules are recognized as binding law because all good law reflects self-interest and in turn ensures its respect. In those instances, one should demonstrate that such conduct is the result of the recognition of customary international law. He indicated that at least in the foreseeable future, more violations than compliance will occur as a result of the more detailed provisions of Protocol II.

Professor Reisman commented that available army manuals and the rules of engagement are useful sources for the identification of customary expectations, although one should distinguish these sources from actual practice. When we talk about the law, Professor Reisman said, we are not really describing actual behavior. Rather, we are describing expectations of demanded behavior. A discrepancy may arise between that demand and actual practice. Effectiveness is needed to sustain those legal expectations so that laws continue to influence actual practice. The manuals are meant to instruct troops, and presumably, those troops internalize them as criteria for determining whether or not to comply with some "code."

Dean Bond recognized that manuals are very good indicators of the views of the right behavior of a particular military institution. A comparison of internal instructions from a wide variety of different military institutions is useful. He indicated that if the scholar finds much overlap, it permits him to make certain inferences about the existence of customary law. This approach seemed more reliable to Dean Bond than deriving logical inferences from the code of the Geneva Conventions to develop something new. He stressed that if manuals are available to be studied, they can be useful. He also indicated that if there is an interest in the actual law concerning conflict, if possible, one should examine the rules of engagement to expedite the discovery of customary law.

Dean Bond pointed out that although it is difficult to obtain such manuals, they would help scholars define customary law. He referred back to Lieutenant Colonel Carnahan's primary point that scholars want to gain an insight into the expectations of the people who actually make these critical decisions in the field, so these scholars can influence or shape them. Dean Bond indicated that if the manuals are made available, he would know what the rules are, so he could best advise others. For these reasons, he concluded, this sort of material is an important source.

Professor Almond said that he served for part of the period on the United States delegation to the negotiations for the Protocols. He asked Mr. Gasser to try to refresh his memory, as to whether articles 13, 14, and 15 of Protocol II come from Hague law or Protocol I. Those arti-
cles, as they appear in Protocol II, have no provision with respect to reprisals although those that appear in Protocol I do. There is no clear showing why this distinction was made. Mr. ALMOND asked Mr. Gasser to refresh his memory as to why the Conference did not cover reprisals in Protocol II. Mr. Gasser could not directly recollect why reprisals were not covered in Protocol II, but recalled that every reference to reprisals or retaliation was stricken from the Protocol II draft in the final negotiating rounds of the Conference. He also recalled that the delegations from Pakistan, India, and Iraq were opposed to them.

Mr. Bruno Zimmermann added that while he had not directly participated in the debates of the Committee that drafted Protocol II during the Diplomatic Conference, he understood there were two main reasons for not including any mention of reprisals in Protocol II. First, reprisals were deemed to belong exclusively to disputes between states, there being no possibility for entities other than states to use that machinery. Mr. Zimmermann noted that during a long discussion, some delegations tried other possible names for this concept such as “measures similar to reprisals” and even a complex formula that would read, “the parties shall respect this Protocol in all circumstances, whatever violations they may pretend the other party has committed.” Second, he indicated that the staff of the ICRC, whether in relation with common article 3 or with Protocol II, has always pretended that there was no escape from those rules, through reprisals or other means, unless specifically foreseen in the text of the rule itself. Thus, every proposed, alternative language to the term “reprisal” failed in Protocol II.

Professor Solf interjected that every reference to the term “parties” was carefully deleted in Protocol II. Inferentially, he said, article I recognizes “parties” when it describes the threshold, but the word “party” was excised automatically from the rest of the text. This deletion occurred because Mr. Justice Hussein of Pakistan and Mr. Alfoluci of Iraq did not want to indicate in any way that they were parties to a non-international armed conflict for fear that it would raise the stature of the rebels in their respective domains.

Professor MERON returned to Professor Reisman’s point that in situations of armed conflict, whether international or internal, it is extremely difficult to collect credible evidence of state practice. Not only do violations abound both types of situations, but access to the theatre of operations is very limited, and the collection of reliable, credible facts is often defeated. Given the situation, Professor MERON said that

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181. Legal Advisor, International Committee of the Red Cross, Geneva, Switzerland.
manuals of military rules of engagement provide the best evidence of
state practice in the long-run. He stressed that individuals should look
for concrete evidence of state practice in this area.

Professor Meron's second point concerned the distillation from Pro-
tocol II of customary law. Protocol II deals primarily with evidence of
either human rights or the law of Geneva. He found that very few pro-
visions in Protocol II are actually rooted in Hague law. Nevertheless,
he noted that the efforts of Mr. Gasser and others to extrapolate from
the existing provisions some prohibitions derived from Hague law are
worthwhile.

Professor Meron invited the group to address the relevance of the
Hague law to Protocol II situations. As an example, Professor Meron
referred to an Appendix Professor Robert Goldman wrote that ap-
peared in an Americas Watch report entitled Land Mines in El Salva-
dor and Nicaragua: The Civilian Victims. Nicaragua has not ratified
Protocol II, although El Salvador has. Professor Meron pointed out
that in his Appendix, Professor Goldman states that the Land Mines
Protocol is not applicable because it is limited to international con-
flicts. Nevertheless, the customary international law of the Hague Con-
ventions is applicable to non-international armed conflicts; therefore,
principles such as the principle of distinction, the principle of immunity
of civilian populations, and perhaps, the principle of avoiding unneces-
sary suffering apply.

Professor Meron then asked the panel to address the relevance of
the applicability of the Hague principles without addressing their ab-
stractions. He added that it is the translation of the specific rules in
practice and not the high level of abstraction that is causing problems.
Commander Fenrick indicated that it is difficult to establish whether
much or any of the Hague law applies to internal armed conflicts. The
only way he could recognize the Hague law applying to such conflicts is
through an examination of article 3 and an attempt to expand the hu-
mane treatment aspect of that article to claim that some of the Hague
law is included under this analysis. It is certainly an imaginative ap-
proach, Commander Fenrick noted, because similar language used in
other parts of the Geneva Conventions clearly does not apply to the

182. AMERICAS WATCH, LAND MINES IN EL SALVADOR AND NICARAGUA: THE CI-
VILIAN VICTIMS (1986).

183. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps,
and Other Devices (Protocol II), annexed to United Nations Conference on Prohibi-
tions or Restriction of Use of Certain Conventional Weapons: Final Act, app. C,
conduct of hostilities. The Geneva Conventions are much more closely restricted to people in some sort of custody. Thus, Commander FENRICK determined that the role of Hague law in internal conflicts was modest.

Commander FENRICK then refocused the discussion to the fact that there are only a few modern war manuals. When the Canadians began drafting their war manuals for the Canadian Armed Forces, they wrote letters to many countries in an attempt to obtain copies of their manuals. Several countries replied in such a way that the uncertainty of the existence of the Geneva Conventions became obvious. Canada received one letter from a country that Commander FENRICK euphemistically described as one of the large Eastern industrial competitors of the United States that made reference to the Hague Conventions of 1907. The response, however, did not mention the Geneva Conventions of 1949. The only countries that he knew to have well-developed manual programs were the Federal Republic of Germany and the United States. Commander FENRICK could not think of any country where the desk officers who are responsible for law of war matters would consider their manuals as accurate reflections of the current state of the law.

Professor GROSSMAN then turned the discussion to the problem of the expectations coming from various actors, such as the military, the civilian population, and the victims. He said that the victims can become important actors, as shown in Argentina where some of the military were subject to trials as well as judged and condemned because they were involved in the disappearances of victims.

If we search for different levels of expectations of behavior from actors, Professor GROSSMAN said, it is very important to identify the manner used to find evidence of those practices. Professor GROSSMAN suggested that such evidence is not found exclusively in manuals the armies distribute, but in the expectations of behavior that the civilian population holds as well. He raised another issue for debate when he asked the extent to which the norms of customary international law, coming from the law of human rights, are found applicable in non-international armed conflicts.

Professor GROSSMAN mentioned particular principles embodied in different conventions. The International Covenant on Civil and Political Rights,184 establishing conditions for a valid declaration of an emergency situation, stipulates that some rights are nonderogable and devel-

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ops criteria to derogate other rights. 185 Similarly, article 27 of the American Convention on Human Rights 186 and the European Convention on Human Rights 187 provide for a special body of practice and jurisprudence applicable to such situations. Professor Grossman cited as an example of a principle of customary international law the right to be recognized as a person with certain rights and obligations before the law. He further noted that disappearances that took place in numerous countries stopped because of the tremendous international and domestic reaction. He indicated that these norms are potentially applicable to non-international armed conflicts as well. Professor Grossman concluded that state practice is heading in that direction.

Dean Bond distinguished general principles of law from customary international law. He preferred to build on the theory not dealing with customary international law, but rather seeking some common principles from among a whole series of documents. Some of these principles are intended to deal with law of war situations, while others deal with civil and emergency situations. Dean Bond pointed out that it is difficult to abstract principles from various documents because the principles tend to be very abstract and generalized. He noted that one can never know with certainty whether the application of a principle in a particular instance is always required or whether it is consistent with that principle.

Professor Oliver found Dean Bond's argument very interesting. He remarked that although the general principles of law common to civilized nations are a source of international law, their application is limited by the scope of article 38 of the statute of the International Court of Justice. Professor Grossman interjected that in addition to such general principles, very concrete rights exist, such as the right to be recognized as a person, which is not merely a principle but an established right. Dean Bond replied that although he did not disagree with Professor Grossman's theory, its implications in a concrete situation are not as clear as the general proposition.

In examining the rules of the Hague law relating to the conduct of hostilities in non-international armed conflict, Mr. Gasser indicated that only a slight part of human rights law directly relates to that area of law. He disagreed with Commander Fenrick's and Lieutenant Colo-

185. Id. arts. 4, 5.
nel Carnahan's attempts to question the value of military manuals as evidence of state practice. He added that such manuals are of great importance in influencing the behavior of troops and also in indicating to the opposing side in a conflict which rules the armed forces are ready to respect. He remained convinced that not only the ICRC's efforts to disseminate such rules to the armed forces, but also its project to create a model manual for armed forces are useful contributions to a better respect of the humanitarian rules.

Mr. Gasser returned to Professor Meron's question of the applicability of Hague law to specific situations. For example, a party to a conflict may use antipersonnel mines to attack the civilian population. As the attack on the civilian population is prohibited by customary law, mines may of course not be used against civilians. Thus, Mr. Gasser said, in such circumstances Hague law is relevant. He then raised the question whether the Hague law rule prohibiting booby-traps and toys containing explosive devices applies to international armed conflicts. The Land Mines Protocol specifically prohibits the use of such devices for international armed conflicts. He asked if such horrible weapons may nevertheless be used in non-international armed conflict, even though the armed forces are the same and the civilians — the victims — are also the same. He concluded that the resort to such perfidious means is as illegal in non-international armed conflict as it is under the law of international armed conflict.

Professor Solf responded that if a specific law or any kind of general international law applicable in non-international armed conflict exists, it is still emerging. He said that the laws against the use of such things as children's booby traps and explosive children's toys are probably in the process of becoming norms. He, however, cautioned the other participants to be very careful not to generalize or claim that if the use of a particular weapon is prohibited in an international armed conflict, it is also prohibited in a non-international armed conflict. Professor Solf then referred to the use of riot control agents as an example. Ninety percent of the states represented in the General Assembly at one time indicated that they thought the Geneva Gas Protocol of 1925 prohibited the use of riot control agents, tear gas, and defoliants in wars. The United States did not join in that resolution, but most states take that position. Professor Solf recognized that states should not be prohibited

188. Land Mines Protocol, supra note 183.
from using riot control agents in situations of tension or disorder within their state and in a non-international armed conflict. These tools, he added, are the most humane type of weapon used to control those types of situations. He emphasized that it is therefore dangerous to generalize about applying norms of international conflicts to non-international conflicts.

Dean Bond then replied to Dr. Gasser's assumption that Protocol II has a narrower scope of application than common article 3. He rejected the idea that almost any type of internal disturbance is a non-international conflict that article 3 covers, and assumed most people would also reject it. Many types of internal disturbances are simply not subject to anything resembling the law of war.

Dean Bond claimed that it was very difficult to imagine a situation where a sovereign state would admit that a non-international conflict within the purview of article 3 existed, unless the opposing party controlled some territory. He noted that as a practical matter, much of the law of war requires the control of some territory for its implementation. This suggested to him that the control of territory is an appropriate criterion for determining whether article 3 applies as well as Protocol II.

Professor Almond said this discussion suggested a kind of enigma that also surfaced in a question he presented earlier concerning reprisals. Although Mr. Surbec's response was that the ICRC did not want to deal with "parties" in this situation, Professor Almond indicated that Protocol II is a supplement to common article 3 of the Geneva Conventions and that article 3 indeed refers to the "parties." Thus, he said, one must deal with the term "parties." Professor Almond stated that the development of international law applicable to a situation where a state is involved in something other than an international conflict will not occur, unless the leaders of a state are willing to recognize that they are dealing with a "party" or the equivalent of a "party" in such conflicts. Otherwise, he said, the state will find that these international laws bind them, but not their opponents.

Mr. Geraldson concluded that most people engaging in the panel discussion agreed that some provisions of Protocol II reflect customary international law. Mr. Broches then offered a card the ICRC published, the Spanish language version of which he believed was in use in El Salvador. The card reads as follows:

THE INTERNATIONAL LAWS FOR ALL COMBATANTS ARE:

1. All civilians, particularly women, children and aged people must be respected.
2. It is forbidden to attack persons, vehicles and installations which are protected by the Red Cross sign. The Red Cross sign is reserved for:
   - the wounded and the sick
   - hospitals and ambulances
   - doctors and nurses
   - relief goods and transports of the Red Cross
   - delegates of the Red Cross
3. It is forbidden to attack or mistreat:
   - a wounded enemy combatant
   - an enemy combatant who surrenders.
4. a. Prisoners must be respected. It is forbidden to kill, torture, or mistreat them.
   b. Wounded or sick prisoners must receive medical treatment.
   c. If you are taken prisoner yourself, you have the right to the same treatment.

Mr. GASSER said that this card is still in use. He said that the ICRC also had a card for the Rhodesia Civil War that was similar to the Nigerian Code of Conduct, which came from the Nigerian Federal government under the influence of the ICRC. The use of these cards, he concluded, is some possible evidence to show what the participants in a conflict consider to be customary law in this field.

CUSTOMARY INTERNATIONAL LAW RELATIVE TO THE CONDUCT OF HOSTILITIES AND THE PROTECTION OF THE CIVILIAN POPULATION IN INTERNATIONAL ARMED CONFLICT

The panel convened at 9:30 a.m., January 23, 1987, with Waldemar Solf presiding as Moderator.

The Moderator, Professor SOLT, noted that states, not parties to the Protocol must define customary international law for the conduct of hostilities, and that this issue is of paramount importance in the United States as well in light of the decision of the Reagan administration not to submit Protocol I to the Senate for its advice and consent. He also noted that a substantial body of both natural and customary law serves as the basis of the law of armed conflict. He added that the rise of massive citizen armies necessitated the codification of some of the rules and the preparation of military manuals, so that soldiers might rapidly learn the restraints that humanitarian law demanded. These codes were based on the principles of military necessity, humanity, and to a lesser extent, chivalry.
The proper starting place to analyze the customary international law of armed conflict is Francis Lieber's code of instructions for the army during the American Civil War. This code, which President Lincoln promulgated as General Orders No. 100, April 24, 1863, is considered an authoritative restatement of the principles of military necessity and the customary law of war (jus in bello) that developed in the seventeenth century. The code did not simply set out rules and prohibitions, it had an underlying concept: “permissible violence.”

The heart of the concept, the principle of military necessity, influenced all specific rules regarding the means and methods of warfare. Lieber's definition of military necessity was, “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.” In other words, Lieber included two elements in this definition: utility and legal permissibility. The means must be truly useful, and even if they are useful by some calculation, they may not be used if the law of war prohibits them. Lieber elaborated on this definition by giving specific examples of actions that military necessity permitted.

In his development of the concept of military necessity, Lieber emphasized the positive aspect of the principle. Actions that the belligerent takes are authorized or justified so long as they are not prohibited. The Lieber approach was often copied and subsequently influenced greatly many military manuals and conventions developed in the nineteenth and early twentieth centuries. The positive concept of authorized actions was incorporated into United States military manuals until the 1956 manual, which perhaps with war crimes in mind, categorized activities that are not military necessity and never returned to Lieber's idea that we start with a notion of what the belligerent can properly do.

In his elaboration, Lieber included strictures that might be considered expressions of the principle of humanity. He reported, “Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.” This is a very interesting restatement of the “just war” concept of right

191. Lieber Instructions, supra note 173, at 3.
193. 7 J. Moore, A DIGEST OF INTERNATIONAL LAW 178 (1906) (quoting Lieber's definition of military necessity).
194. 1956 FIELD MANUAL 27-10, supra note 165.
195. 7 J. Moore, supra note 193, at 178.
intention. Even a "just" belligerent using generally proper means must have the right intention.

Lieber continued his explanation of the concept of military necessity by expressing principles usually associated with the principle of humanity:

Military necessity does not admit of cruelty — that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton destruction of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

In my view, there is a constant interaction between the principles of military necessity and humanity. This is a very subtle type of analysis. It is not merely a type of cost effectiveness analysis. Rather, it incorporates the moral dimensions of the interaction of belligerents.

In the nineteenth century, concepts that formerly might have derived from natural law principles were increasingly described as flowing from the "principle of humanity." The principle of humanity was a secular, higher, normative source of law associated with the idea of "civilization" and "progress." An explicit conventional reference to the principle of humanity is the concept prohibiting any means of war causing "superfluous suffering," which was expressed in the 1868 St. Petersburg Declaration. While the Declaration holds that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military force of the enemy," it concludes that "this object 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.”

The principle of humanity tends to waver between emphasizing the proposition that states should avoid unnecessary damage and suffering, which is simply a different way of stating the principle of military necessity, and emphasizing the proposition that certain means are inadmissible, such as poison, regardless of their putative military utility. If the means cause superfluous suffering, there is something innately unacceptable about them.

196. *Id.* at 178-79.
197. Declaration Renouncing the Use in War of Certain Explosive Projectiles of December 11, 1868 (Declaration of St. Petersburg), *reprinted in 1 The Law of War: A Documentary History* 192 (L. Friedman ed. 1972) [hereinafter *The Law of War*].
198. *Id.*
In my concept of military necessity, I combine the principles of military necessity and humanity by adding an element that qualifies Lieber's definition of military necessity; therefore, I use the term "legitimate military necessity." Legitimate military necessity permits or authorizes all measures truly necessary for the accomplishment of legitimate military ends provided that the laws of war and natural law permit them. It was not sufficient to say that whatever was truly necessary could be done as long as it does not violate the law of war. At any point, the law of war may not cover all the subjects that are important in a war. Accordingly, the additional dimension of natural law should be included. Natural law goes beyond the subject of the just war doctrine and includes concepts of human rights. Natural law was out of fashion in the nineteenth and first half of the twentieth centuries, but it was replaced by the concept of "humanity." I see the principle of legitimate military necessity as having three components: utility, legal permissibility, and some kind of higher law or resource that can be consulted when there is a gap in the law. These gaps occur frequently because of technological changes and the differences in the character of conflicts.

The developing conventional law of war in the de Martens Clause in the Preambles to the 1899 Hague Convention No. II199 and the 1907 Hague Convention No. IV200 significantly reflects the principle of humanity. The 1907 Hague Convention No. IV states that the High Contracting Parties "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 public conscience."201 All four of the 1949 Geneva Conventions and most of the conventions in the law of international conflict since then contain comparable references to the "laws of humanity and the dictates of the public conscience."202 Additionally, a number of specific provisions in the regulations of the 1899 and 1907 Conventions reflect the principle of humanity. For example, article 23(a) prohibits poison and poisoned weapons, article 23(b) disallows

201. Id. preamble.
“treacherous killing,” article 23(c) and (d) prevents denial of quarter, and article 23(e) prohibits a nation from employing “arms, projectiles or material calculated to cause unnecessary suffering.”203

In addition to serving as the basic principle of the customary law of war, the term “military necessity” is used in the conventional law of war as an exceptional justification for deviation from the law or as an elastic clause. Article 23(g) of the regulations of the 1899 and 1907 Hague Conventions prohibiting the destruction or seizure of the enemy’s property “unless such destruction or seizure be imperatively demanded by the necessities of war”204 is the best known of these elastic clauses.205 Another example is article 26, wherein the officer in command of an attacking force must warn the authorities of an inhabited area before commencing bombardment, “except in cases of assault.”206

A third concept of military necessity was developed primarily by German military writers, political theorists, and international law publicists in the late nineteenth and early twentieth centuries. The so called Kriegsraison doctrine held that Kriegsraison geht vor Kriegsmanier (military necessity takes precedence over the law). The underlying concept of the Kriegsraison doctrine was an unlimited version of raison d’etat, producing the dictum that Not kennt kein Gebot (necessity knows no law).

During the period of its formulation, theorists could defend this doctrine on the ground that the law of war was only customary and not clear and binding. The Kriegsraison doctrine, however, was perpetuated after the codification of the customary law of war in the 1899 and 1907 Hague Conventions and applied repeatedly by the Germans in World War I. English and French publicists attacked the Kriegsraison doctrine prior to and during the First World War. American publicists, on the other hand, attacked the doctrine during and after the war. What could be called an “allied” view reiterated Lieber’s version of the rule: the laws of war limit military necessity. The “allied” view, however, failed to acknowledge that the existing customary and conven-

203. See Hague Convention No. II of July 29, 1899, supra note 71, art. 23(e); Hague Convention No. IV of October 18, 1907, supra note 71, art. 23(e).
204. See Hague Convention No. II of July 29, 1899, supra note 71, art. 23(g); Hague Convention No. IV of October 18, 1907, supra note 71, art. 23(g).
205. Many war crime cases interpret article 23(g), including, for example, charges of unjustified wanton destruction in the Second World War. Two of the best known cases are United States v. von Leeb (The High Command Case), reprinted in TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS vol. 10, at 1-1,322, vol. 11, at 3-756 (1950-1951), and United States v. List (The Hostage Case), reprinted in id. vol. 11, at 759-1319 (1950).
tional law of war did not regulate adequately many new means of total war, such as submarine warfare, aerial warfare, and chemical warfare. Thus, to say that the Allies adhered to the laws of war still left open the question of their practices with respect to the means and methods of warfare that the laws of war did not adequately regulate. The need for the supplementary principle of humanity or natural law was evident. This was the case, a fortiori, in World War II.

The two basic principles of the customary law of war, according to the "just war" doctrine, are proportionality and discrimination, or noncombatant immunity. The principle of proportion is central to the principle of legitimate military necessity. The importance of the principle of discrimination or noncombatant immunity is not so clear. Thus, the 1940 version of the United States Department of War Field Manual 27-10, Rules of Land Warfare, lists three basic principles of the law of war: military necessity, humanity, and chivalry. The manual describes the principle of humanity as "prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war." This is a negative restatement of the principle under military necessity that military measures be truly necessary for the purposes of the war. The manual does not state explicitly the principle of discrimination or noncombatant immunity. The 1956 version of Field Manual 27-10, which is still in force, departs from the traditional United States format of listing the principles of the laws of war and emphasizes that military necessity is not a justification for violating the laws of war.

It should be noted that the literature on the law of war following both World Wars I and II was inclined to abandon hope on the principle of discrimination and noncombatant immunity due to the near-universal violation of the principle, notably in aerial bombardments. The United States Air Force resurrected the principle of discrimination or noncombatant immunity in the pamphlet International Law — The Conduct of Armed Conflict and Air Operations, under the category of the principle of humanity. The pamphlet states that in addition to forbidding the infliction of "suffering, injury or destruction not actually

207. See M. WALZER, JUST AND UNJUST WARS 138-59 (1977) (discussing the concepts behind the principle of the "just war" doctrine).
209. Id. para. 4(b), at 2.
210. 1956 FIELD MANUAL 27-10, supra note 165.
211. Id. para. 3(a)-(b), at 2-3.
necessary for the accomplishment of legitimate military purposes" and disproportionate means:

[1]he principle of humanity also confirms the basic immunity of civilian populations and civilians from being the object of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties which may occur during the course of attacks against military objectives, and which are not excessive in relation to the concrete and direct military advantage anticipated. 213

The Air Force maintained these two just war doctrines by developing principles of proportion and discrimination. Proportion is the essence of military necessity. Discrimination is one element of humanity.

If you take this approach, which I support, there are at least three elements of humanity. There is the avoidance of unnecessary damage, the avoidance of certain means that cause superfluous suffering or for some other reasons are simply unacceptable, and the principle of discrimination or noncombatant immunity. Attempts to apply the principle of discrimination or noncombatant immunity are found in Protocol I, particularly in articles 51 and 52.

REMARKS OF JUDGE CARL-IVAR SKARSTEDT 214

As a small introduction, I would like to remind you of the fact that Sweden is a small country, and in Sweden relatively few of the jurists and others with an interest in the subject are working full time in international humanitarian law. Some of us, including myself, do not have the opportunities to work full time with this very interesting material, but I am fascinated with it in spite of the lack of time I can devote to it. Some of us who were responsible for the 1984 Final Report of the Swedish International Humanitarian Law Committee 215 realize that today we must rely on a broader explanation of how general international law is developed and how it is generally enforced upon all states, not only upon states to which the agreements formally apply.

In our view, there exists a general concept of justice, a general opinio juris, that can be manifested, for example, in United Nations decisions, both in the committees and in the General Assembly. This concept of justice is not necessarily manifested through ratification or other international agreements established by diplomatic conferences. It is necessary to make this point because a greater awareness of the customary core of the two Additional Protocols to the Geneva Conventions could

213. Id. para. 1-3a(2), at 1-6.
214. President, Court of Appeals for North Sweden.
hasten the ratification process for Protocol I. Protocol I, in the opinion of Sweden and other countries, is to a large extent a codification and specification of traditional principles already established under international humanitarian law.

Now, however, almost three years after the birth of the Final Report of the Swedish Humanitarian Law Committee, I must confess that I am not overly enthusiastic about the idea that customary law could substitute for the formal ratification of the Additional Protocols or even excuse a nonratifying state. A legal system that consists only in developing customary law seems realistic and even attractive in the short term, but is a rather dangerous approach in most other respects.

In a separate section of its 1984 Final Report, the Swedish International Humanitarian Law Committee set forth some of the rules in Additional Protocol I that appear to have the status of customary law. Such an inventory might be of practical significance in a situation where Sweden, which has ratified Protocol I, comes into conflict with an adverse party that has not ratified the Protocol. Under article 96, which contains the principle of reciprocity, the Protocol applies only to states that have ratified or acceded to it. This, however, does not support the conclusion that Sweden would not apply the rules of the Protocol in such a situation. The Committee notes that Sweden must always respect the rules constituting international customary law. From the humanitarian point of view, which the Committee was instructed to take into account, it is natural to imagine that Sweden would do everything in its power to ensure that every party to a conflict in which Sweden is involved applied Additional Protocol I.

Accordingly, the Committee has made an attempt to list some of the rules in Protocol I that have the status of customary law, even if only in their main outlines. Committee members had different opinions, and none of us were quite sure of the acceptance and validity of our thinking. In the report we recognize that there are no guarantees that other states will accept the Committee’s opinion on which rules have the status of customary law, and it cannot be guaranteed that an adversary will respect these rules.

The Swedish government has not yet given its formal approval to all the ideas that the Committee has put forward in its report. Nevertheless, I have good reason to think that to a very large extent the government will follow the Committee’s proposals. I am very glad that this small paper from the Swedish International Humanitarian Committee, two and a half pages of the total four hundred and thirty-three in this report, possibly has contributed to a constructive and valuable dialogue in this very competent Workshop. We can all be influenced by our dif-
different interpretations so that we at least in the Western Hemisphere can establish a common view as to which parts of Protocol I should be accepted as customary law, even by those states that have not yet ratified the Protocols. Above all, we regard it as crucial to secure universal adherence to the existing conventions and Additional Protocols, so this body of international humanitarian law can be fully consolidated and respected.

As a conclusion outside this legal sphere, let me state things as the Red Queen confidently stated in Lewis Carroll's *Through the Looking Glass:* I could have done it much more complicated. Our consolation after this Workshop is that if we are confused, we are at least on a higher level.

**Remarks of Lieutenant Colonel Burrus M. Carnahan**

When the British set up courts in India, they faced the problem of finding a convenient source of traditional local law; a source that would be accessible and understandable to English colonial judges and administrators. Fortunately, Hindu religious literature appeared to provide a ready solution in the form of the ancient Code of Manu. Scholars later determined, however, that the Code of Manu had never been a direct source of law in traditional India. Rather, it was an idealized statement of what the Hindu priesthood believed the law ought to be. Ironically, it became positive law only at the hands of an alien imperial power. The Code of Manu is a good example of the "venerated pseudo-code," a document highly valued in its society which appears to be a real code of law, but which is not, in fact, a body of positive law.

The Code of Manu is not the only example of such a document. Many so-called codes of the ancient Middle East, including the famous Code of Hammurabi, appear to have had this character. During the Middle Ages in Europe, Roman law was thought to be the ideal law for the universal Christian community and was the only law studied in the universities. The academic world ignored the law the European courts actually applied. To the south and east of Europe during the same period, jurists and theologians developed Islamic law as a similarly idealistic system to govern the moral lives of believers. Meanwhile, the judges that the rulers of Moslem states appointed often applied very different rules in their courts.

In the modern world, the international law of armed conflict is unfortunately approaching this same venerated but irrelevant status. This is

especially true of humanitarian law, as reflected in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. During this century, the written law of warfare has undergone a steady development toward both greater humanitarianism and greater complexity. At the same time, it has become increasingly divorced from the realities of warfare.

Many provisions in Additional Protocol I illustrate why the written law of war has become increasingly irrelevant. For example, articles 50(1) and 52(3) create a presumption of civilian status whenever "doubt" exists. Military personnel will be unable to implement this presumption in many combat situations because survival often depends on decisions based on inadequate information that is never free from "doubt." Article 56 creates a special protected status for certain installations containing "dangerous forces," even if those installations are otherwise legitimate military objectives. To make matters more difficult, article 56 establishes no clear standard to determine whether an installation is protected. After entitlement to protection is established, however, it can be lost only as the result of a confusing and excessively high level of abuse by the enemy.

Paragraph 8 of article 51 furnishes another prime example of impracticality. While paragraph 7 provides that the presence of civilians shall not be used to render military objectives immune from attack, paragraph 8 states that "[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians." Although the defending party has deliberately and unlawfully used a civilian population to screen military objectives from attack, the attacking party still must break off the attack if it appears that collateral civilian casualties might be "excessive," or the attack otherwise indiscriminate. The purpose of this rule is obviously humanitarian. In reality, it would only encourage efforts to use civilians to screen objectives from attack, at least from a law-abiding attacker.

Finally, Protocol I radically undercuts the doctrine of belligerent reprisals. Therefore, one side in a war can no longer answer unlawful attacks by punitive, proportionate violations. The doctrine of reprisal has often been abused, and it is difficult not to sympathize with the humanitarian motives behind efforts to prohibit belligerent reprisals. Still, it has long been recognized that "actual reciprocity is an essential

217. See Protocol I, supra note 4, arts. 51-56 (prohibiting reprisals against civilian persons, civilian objects, cultural objects, food and things indispensable to the civilian population, the environment and certain dams, dikes and nuclear power stations).
and just condition of the observance of the rules of war." Eliminating belligerent reprisals would remove one of the few practical deterrents against violations of humanitarian law.

Whereas the 1977 Protocol I contains many examples of an impractical or excessively idealistic approach to the law of war, the ascent of international humanitarian law into venerable irrelevance may have begun long before, as reflected in the demise of the concept of belligerent occupation. The law of belligerent occupation developed during the nineteenth century in an effort to reconcile the legitimate defense needs of invading armies with the rights of inhabitants of occupied territory. Since the end of World War II, however, no government has claimed unequivocally to exercise rights of belligerent occupation.

Reluctance to make such a claim may be due in part to the recent unfortunate tendency to regard all occupation of foreign territory as an act of aggression, even if the occupation arose out of a legitimate act of self defense. This reluctance, however, has also undoubtedly arisen from the complex, cumbersome, and restrictive regime established for occupations by the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Under the 1949 Convention, the law of belligerent occupation has restricted the rights of occupying powers so much that no nation engaged in an armed conflict has been willing to admit that it is legally bound to apply that Convention.

To the extent that it attempted to reform the law of belligerent occupation, the Fourth Geneva Convention on civilians may claim the same type of dubious success as the Kellogg-Briand Pact of 1928. The Kellogg-Briand Pact attempted to abolish "war" as an instrument of national policy. It has been eminently successful in accomplishing its goal, with the notable exception of the period from 1939 to 1945. Since 1928, there has been a distinct reluctance to declare war or to recognize the existence of a state of war anywhere in the world. The term "war" was simply read out of the international vocabulary. Instead, of course, we have seen a blossoming of "acts of forcible self-defense," "armed conflicts," and "humanitarian interventions." Similarly, the 1949 Fourth Geneva Convention has succeeded in eliminating recognition of belligerent occupation from the practice of states as a means of denying the applicability of the onerous regime the Convention.

218. See 2 L. Oppenheim, International Law 236 (H. Lauterpacht 7th ed. 1948) (describing actual reciprocity not only as an essential condition, but as a just condition of the observance of the rules of war).
established.

I suspect that nations will make similar denials with many of the rules of the Protocol that are impractical. Nations, even if they are parties to the Protocol, simply will not recognize that they are involved in a situation where the protocol has to be applied. Armed conflict will go the way of war, and the existence of armed conflict will not be recognized.

The four Geneva Conventions of 1949, together with the two Geneva Protocols of 1977, make up a subtle, detailed body of law that is 559 articles in length, comparable in complexity to the Internal Revenue Code of the United States. One may wonder whether any nation at war, even given the best will in the world, can comply fully with all this law. As we have seen, one possible reaction to this situation is to deny the applicability of the most inconvenient and thus often the most humane parts of this law. Another and probably more dangerous reaction is to bring all international law into disrepute. Neither reaction serves the humanitarian aims behind the law of Geneva.

Clarence Darrow once half facetiously suggested that the legislature be convened for a special session that could do nothing but repeal existing statutes. A similar pruning operation might strengthen the authority of international humanitarian law by eliminating provisions least likely to be reflected in the actual practice of states at war. This operation may already be taking place through the mechanism of customary international law.

The importance of custom lies in its stress on the general practice of states, and hence on the practicality of the rules it establishes. When juridically significant practice occurs on a matter that an existing treaty covers, practice is usually thought of as an aid in interpretation of the treaty. Opinions differ as to whether practice can amend a treaty provision. In principle, there would appear to be no reason why later custom could not supersede a prior treaty text as a source of law.

Whether considered as custom or as an aid to interpretation, the main problem with practice is that it is an unwritten source of law, often unavailable to decision makers when time and resources are limited. Scholars should identify and save the practicable parts of the new written law, and in particular Protocol I, before they sink into the morass of irrelevance. Once identified, national decision makers can be pressed to adopt these parts of the written law into state practice.

The main requirement to be applied in this process should be that a written rule should have no significant military impact on the outcome of international disputes. We must not forget that, however horrible it is, the institution of war has survived because it serves a function in
international society: it determines definitively which party to a dispute is more powerful at a particular time and place. However humanitarian it may be, no rule of international law is likely to survive if it gives a significant military or political advantage to one side in a dispute. Such a rule would undercut the function of the institution it was intended to regulate because it would distort the real power situation. The proper role of the law of war is to keep the violence inherent in war “on track,” to ensure that it does not spill over to harm persons and property not directly related to resolution of the dispute over power.

This is not a plea for the unlimited predominance of military necessity or Kriegsraison. Considered alone, the principle of military necessity might suggest to the leader of a commando unit behind enemy lines that he should kill all his prisoners, or to the captain of a submarine that he should destroy the lifeboats from a torpedoed ship. Such actions, however, are not likely to affect the ultimate outcome of an armed conflict, and international law properly considers these actions war crimes.

Turning to the text of Protocol I, it appears that most of the provisions contained in articles 10 through 20, which intended to improve the status of civilian medical activities and civilian sick and wounded, would meet the above test for inclusion in customary international law. Even here, however, certain doubts must be noted. Article 16, for example, establishes such a high level of protection for medical activities that it would protect the operation of clandestine hospitals in guerrilla warfare situations. Consequently, no government facing a guerrilla conflict will ever admit that article 16 applies to its situation. It also will probably deny that the rest of the Protocol and the Conventions apply as well, except perhaps those provisions that it recognizes as customary law.

Several rules in part IV of the Protocol that call for general protection of the civilian population are likely candidates for inclusion in customary law. The rules in article 51, paragraph 2 against attacking the civilian population or engaging in acts primarily intended to terrorize that population seem to be of this character. Similarly, the definition of military objectives and civilian objects in article 52 is probably already a part of customary law. The first paragraph of article 54, stating that “[s]tarvation of civilians as a method of warfare is prohibited,” while not currently part of the customary law of war, could be accommodated in that law, even though the remaining paragraphs of the article raise practical problems.

Article 57, paragraphs 1 and 2(c) reflect the customary law of war on land, stating that “constant care shall be taken to spare the civilian
population, civilians and civilian objects” and “effective advance warn-
ing shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” Paragraph 4 of that article, which reads, “each Party to the conflict shall . . . take all reasonable precau-
tions to avoid losses of civilian lives and damage to civilian objects,” similarly states a customary rule of air and sea warfare.

Articles 59 and 60, concerning undefended localities and demilita-
rized zones, are an accurate statement of state practice in implement-
ing article 25 of the 1907 Hague Regulations on Land Warfare. On the issue of who is to be considered a civilian, articles 73 and 79 of the Protocol include refugees and journalists in this category. The main problem in interpreting these provisions is how much civilians must participate in the war effort before the Protocol no longer protects them. The standard of the Protocol providing that civilians are protected unless and for such time as they take a direct part in hostilities furnishes little clarification.

It is thus hard to believe that governments at war will make a serious effort to protect civilian members of military aircraft crews or the civilian crews of merchant vessels and civil aircraft that are otherwise legit-
imate military objectives, as article 50 required. In general, the Proto-
col seems too rigid in its systems for classifying persons that an armed conflict affects. An individual is either a member of the armed forces, and therefore a legitimate target of military operations, or a civilian, for whom constant care is required to minimize the chance of even col-
lateral injury. State practice, on the other hand, suggests the existence of at least one intermediate category: persons who, while not taking a direct part in hostilities, are so intimately connected with a military objective that they have forfeited the right to be free from risk of col-
lateral damage.

Much of the excessive idealism that encumbers the written law of war stems from efforts to “develop” international law rather than merely “codify” existing custom. It appears impossible for great interna-
tional conferences, heavily influenced by the practices and attitudes of the United Nations General Assembly, to resist the temptation to “develop” international law by negotiating agreements that include, to at least some degree, the highest aspirations of every ideological bloc represented at the conference. One problem with the Protocol and with the whole process of negotiating international law is that decisions must

221. See Hague Convention No. IV of July 29, 1899, supra note 71 (stating “[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited”).
be reached at these international conferences by consensus. Often the real goal of these conferences is to produce a political statement that, as a United Nations General Assembly Resolution, reflects everyone's view rather than an agreement that will work in practice.

As a result of the politics of the conference in which it was negoti- ated, Protocol I thus defines "armed forces," whose members are entitled to prisoner of war treatment upon capture, in the broadest possible terms, but excludes an entire category of combatants—mercenaries—from any protection. Similarly, Protocol I prohibits attacks intended to terrorize the civilian population, but accords new international respectability to national liberation movements that have traditionally claimed the right to use terror tactics.

Perhaps the era of universal international law-making conferences has come to an end. World values are now too diverse for the successful development of general international law in great, all-embracing conventions. Piecemeal, limited agreements on specific subjects may be the most that can be hoped for in the foreseeable future.

The diversity of national values also will affect the development of customary international law and may lead to the rise of regional customs on the law of war. In principle, such a development would be undesirable. Such a development, however, would better reflect international reality than a supposedly universal document that simply "pap ers over" deep divisions in ideology and practice.

While customary law develops through state practice, the ideal Geneva law, and particularly Protocol I, undoubtedly will remain formally in force as a venerated pseudo-code. In the past, such codes have had an interstitial and inspirational impact on the development of positive law, and the same undoubtedly will be true of some parts of Protocol I.

**REMARKS OF PROFESSOR HAMILTON DESAUSSURE**

I want to begin by noting that the military manuals of the three services effectively translate the language of the diplomats into language that commanders can follow, and they are widely disseminated. In addition, the manuals reflect the practices of the services. Commanders of three and four star rank, who are typically people who select military objectives and targets, understand and take into account these manuals, at least in limited conflicts.

After World War II, many people felt that no international law of

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222. Protocol I, *supra* note 4, arts. 43, 44, 47.
223. *Id.* arts. 1(4), 96(3).
224. Professor of Law, University of Akron, School of Law.
air warfare existed. To the extent that we correct that perception or at least say that some law, albeit imperfect and incomplete, exists, the air commanders will not feel that they have unbridled license to bomb anything they want. It seems to me that the military objective expands and contracts according to the intensity, duration, subjects, and location of the armed conflict. I agree absolutely with Lieutenant Colonel Carnahan that "grey areas" exist in the law, and that is why I think that the military objective itself fluctuates. For example, it may be entirely appropriate to bomb large industrial complexes in such a wide conflagration as World War II, but it would be totally out of line for a state to take out a whole city, part of a city, or even part of an industrial complex in a limited engagement, such as the conflicts in the Falkland Islands, Nicaragua, or Grenada or the bombing of Tripoli in Libya by United States Air Force jets. Therefore, countries must analyze the type of conflict at issue to determine the scope of the military objective.

Protocol I contains some very interesting articles with respect to bombing, which I do not have the time to discuss. I limit my comments to the elusive concept of the military objective. It is often overlooked that ever since the old balloon declaration in 1899\textsuperscript{225} all of the drafts on the law of armed conflict addressed the issue of air attacks. In 1899, the declaration prohibited dropping anything from a balloon for a period of five years. The Hague II Convention extended the declaration to include not just bombs but projectiles or any other explosives. Similarly, a provision in the Hague regulations annexed to Hague Convention IV\textsuperscript{226} prohibits bombing of undefended towns by whatever means. Hague Convention IX\textsuperscript{227} also contained a similar prohibition of a bombardment of undefended sea ports.

No other regulation of air warfare was instituted until the Commission of Jurists in 1923 wrote the rules of air warfare.\textsuperscript{228} These rules included a very interesting provision that prohibited terrorism or bombing for the purpose of terror. Another provision that may have influenced the Protocol stated that only military objectives, that is to say an object the destruction of which constitutes a distinct military advantage, may constitute a military target. The 1923 rules of air warfare defined those objectives in an exclusive manner and included such targets as military forces, military depots, factories, transport lines, and communication equipment.

\textsuperscript{225} Hague Convention No. IV of July 29, 1899, \textit{supra} note 71.
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} Hague Convention No. IX of October 18, 1907, \textit{supra} note 71.
\textsuperscript{228} Hague Rules of Air Warfare of 1923, \textit{reprinted in} 1 \textit{THE LAW OF WAR, supra} note 197, at 437-49. The draft rules were never adopted.
The Protocols, however, do not give an exclusive enumeration because of the experiences in World War II and other such history. They also make possibly unintended statements. The Protocols do not define military objectives as those constituting a distinct military advantage. Instead, they state that military objectives are limited to those objects which by their nature, location, and use are military objectives and which offer a definite military advantage. In other words, and maybe I am looking at it too closely, the Protocols translate the old Hague rules, which were never officially adopted but were often cited, from a one-step approach, which was that they were a military objective if they offered a distinct military advantage, to a two-step approach. First, they had to be a military objective and second, they had to offer a distinct military advantage.

This translation of approaches is not simply a quibble over words. There could be targets that would be military objectives but in certain limited cases do not offer a distinct military advantage. In the Falkland War, for example, it might have been a military objective to hit a personnel depot in the heart of Argentina, but it would not have been a distinct military advantage with respect to the reoccupation of the Falkland Islands. Another example, arguably, of hitting military objectives without a distinct military advantage is the 1972 Christmas bombings of Hanoi. The negotiations for truce were going on in Paris. The Vietnamese, as I read it from unclassified literature, were fairly well underground, and we were not going to stop the war effort by hitting military depots in Hanoi. These were military objectives that did not offer distinct military advantages.

I think also of my own experiences in World War II as a bomber pilot, and I remember distinctly my commanders telling me that when I was not able to get to the target I should divert and pick out some fairly peaceful looking little village and hit the martialing yards there. Now maybe that would have been a distinct military advantage in 1942, but in February 1945 I doubt that it was. I doubt if it was a military advantage to hit Dresden in February 1945, a month and a half before the end of the war, although if you asked the military, they hit military objectives. I doubt frankly if there was a military advantage in attacking Tripoli and Khaddafi to combat terrorism. It is true that bombing the radar sites was a military advantage because as a result they could not target our planes. But is hitting a building in which you think Khaddafi is located a military advantage or a political advantage? Is that aiding in the military capture or defeat of the en-

229. Protocol I, supra note 4, art. 52(2).
Whether unintended or not, the two-fold step set forth in article 52, paragraph 2, which requires a military objective first and then a military advantage, actually works well. It is not just the bomber pilot sitting in the cockpit who reads these rules, because he is little more than a robot up there. He goes where his commander tells him to go. These rules are therefore more important to regulate the decision makers.

It is also true that something can represent both a military advantage and a political advantage. The question in my mind is, what is the predominant motive? Is it in fact to gain a military advantage? That is the expression used in the Protocol. It does not say "definite advantage" rather it says "definite military advantage." Is the predominant motive simply to put political pressure on the opposition? My critics argue that all wars are fought for political ends. That is true. Wars are fought for political ends, but military operations are taken for military objectives and military ends. Therefore, if you are bombing a place not for the military objective but to put political pressure for some short-term objective on the enemy, I do not think the bombing fits within the definition of the Protocols.

Another question that should be addressed is what triggers the application of the rules in the Protocols? What exactly is an armed conflict? Our Navy jet pilot was shot down over Syria, and they captured Lieutenant Goodman. I believe he was a prisoner of war, and for the purposes of his status there, was captured in an armed conflict. When the Israelis bombed southern Lebanon, it was definitely a Protocol situation, regardless of whether they were bombing for a military end, a military objective, or a political purpose.

The same problem runs through the doctrine of proportionality. What is excessive in relation to the military objective? I think the doctrine fluctuates according to the intensity and the scope of the conflict and who is involved. I would like to see more implementation of these rules in the manuals, more distinction of what is a military objective and what is not, and more discussion of proportionality.

I would like to suggest three things. First, expand the excluded target areas. Second, distinguish clearly military advantages from political advantages. Third, include in the manuals concrete cases where it is a military advantage and a true military objective, and cases where it is not. Thank you.

230. U.N. CHARTER art. 52, para. 2.
DISCUSSION

The Moderator, Professor SOLF, wished to clarify Professor DeSaus-
sure’s definition of military objectives in the Protocol. He noted that to
define a military objective and suggest that states may attack, destroy,
capture, or neutralize it is a leap forward in candor with respect to
humanitarian treaties. All prior humanitarian treaties, unlike the
Lieber Codes, limited themselves to what states must spare and did not
elaborate on what states may destroy or attack. This limitation, he
stated, was not appropriate in a humanitarian instrument. He indicated
that the fighters of war must decide what constitutes a military target,
and one need not put any imprimatur of justification on it. He added
that for this reason, none of the treaties define military necessity.

Professor SOLF indicated that until the Protocol, an abstract defini-
tion of a military objective never existed, and when the ICRC sug-
gested such a definition, the traditionalists complained that a humani-
tarian instrument should not include such a definition. The various
groups ultimately reached a compromise in article 52, paragraph 1,
where the article defines military objective in the traditional, prohibi-
tive way. The article defines civilian objects as those that are not mili-
tary objectives and thus not the object of an attack. Paragraph 2 of
article 52 then defines a military objective, within the context of the
Protocol, through satisfying a two-pronged test that every target must
satisfy. In describing the test, Professor SOLF noted that first, the tar-
get must contribute significantly to the military action of the enemy
through factors such as its nature, location, purpose, or use. Second,
partial or total destruction, neutralization, or capture of the target
must afford a definite military advantage.

Professor SOLF further noted that the basis for the ICRC draft of
the Protocol in article 51, was the concept that civilians lose their indi-
vidual immunity from attack if they engage actively in hostilities. It is
harder for individuals to lose their immunity than for objects to become
military objectives. As an example Professor SOLF noted that a plant
that produces rubber boots for the civilian population may not consti-
tute a military objective. If the product made at the plant, however,
goes primarily toward military forces, that item may become a military
objective because it is effectively contributing to military action. He
concluded, therefore, that an attack of the plant is permissible. The
civilians making rubber boots for the military are not legitimate targets
for attack as individuals, but the plant where they are working is a
legitimate target. Professor SOLF, therefore, concluded that the civil-
ians assume a risk when they work inside such a factory. Professor
Solf furthermore explained that civilian members of a military aircraft group assume an even greater risk, although the civilians do enjoy the protection of the rule of proportionality. If the target is important, however, real effective protection is minimal.

Lieutenant Colonel Carnahan, commenting on the status of civilians closely associated with military objectives, pointed out that article 57 seems to require military officers to weigh the dangers to such civilians when determining military objectives. He noted, however, that no individual seriously believes that a combatant will follow this rule in the Protocol, or that military staff officers will actively balance the advantages of destroying an aircraft with the danger to the civilians in the aircraft when the officers can shoot down other types of aircraft carrying all military crews. He concluded that the tests in the Protocol, such as civilian versus military, are a bit inadequate, and that a greater distinction is needed in this definition.

Lieutenant Colonel Carnahan also wanted to correct the misconception that he and Professor DeSaussure disagreed on the value of military manuals. When Lieutenant Colonel Carnahan spoke before of the skepticism military members express toward certain aspects of the law of war, he referred to the law of war in its raw, unseasoned form rather than to military manuals that offer international legal concepts in a digested form. When an officer reviews operations, plans, or rules of engagement and wants to advise the military operator of a particular procedure, the officer will not explain the process in international law terms, but rather cite from a section of the field manual. The actions of the officer thus confirms the field manual as the approved legal proposition that will become the authority for future orders. For this reason, Lieutenant Colonel Carnahan recognized military manuals as very important.

Lieutenant Colonel Carnahan stated that he has always supported Professor DeSaussure's argument that military objectives should depend on the intensity of the conflict. He noted that it is unfortunate that Protocol II does not recognize this viewpoint. At a less intense level of conflict, for example, states can care a great deal about the environment, as prescribed in article 55, but in a high intensity conflict like World War II, countries cannot spend time worrying about the environment. To a degree, the West recognized this problem through the statement that the Protocols did not apply to weapons of mass destruction or nuclear weapons. He added, however, that the text of the Protocol does not expressly acknowledge this issue. Lieutenant Colonel Carnahan noted that the Joint Chiefs of Staff initially thought the Red Cross agreed that such distinctions are ambiguous, but retreated
in some of its recent pronouncements on this point. Lieutenant Colonel Carnahan commented that allowing the level of conflict to determine the proper military objectives presents problems, although as a general proposition it is needed as the law of war. For example, he indicated that individuals who are able to tell the difference between a military and a political objective have a unique ability. For many years, people have believed that this distinction exists and claim that it should continue to be made. The military services, on the other hand, do not differentiate between these objectives. They assume that all military action intertwines with a political goal of some sort. Lieutenant Colonel Carnahan agreed that probably no such distinction exists in military services, but if it does exist, he doubted that the distinction is necessary.

In concluding, Lieutenant Colonel Carnahan noted there is a tendency to forget that in customary law, the principle of distinction is not universally applicable. Customary law recognizes some situations and techniques of warfare where the principle of distinction need not be respected. This circumstance is especially true in the traditional law of naval blockade, a highly effective means of warfare. The Protocol may delete some of these exceptions and Lieutenant Colonel Carnahan recognized this as one of its problems.

Professor O'Brien stated that if the principles of military necessity and discrimination had been applied across the board during World War II, the question of whether there was a sufficient, positive, conventional law on aerial bombardment would not have arisen. Indiscriminate bombing simply would have been considered illegal. He referred to the United States bombing of Brest as an example of indiscriminate bombing. He suggested that nations emphasize these principles to prevent contradictions and gaps in positive law from occurring because presently, some activities are prohibited while other reprehensible events are not.

Professor O'Brien agreed with Lieutenant Colonel Carnahan's comments on the positive function of the law of war. He indicated that the law of war should strive to force a belligerent to fight fairly, but with some limitations, and should not attempt to maximize every conceivable prohibition or limitation. Professor O'Brien stated that comparatively modest rules and guidelines that are practical and acceptable to the practitioner are more beneficial than overly detailed rules.

Professor O'Brien disagreed entirely with Professor DeSaussure on the usefulness of distinguishing political from military goals. For example, in the interest of just and limited war, the Christmas bombing of Hanoi was one of the most sensible things ever done, because it used a
limited military force to end a conflict. He noted that the object of war is political and may involve the destruction or reduction of the forces of the enemy as an intermediate step. Therefore, it is best to move directly from military force to the desired and legitimate political purposes.

Professor O'BRIEN indicated, for example, that it is not better to declare war against Khaddafi and then try to reduce his military forces. He noted that although this action has a military purpose, it does not accomplish the goal of the United States. He suggested that the United States put pressure on Khaddafi, until he stops encouraging and exporting terrorism. He considered a raid on Khaddafi's headquarters or home as an attack against a military target because Khaddafi's whole terrorist network begins there. If all these sensible politically vital things are contrary to the Protocol, Professor O'BRIEN suggested it is all the more reason not to have anything to do with the Protocols. He recognized that from a political point of view, people are interested in using armed coercion for important political purposes, but still trying to limit armed conflict as much as possible. He further stated that if the Protocol contains a logic that says everything must have a distinct military advantage and that logic collides with the technicalities of the law of war, then the Protocols to that extent are not recommended to those looking for limitation of armed coercion in international politics.

Professor SOHN disagreed with the notion that war is useful, stating it undermines the whole idea of the rule of law, and disregards the many useful decisions of the International Court of Justice and is an extremely negative position. He suggested the development of other methods of solving problems, as well as the establishment of a body with enough authority to interpret the laws of war. Until such a body is created, he noted, interpretation of the law will involve the creation of more and more rules, which, in turn, will require further explanation. Recognizing that most of the Protocol improves the law of war, he recommended that the United States adopt this document and make reservations where necessary.

Lieutenant Colonel CARNAHAN responded that he certainly did not mean to suggest that war is a desirable thing. As an empirical matter, war has survived all efforts to abolish it, and he was simply trying to account for this survival. War has survived because it serves the purposes of nations. Lieutenant Colonel CARNAHAN, however, was not suggesting that war as an institution is a way of solving problems, and that nations should not find other ways to solve problems under international law. He stated that a law of war must consider the objectives that the war accomplishes, and that some efforts at writing the law of
war do not accomplish this result. As an example of this Lieutenant Colonel Carnahan noted that the Joint Chiefs of Staff carefully reviewed the Protocol but could not recommend ratification simply because it would create too many problems as a result of the complexity and comprehensiveness of the Protocol. Professor Sohn and Mr. Goldklang pointed out that the human rights treaties that President Carter sent to the Senate contained almost twenty reservations.

Professor DeSausserre stated that Professor O'Brien's point is that the end justifies the means, and an action that shortens the war is permissible. This viewpoint obviates the rules; therefore Professor DeSausserre did not agree with the idea. Professor DeSausserre indicated that many of the rules that the Protocols incorporate are handed down through generations, including the requirement that there exist a military objective serving a military advantage.

Professor DeSausserre agreed with Lieutenant Colonel Carnahan that there is a time when civilians, due to the nature of their work, are considered legitimate military objectives. He pointed out, however, that the most worrisome engagements are not the whole scale conflagrations, but rather the limited types of engagements, such as the taking of the Falklands and Grenada, the bombing of southern Lebanon, and the events in Nicaragua.

Judge Skarstedt remarked that, contrary to Lieutenant Colonel Carnahan's opinion, he feels the rules in Protocol I are practical. Military and technical experts, not diplomats, formulate these rules. Problems closely associated with the war effort, such as protection of civilians, are solvable.

Lieutenant Colonel Carnahan stated that military lawyers and operatives have little trouble with article 52(2) because they act under the assumption that military and political objectives are intertwined. In fact, the definition of military objective contained in article 52(2) accurately corresponds with the method military targets choose, especially in bombardment situations. He noted, however, that the military may veto these targets later for political reasons, as often occurred in Vietnam.

The Moderator added that difficulties arise when conflicts affect civilian populations or civilian objects, a situation articles 51 and 57 address. Humanitarians seriously criticized these articles. The rules require military officers to balance anticipated civilian casualties against the importance of the target. Commanders could develop a sense of
such balancing acts in training and exercises. Professor DeSAUSSURE questioned which types of situations come under the provisions of Protocol I, at least as it reflects customary rules. If the Protocol meant any type of advantage, he questioned why the word "military" is used in the Protocol rather than merely using the phrase "a distinct advantage to the country."

Professor W. T. MALLISON\textsuperscript{232} raised some of the problems in naval warfare, such as attacks on neutral flag merchant ships, and the legality of submarine attacks on them. He said that these situations involve customary law and that any merchant ship exercising a belligerent function immediately becomes a lawful object of attack. In the Second World War, Allied merchant ships became a part of the belligerent naval forces through their incorporation into the naval convoy system. No merchant ship sailed without the permission of the United States Navy Department or the British Admiralty. In the same way, neutral merchant ships were forced into the naval warfare system, as described by Ms. Mertens in her book in the British official series entitled \textit{Merchant Shipping & the Demands of War}. Consequently, submarine attacks upon such functional combatant merchant ships were lawful. This is also consistent with customary law, which provides that a military unit or ship cannot become a combatant unit without simultaneously becoming a lawful object of attack. This subject is considered in more detail in Professor Mallison's book entitled \textit{Studies in the Law of Naval Warfare}, printed by the United States Naval War College in 1966.

Commander FENRICK remarked that most of Protocol I is worthwhile, and many of the provisions reflect customary law and state practice. If these provisions are not embraced as customary law, then essentially nations must rely on undefined concepts, such as military necessity. He concluded that more precise standards are needed. Lieutenant Colonel CARNAHAN replied that the Protocol is directly applicable to low-intensity level conflicts. Because the legitimacy of a military objective changes with the intensity of the conflict, he recognized that the problems arise at the higher level conflicts. Professor SOLF stated that it was agreed that a certain place in the hierarchy of command establishes the level of the conflict. People who know what article 56 means and how to apply it are making the decisions about what to attack and at what level. He assumed they base their decision on careful preplanning and consideration of all factors.

Lieutenant Colonel CARNAHAN observed that it is difficult to deter-

\textsuperscript{232} Professor of Law, The National Law Center, George Washington University.
mine the location of civilians. Tactically it is difficult to predict the extent of civilian losses when weighing them against military advantages because the military usually has no way of knowing the location of the civilians.

Colonel JAMES A. BURGER stated that the concept of customary law is connected with the definition of a just war. He regarded customary rules as important because they apply to the conduct of many nations that have not signed the Protocols and represent a reliable source of law outside of the treaties.

Commander FENRICK pointed out that there are important reasons to have manuals, aside from their role in defining customary rules. He regarded manuals as important because they define the rules of the game, even though they may never settle the question of what the rules are as points of law. In a conflict, he remarked, a country should know the practices it should follow and the rules the adversary will abide. He was concerned that both states continue to follow those rules. If one party disregards them, however, most likely the other nation will also. He considered it unfortunate that a large group of nations signed the Protocol without giving very much thought to its application. He noted that when a country starts to develop manuals and issues instructions to its forces, it indicates that it is seriously considering the application of the rules.

Mr. GASSER commented that states, including the United States and its allies, negotiated the Protocols over many years, and Western nations heavily influenced the substance of these treaties even though the "automatic majority" of the Third World was always present. In spite of this influence, he noted, it seems today that the United States does not consider those same rules to be any longer acceptable. This is all the more surprising as military experts had been involved in the negotiating process. He also noted that the United States only disputes small parts of Protocol II, and he wondered whether the whole may not be accepted even if a small part of it is disliked.

Mr. GASSER further commented that the ICRC does not consider it better that states decide which means are justified based on their own perceptions. He stated that the ICRC would urge one side in a conflict to respect the provisions even though Protocol I binds this party and not the other. Lieutenant Colonel CARNAHAN added that the responses of a non-party state will serve to elucidate the parts of the Protocol that are or could become customary law.

233. Chief, International Affairs Division, Office of the Judge Advocate General, United States Department of the Army.
Professor L.F.E. GOLDIE\textsuperscript{234} questioned the extent to which lawyers who prescribe proportionality deviate from the prudent prescription of military economy. He noted that commanders traditionally are called upon to exercise no greater force than is necessary to overcome the enemy, which is known as the war of military economy. If proportionality is taken away from military economy, Professor GOLDIE wondered if military economy becomes less economical. If so, he questioned whether the army would sacrifice its soldiers to the enemy.

Professor SOLF stated that not much divergence between the principle of war of economy and the rule of proportionality occurs. He suggested that military legal advisers familiarize themselves with the problems of military commanders and planners. The security of a military's own forces is an important factor in weighing the military advantages against civilian casualties. He concluded that a commander, therefore, does not have to sacrifice his troops because the security of those troops is part of the military advantage that military advisors must weigh.

Mr. LUKE T. LEE\textsuperscript{235} stated that according to a well established rule of customary law, a country that has signed but not yet ratified a treaty still has certain obligations. One of these obligations is not to defeat the purpose of that treaty pending ratification. Mr. LEE questioned how this applies to a country that has signed but not ratified Protocol I and is directly involved in an armed conflict. He also inquired about the results when that country is not directly involved in an international armed conflict, but has troops in an international force.

Lieutenant Colonel CARNAHAN responded that the obligation prohibits rendering the ultimate act of ratification meaningless. The United States, specifically, has notified the depository of Protocol I that it will not ratify the treaty. Notice was then sent to the other parties and signatories to the treaty that the United States is no longer under that obligation.

Professor SOHN agreed that one of the agreements of the law of treaties, which the United States has not ratified but abides by, is that a party to the treaty should not do anything that would clearly indicate a lack of compliance with the Convention. The agreement also establishes a way to limit this obligation because it states that this obligation no longer binds a party if the party clearly notifies other nations that it

\textsuperscript{234} Professor of Law and Director, International Legal Studies Program, Syracuse University School of Law.

\textsuperscript{235} Director, Office of Planning and Programs, United States Coordinator for Refugee Affairs, United States Department of State.
is not going to ratify the document. Intermediate stages exist, however, where a nation states that it will not ratify the treaty but will apply the Convention where appropriate. This situation creates ambiguity because other nations do not know which rules that nation will respect. For this reason, he recommended that the United States list the articles it will abide by, rather than wait until a war starts. Alternatively, the government may prepare a list of the provisions it will not follow, so work can be done to overcome those objections. He noted that such a list would help other nations know which articles the United States does not comply with, and equally as important, know that the United States will respect the remaining three quarters of Protocol I.

Captain ROACH discussed the importance of determining the types of activities that constitute international armed conflicts under Protocol I. Regarding the identification of state practice, Captain ROACH stated that those involved in writing military manuals apply a reasonable person test, or at least a reasonable military person test. He added that the process of working out what commanders are expected to do is in part, an indication of what is viewed as customary law.

Professor ALMOND commented on the customary law incorporated in military manuals. He remarked that states share a common international legal system and strive for commonality in the interpretation of that law. He, therefore, suggested that the manuals in the future substantially conform to each other. He also recommended the creation of a common NATO war manual in the future, even though some policy reasons exist that may block the creation of such a manual.

Professor ALMOND further noted that the rules of engagement, many of which are classified, represent another source of the view of the United States on customary law. The rules of engagement incorporate international law in their framework. He suggested that others, especially our adversarial nations, do the same.

Professor ALMOND questioned whether reprisals represent part of customary international law. If they do, he indicated that Protocol I waives the right of a state to exercise those rules of customary international law. He recognized that reprisals are remedial measures, asserting that one of the terrible deficiencies of the Protocol is the elimination of reprisals. He viewed reprisals as a means of forcing conformance to the law of war. Professor ALMOND considered it unfortunate that Protocol I removes this type of sanction.

Professor SOLF noted that the Geneva Conventions and Protocol I contain a provision that requires the parties to send to the depository state a copy of their official translation of the treaty and copies of all published implementing regulations. The United States did send multi-
ple copies of *Field Manual 27-10* to Geneva. Although he did not recall whether the United States disseminated copies to all other parties, he doubted that any other nation had ever sent anything. Professor Solf inquired why nobody requested the Swiss government to urge all parties to comply with that requirement. He noted that these parties could create a large storehouse of copies of all military manuals, except those that are classified, for scholars to compare.

Mr. Gasser responded that a number of states have not adopted any regulations, and some other states have not adopted satisfactory regulations. Even those states that have adopted good regulations have not complied with the duty to circulate these to all of the parties to the Convention. The last step taken in this direction was an invitation by the 25th Conference of the International Red Cross (Geneva 1986) to all states to adopt legislation implementing the Geneva Conventions and to inform all parties on the measures taken.

Professor Desaussure, commenting on Professor Almond's statement, pointed out that as of 1970, the United States Air Force was very proud of the fact that it had never made a reprisal air raid. He defined reprisal as the unlawful conduct in response to prior unlawful conduct. The Air Force has asserted publicly that it has never made reprisals, rather it made retaliations. As Professor Desaussure reads the Protocols, they outlawed reprisals except against military objects. Every other provision contains a specific prohibition against reprisals.

Professor Solf pointed out that if the retaliation is lawful, a state may attack a lawful target with lawful means. He noted, however, that a reprisal is unlawful; its sole purpose is to force the enemy to stop committing some particularly harmful illegality. Customary law, at least as reflected in the United States military manuals and every other military manual Professor Solf had seen, outlines the conditions where reprisals are made. Professor Solf knew of no treaty that included these conditions and noted that an attempt by France to include them in the Protocol was defeated because of the humanitarian notion that these instruments should not include authorization for violence.

One participant noted that the Vienna Convention on the Law of Treaties addresses the notion of reprisals. The provision on the suspension for breach, that is a form of reprisal, recognizes suspension only when humanitarian considerations and the protection of individuals are not at stake. For example, if one country shoots ten people in another country, the second country cannot shoot ten citizens of the attacking country. He noted that in the Iran hostage situation, many

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people urged the United States government to take Iranian diplomats hostage, but the United States refused this suggestion based upon the same principle.

Mr. Gasser commented that several nations consider making reservations against the prohibition of reprisals. He asked Professor Almond to cite situations where reprisals efficiently stopped violations of humanitarian treaties. Professor Almond answered that first, reprisals operate as a deterrent. Second, reprisals operate through their actual use. During World War II, Nazi Germany threatened to use lethal gasses against the allies of the United States. In response, the United States referred to its right of reprisal under customary international law. President Roosevelt, in 1943, declared that such an act by Germany was illegal and was subject to an act in response. Professor Almond indicated that such a response would clearly constitute an illegal act. This use of reprisal represented an effective threat because the reprisal was available. If Roosevelt had instead faced the situation under the Protocol, which forbids reprisals, he would have been compelled to do something without violating the Protocol.

Another participant mentioned another example of the effective use of reprisals. Hitler, in order to respond to the threat of commando raids, shackled prisoners. The 1929 Conventions did not permit this action. The United Kingdom promptly retaliated through shackling German prisoners, whereupon the German shackling quickly ceased.

Professor Sohn indicated that very often the language is changed but the basic principle remains. The basic problem is simply the word "reprisal" because now reprisals are condemned in many ways. As a result, if a state asserts that it will implement a legal reprisal, other nations become upset. He noted that the Protocol permits a state to take legal countermeasures. If a state, therefore, reserves the right to take countermeasures when another nation violates international law, no one can object. On the other hand, if a state reserves the right to take illegal reprisals, it has done the worst thing possible.

Professor Almond reiterated that a reprisal is legal. He noted that a state has the legal right to either respond with another illegal method of attack or respond with an illegal weapon to an illegal act that another state has committed against that state. He was certain that this legal right exists under those conditions.

Professor Sohn responded that a state can take reprisals or retaliations provided that it does not violate human rights. For example, the bombing of a city is possibly a legal reprisal, but the state must give notice to the civilian population to evacuate. Otherwise, he indicated, the reprisal violates the law of war.
The afternoon round table convened at 3:00 p.m., Professor Waldemar Solf moderating.

REMARKS OF THE MODERATOR

The topics for this afternoon's round table include: medical air and sea transport, articles 24 through 31; the relationship of the prohibition of starvation of civilians as a method of war with the relief measures, articles 54 and 69 through 71; and the qualifications of combatants as prisoners of war, articles 41 and 43 through 47.

Let me step down from my role as moderator and make a few comments on the Swedish Paper. The Swedish Paper indicates that articles 18(1) and (3) of Protocol I require medical transports and medical units to be identifiable and call for installing whatever equipment and training is necessary for people to recognize these emblems or signals.

The Swedish Paper suggests that the main outline of articles 25 through 27 is customary international law. These articles create different zones with slightly different rules pertaining to the protection of medical aircraft. This is necessary because under the present rules of the Geneva Conventions, medical aircraft are not protected anywhere in the world unless they are flying under an agreed flight plan. Their heights and routes have to be agreed to by the adverse party, otherwise they are not protected. This turns out to be very restrictive, particularly in the battle area where helicopters must be capable of transporting wounded personnel.

The Geneva Convention contained this restrictive rule because it became apparent during World War II that aircraft could be destroyed at ranges that far exceeded the capability to recognize a Red Cross emblem, which was the only way medical aircraft were identified. Furthermore, there was a general feeling that medical aircraft could threaten security because they could see enemy dispositions which in turn would lead to an advantage. This fear of abuse of medical protective status also created the need for certain restrictions.

Our unfortunate experience in Vietnam, where a great number of medical aircraft with patients were lost by ground fire, motivated the United States to do something about this. Two problems were identified. First, the range of recognition had to be extended. Second, confidence that protected status would not be abused had to be instilled. We discovered that the range of recognition could be extended through an improved means of communication. A frequency that would allow communication by medical aircraft, a light signal that would allow monitoring of the planes, or a radar signal, such as the “identify: friend or
foe" signal, were all technically feasible. A Department of Defense study found that it would only cost about $500,000 to modify all Hawk surface-to-air missile launchers world-wide so that they would be responsive to an additional security signal.

It is still necessary to get permission from the adversary for an aircraft to trespass on territory that is physically controlled by the enemy. The term "physical control" was used to avoid the legal aspect of what is occupied or invaded territory. For this purpose, article 29 establishes communications procedures, including obligations as to what has to be agreed upon, who has to be notified, and the duty of the adversary to respond.

Specific restrictions as to unacceptable activities were also included in the Protocol. For example, medical aircraft, ideally suited for searching the battlefield for wounded, cannot go on a random search because the enemy will consider them to be performing reconnaissance. A rule prohibiting search in the contact zone, unless an agreement exists, was also included. The rules and means of communications are provided for in detail in articles 6, 7, and 8 of the Annex. The rules of the international IKO Civil Aviation Agency on challenging and inspecting aircraft were adopted. These provisions are mentioned to show that providing reasonable protection to medical aircraft is a very complicated matter that requires complicated solutions. In fact, there are twenty-two articles in Protocol II, about eighteen percent of the entire agreement, that have some essential relationship to the protection of medical aircraft. A problem could arise if a conflict erupted between a state party to the Protocols and a state that is not a party. To protect medical aircraft, a special agreement must be arranged between the parties to apply the provisions suggested by the Protocols.

I support the conclusion in the Swedish Paper that articles 25, 26, and 27 are humanitarian law. Because present law only recognizes protection when there is an agreed upon flight plan, however, these provisions are not customary international law. I am optimistic that this desire to protect medical aircraft will continue. Such an effort was made in the Falkland Islands conflict, and the Soviets favored these positions at the Diplomatic Conferences.

**REMARKS OF COMMANDER WILLIAM J. FENRICK**

I support the articles and would like to see as many of them as possible become customary law. Currently, article 24, which has a general principle concerning the respect and protection of medical aircraft, and article 28(1), which prohibits the use of medical aircraft to gain a mil-
tary advantage, clearly constitute customary law. The remaining provisions in articles 24 through 31 are suitable for eventual incorporation into customary law, with one proviso: they may be too detailed for incorporation into customary law. This is a problem with a lot of the provisions in the Protocols. I am not completely convinced that many parts of the Protocol are suitable for customary law, but I certainly remain open to persuasion.

The relief measures provisions are relatively modest adaptations of preexisting provisions and hopefully are suitable for eventual incorporation into customary law, subject once again to the question of whether or not they are too detailed. I would like to see the starvation provision, except the reprisal part, become part of customary law. The provision is relatively general, but it does not quite sort out the law concerning starvation which existed prior to adopting the Protocols. Admittedly, this is a rather difficult task. Naval war practices concerning blockades, land war practices concerning sieges, the Hague rules on devastation of enemy property, and the restrictions concerning poison are examples of what must be looked at. A substantial portion of the starvation provisions in article 54 is customary law, and I suggest that it comes very close to being customary law when considered as a whole. Regarding prisoner of war provisions, articles 43 and 44 are clearly intended to extend the scope of the groups of people who are entitled to prisoner of war status, in particular by relaxing the criteria for identification of lawful combatants. These provisions are the new law to the extent that they differ from the Geneva Conventions. Whether or not they are suitable for eventual incorporation into customary law depends essentially on how one comes down on the side of a very lengthy debate. The debate concerns whether or not one is upset about the blurring of the principle of distinction, which obviously occurs if relaxed standards are applied, or whether one prefers to use the "carrot-and-stick" principle to bring a broader group of people in under the law of armed conflict and provide them with an incentive for compliance with the law. Personally, I believe these provisions should be incorporated into customary international law because the idea of using incentives is useful, and because guerrilla warfare or irregular warfare is inevitable. Holding to the old standards is not going to change that fact; guerilla warfare is not going to go away if one maintains that these people are not entitled to combatant status. The current effect of denying these groups of people combatant and prisoner of war status, however, is relatively minor; Western democracies would still never do such things as engage in the mass execution of captured irregular troops.

The provision regarding mercenaries in article 47 clearly does not
constitute customary international law at the present time. It is undesirable that it should constitute customary international law at any point in time because it essentially penalizes a group of people on the basis of status rather than on any acts they may commit. This article tends to differentiate entitlement to lawful combatant and prisoner of war status on the basis of motive, which is a re-emergence of "just war" concepts in a totally inappropriate environment. The mercenaries provision could develop into some sort of concept which holds that people fighting for the "bad side" are not entitled to combatant or prisoner of war status, and of course everyone knows that the person on the bad side is the person fighting you.

People argue that the mercenaries provision constitutes customary law largely because there were minimal objections to it on the part of the Western powers during the negotiation of the Protocols. They also rely on such things as the various OAU and United Nations General Assembly declarations. There are, however, many questions concerning the relevance of OAU resolutions and the legal validity or efficacy of United Nations General Assembly declarations.

**Remarks of Bruno Zimmermann**

I would like to begin by pointing out that the Geneva Conventions have been accepted by almost all states and may be considered customary law. In comparing Protocol I to the Conventions, article 70 is considered one of the most impressive steps made by Protocol I in relation to the civilian population. It provides that if the civilian population of a nonoccupied territory is not adequately provided with supplies essential to its survival, such as food, medical supplies, clothing, bedding, and means of shelter, relief action shall be undertaken subject to the agreement of the parties concerned. The rights of the parties allowing the passage of consignments are roughly the same as those in the Fourth Geneva Convention regarding search and supervision.\(^\text{237}\)

It is interesting to look into the meaning of the clause "subject to the agreement of the parties concerned." According to the *Commentary* to the Protocol, "the parties concerned" are the state that is to receive the relief and the authorities of the territory from which it is to come.\(^\text{238}\) This requirement of an agreement is not to be understood as allowing any wanton or habitual refusal, but as an attempt to reserve extreme and varied reasons for objection. This clause does not refer to other


\(^\text{238}\) *Commentary on the Additional Protocols of 8 June 1977*, *supra* note 45, at 816-20.
parties, which have to allow passage of relief consignments. Those parties are mentioned later in paragraphs 2 and 3 of article 70 and they enjoy only certain rights in relation with the passage of consignments.

A similar concern for the safety and survival of the civilian population was made and manifested in Protocol I, article 54, "Protection of objects indispensible to the survival of the civilian population." Paragraph 1 of this article reads, "Starvation of civilians as a method of warfare is prohibited." If paragraph 1 of article 54 and article 70 are considered together, it inevitably raises the questions of siege and blockade.

These provisions require besieging forces to allow evacuation of the besieged population if there is no other way to avoid its starvation. This is the extreme case in which arrangements to organize relief action under proper supervision are not available. This is in sharp contrast with the pre-existing law and custom as reflected in the Geneva Conventions. The pre-existing law restricted the free passage of relief consignments. Article 17 of the Fourth Convention states that the parties to the conflict only had to endeavor to conclude agreements for the evacuation of wounded, sick, aged persons, disabled, and maternity cases.

As to blockades, there is no doubt that Protocol I, article 54, paragraph 1, would also apply to this aspect of naval warfare. This clearly results from article 49(3), which reads in its first sentence, "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."

In conclusion, Protocol I imposes greater limitations on siege and blockade than the Fourth Geneva Convention. At the same time, Protocol I provides means that prevent humanitarian rules from unduly advancing the military efforts of the beneficiary. These limitations are much greater than the limitations contained in the Geneva Conventions, considered as customary. Those Conventions alone would not prohibit starvation of civilians if it was necessary to obtain the surrender of the besieged place or to defeat a country.

REMARKS OF COMMANDER JOHN BENNETT

I would like to premise my remarks by pointing out that they represent my own sad, bloodthirsty thoughts. It seems clear that custom-

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239. Maritime U.N. Division, Organization of the Joint Chiefs of Staff, United States Navy.
ary international law allows a state to use starvation when its intent is to hasten the surrender of the other side. The Protocol rules would make major changes. It is also questionable whether article 49(3), which deals with blockades, is desirable customary international law.

The Fourth Geneva Convention contains a nicely balanced operation whereby various protected or semi-protected people get relief, but a state is not obliged to do so if it would give the other side a military advantage. This has important implications for the general civilian population. In the Protocol, civilians in the war factories have to be fed.

The general statement in article 24 on the protection of medical aircraft and the statement in article 28(1) on not using medical aircraft for military advantages are customary. Other provisions are more problematic. "Control" could be hard to determine for aircraft flying over the sea and even for airspace over land. It may not be a great advantage to move away from having to agree on specifics ahead of time because in the confusion of war, a state may not be able to make all of these distinctions. I agree with Professor Solf that there are some exceptions to what is customary law in article 15. The distinctive signs and references as applied to military units certainly are customary. The distinctive signals have nothing customary about them at all. As for paragraph 3 of article 15, applying these rules to civilians is new and would certainly be an appropriate extension of customary law. One impediment to developing customary law on the details of identifying medical aircraft is that the flashing blue lights have proven to have certain problems. They tend to look like gunfire or rocket fire from the helicopters, and at a distance the blue light turns white.

**Remarks of Professor W.T. Mallison**

My remarks focus on the articles relating to combatants. It is very important that all combatants who exist *de facto* be brought within the legal system. When we talk about combatants, we are also dealing with the equally significant value of protecting civilians as much as possible in the grim context of an international armed conflict.

Before getting to the Protocol, let me discuss part of the customary law that appears in the Geneva Convention on Prisoners of War, particularly article 4(A). The fourfold criteria of military command, distinctive sign, open arms, and adherence to the law are set out in the article and are ancient and venerable requirements dating back to the

Hague Convention Number Four of 1907,241 Number Two of 1899,242 and also to the unratified Brussels Declaration243 which first enunciated these four criteria in article 9. Even though the Brussels Convention was not ratified, the fourfold criteria of article 9 were respected as customary law and the exact wording appeared in the subsequent conventions, including article 4(A)(2) of the Geneva POW Convention.

A few words were added to the wording of the earlier conventions in article 4(A)(2). For example, organized resistance movements were added as a party to a conflict. It is widely agreed that the principal model for this article was Marshal Tito's Partisans. The article-by-article analysis of the Protocols written by our distinguished colleague Professor Solf and two European coauthors, points out that an organized resistance movement, if it meets the qualifications of independent status and recognition, should be regarded as its own party to the conflict. Two obvious examples are the South West Africa People's Organization and the Palestine Liberation Organization, each of which is recognized by a number of states and by its respective regional public organization.

Other provisions in the article describe factors for recognizing whether an organized resistance movement has the status of a party to the conflict. For example, article 4(A)(3), modeled on General DeGaulle's Free French Forces, refers to a government or a nongovernmental public authority not recognized by the detaining power. The common article 3 of the 1949 Geneva Conventions, the miniconvention dealing with civil wars, refers to the parties to the internal conflict as "each party to the conflict," thereby giving such status to rebels and insurrectionists. This definition is important because it is consistent with the history and the reality of organized resistance movements in the Second World War, and it does not require a connection with a state. If there is a connection with a state, so much the better, but a connection is not a requirement to giving this important status to the organized resistance movement.

Another feature of article 4(A) insufficiently emphasizes that the criteria for regular combatants are identical with the criteria for irregular combatants. At the Geneva Diplomatic Conference of 1949, it was proposed on the floor of the conference that the four criteria for irregulars in article 4(A)(2) be amended and specified as applying to regulars

under article 4(A)(3). The response was that it was so well-known that these same four criteria applied to regular combatants that it was actually not necessary to specify it at all. The fact that article 43 of the Protocol makes no distinction between regulars and irregulars is not quite as novel as it is sometimes regarded.

It is important to recognize that article 44, paragraph 3 does not repeal the four basic criteria, except in situations where they are unworkable. In the situation where compliance with the criteria of article 4(A)(2) of the POW Convention could be a suicide pact for the organized resistance forces, an exceptional arrangement is spelled out. When forces practicing what is widely known as guerilla warfare, referred to as the nature of the hostilities, cannot meet the four criteria, it is sufficient that arms are carried openly during each military engagement and during the time when forces are visible to the adversary in the military deployment leading up to the engagement. There are differences of opinion as to how long or short that time is. It is important that now we have provided something not in the pre-existing customary law of the Geneva Conventions that permits and encourages the irregulars to stay within the ambit of the rules. The United States Army Rangers and the Marine Corps Raiders are outstanding practitioners of guerrilla warfare. They, like the irregulars who are their own party to the conflict and who may not even be associated with a state, are the beneficiaries of article 44, paragraph 3. It is extremely important that we recognize the benefits of article 44 for regular armed forces as well as for irregular forces.

REMARKS OF PROFESSOR HOWARD S. LEVIE

These remarks refer to the same articles that Professor Mallison discussed, but from a slightly different perspective. Articles 43, 44, and 45 actually were enacted in order to give Protocol I some specifics with respect to the general provision on the protection of members of national liberation movements contained in article 1(4) of the Geneva Convention. Article 43 provides that an individual captured in the uniform of an organized armed force will be regarded as combatant. Article 44 says that such a person would be entitled to the status of a prisoner of war, and the fact that he has allegedly violated the law of war would not deprive him of that status. Moreover, despite the fact that the person is captured in uniform and may not have complied with the law of war, if administratively the enemy determines that the individual is not a prisoner of war, he has a right to an adjudication by a tribunal as to his status. While awaiting that determination, the person
is entitled to the treatment of a prisoner of war.

Article 85 of the Third Geneva Convention of 1949 states that prisoners of war prosecuted under the laws of the detaining power for acts committed prior to capture shall retain, even if convicted, the benefits of this Convention.

This Convention was not in effect at the time of the Korean Conflict. Both sides, however, agreed to comply with the humanitarian principles of the Convention, and without dispute, article 85 was one of those humanitarian principles. Nevertheless, the North Koreans and the Chinese Communists stated that captured United Nations command troops were not entitled to prisoner of war status, until they repented for their misdeeds. The North Koreans never stated exactly what the prisoners' misdeeds were or why they were not entitled to prisoner of war status. It was probably because the prisoners were fighting communist imperialists.

When the Soviet Union ratified the Third Geneva Convention, it did so with a reservation to article 85.244 This reservation indicated that the Soviet Union did not consider itself bound by article 85 "to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question"245 while serving their punishment.

There was some concern with regard to that reservation. The Swiss government, as the depository, was asked to inquire as to the meaning of the reservation. The Soviet Union responded that its reservation signified that prisoners of war who, under the law of the Soviet Union, have been convicted of war crimes or crimes against humanity must be subject to the conditions in the Soviet Union for other convicted persons. After the sentence becomes legally enforceable, persons in this category consequently do not enjoy the protection that the Convention affords.

North Vietnam acceded to the Convention in 1957, so during the entire Vietnam imbroglio it was in effect. When North Vietnam acceded, it made a reservation similar to the Soviet reservation. All the communist states made somewhat similar reservations. North Vietnam

245. Id. at 460.
said prisoners of war prosecuted for and convicted of war crimes or crimes against humanity in accordance with the principles established by the Nuremberg tribunal will not enjoy the benefits of the provision of the present Convention as provided in article 85. During the hostilities in Vietnam, North Vietnam stated, in effect, that it would regard captured Americans as “pirates,” people who have destroyed the property and massacred the population of the Democratic Republic of Vietnam, as major war criminals caught in flagrante delicto and liable for judgment in accordance with the laws of the Democratic Republic of Vietnam. This can be construed to mean exactly what the Soviets had said their reservation meant: when a person is captured he or she is a prisoner of war, until he or she is tried and convicted in accordance with the laws of the Democratic Republic of Vietnam. That is not, however, the way the North Vietnamese construed it. They contended that all American prisoners of war were automatically war criminals, despite the fact that there was never a trial and never a conviction.

Under articles 43, 44, and 45 of the Protocol, it should be much more difficult for anyone to advance the contention that by the fiat of the capturing power, a captured member of an organized armed force in uniform can be considered not to be a prisoner of war, but a war criminal. Thus, the provisions of these articles, which originally were intended to extend specific protection to members of national liberation movements, unintentionally grant greater protection to members of organized armed forces because they are guaranteed these specific rights, which were not included in article 85 of the Convention and were eliminated by the reservations made by the Communist countries.

These provisions amplify and make more specific the provisions of the Geneva Convention, but they do not enlarge it. They give to uniformed personnel benefits that existed before, but in a more specific manner. It will be much more difficult for any country to contend that a person captured in uniform is a war criminal, when he has not been tried and convicted. This, however, is not a panacea or a complete cure because there are undoubtedly “law-defying nations,” which, despite the more specific provisions in the Protocol, will still take the position that captured soldiers fighting for capitalism are war criminals per se and not entitled to prisoner of war status.

DISCUSSION

Judge SKARSTEDT agreed that the articles concerning the protection of medical aircraft constitute customary international law. The Swedish International Humanitarian Law Committee has attempted to es-
tablish that the rules in Protocol I also have the status of customary law. Professor Mallison’s belief that there were more articles than those mentioned in the Swedish draft that could constitute customary law impressed Judge SKARSTEDT, who said he would convey Professor Mallison’s ideas to the Swedish government.

Major General PRUGH expressed surprise over Commander Bennett’s “luke warm” support of the medical evacuation protections. He got the impression that Commander Bennett felt that they were not very significant, although many regard the medical provisions as a major step forward. Major General PRUGH pointed out that the provisions constitute new humanitarian law, offering a new technique for quickly evacuating a wounded soldier from the battlefield. He strongly supported the new evacuation provisions, even though they are contrary to the thrust of the war.

Commander BENNETT replied that he based his criticism on the impracticality of the provisions in those articles. In his view, the protections offered in real war circumstances are illusory. He also questioned the reliability of distinctive signals for determining the aircraft types of planes that are possibly 200 miles away.

Mr. THOMAS E. McMANN stated that while stationed in Vietnam, 199 medical evacuation helicopters were shot down in his outfit. He explained that when word got out that the enemy was shooting at medical aircraft, it was very difficult to get aircraft to land in the rice paddies to provide support. He found it distressing that the law of war in place then, offering no protection, still governs today. According to Mr. McMANN, the Protocol rules may not work, but unlike the Geneva Convention rules, they will not authorize the shooting of medivac helicopters. In his view, it is impossible to adhere to the Geneva Convention rules. Because young soldiers die when these aircraft cannot safely land, Mr. McMANN emphasized that the guidelines of the Protocol rules are needed.

Professor SOLF suggested that the principle underlying these rules should make medical aircraft immune from attack. The problem, however, is getting them recognized. He noted that blue lights were the only alternative to the red cross available at the time they were used, and in a demonstration, blue lights were visible at a distance of seven or eight kilometers, which is much greater than the visibility of a red cross. He strongly suggested that research on the electronic signal system continue.

Professor SOLF also recognized that electric signals, which are more
effective than the blue lights, are not used. After passage of resolutions at the Diplomatic Conference, the International Telecommunications Union began work on the electric signals issue. The World Administrative Radio Conference, in 1979, provided rules that authorize the use of international emergency signals for initiating communications about the movement of medical transports. When a medical aircraft is under attack, the rules call for the pilot to switch to one of the authorized emergency frequencies to establish communication. Professor SOLF suggested that work be continued to improve the electric signal systems, and indicated that the Conference will revise the rules as technology changes.

Mr. ROBERT HALFYARD suggested that the various objections to Protocol I and the reservations to Protocol II result from critics looking at the proposed Protocols with a negative attitude. He proffered that the critics identified issues that are only potential and not inevitable problems. He drew analogies from historical debates about prior agreements. For instance, in 1907, many people criticized the Hague Conventions as unworkable; the Conventions, however, governed activities during World War I. There were also many people who thought the 1929 Geneva Convention would not work, but combatants adhered to it throughout World War II. In addition, although many criticized the 1949 Geneva Conventions, combatants have observed them in various military operations since 1949. Mr. HALFYARD emphasized that people can learn from history and concluded that our military leaders can learn ways to conduct war within the restrictions of the Hague Conventions, the Geneva Conventions, and the Protocols Additional to the Geneva Conventions.

Mr. HALFYARD vigorously urged the President and the Senate to ratify Protocol II. After gaining experience with Protocol II in what he perceives as unfortunate and inevitable military operations, Mr. HALFYARD stressed that if Protocol II works, the United States should go ahead and have the courage to adopt Protocol I, with some necessary reservations. Although some of Protocol I is slightly slanted against the type of military operation the United States conducts, he believes the United States has nothing to lose in ratifying Protocol II because it is unimaginable that a nation could lose a war because it let a medical helicopter go through.

Mr. ZIMMERMANN explained that article 49 was not intended to alter the law of blockade. He stated that blockade is not prohibited, but when a starving civilian population requires medical personnel or other
relief actions, combatants must relax the blockade to prevent starvation. He added that these measures could be done, in particular, by relief activities under the supervision of protecting powers.

Professor Mallison lauded the United States delegation to the Diplomatic Conference on Protocol I for its success in obtaining the objectives of the United States and noted that the existing articles, including article 96, reflect those objectives. He considered the delegates' performance outstanding.

Mr. Gasser sought to end the debate on a positive note. He reiterated Professor Levie's comments on Vietnam and article 85 and emphasized the importance of Vietnam's ratification of Protocol I without reservations to articles 43, 44, and 45. He was confident in the law of the Protocols, and stated that they are workable and contribute also to the consolidation of customary law rules protecting war victims.

The Moderator closed the Workshop with the conclusion that the Workshop was successful in starting a dialogue in the United States on which provisions in the Additional Protocols to the Geneva Conventions are recognized as customary international law.