Air War and the Law of War

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I. INTRODUCTION

For many it must seem incongruous to speak of "law of war" in light of the degree of destruction wrought during World War II. It appears a contradiction in terms when one considers the number of civilian dead,[1] recalls British Prime Minis-

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1. Estimates of German deaths vary. The United States Strategic Bombing Survey, Summary Report (European War) 15 (1945) estimated that 250,253 civilians were killed by Allied bombing between January 1, 1943, and January 31, 1945. Hans Rumpf in THE BOMBING OF GERMANY 164 (1962), places the figure at 600,000. David Irving in THE DESTRUCTION OF DRESDEN 41 (1963) sets the number of civilian deaths at 635,000. However, Irving originally estimated civilian deaths resulting from the February 1945 Allied air raids on Dresden at "more than 135,000." *Id.* at 11. Subsequently, in a letter to The Times, London, July 7, 1966, at 13c, he reduced the total to 25,000. But later historians continue to cite Irving's original figure in arriving at their own conclusions as to total civilian deaths. *See, e.g.*, L. BIDINIAN, THE COMBINED ALLIED BOMBING OFFENSIVE AGAINST THE GERMAN CIVILIAN 1942–1945 37, 51, 242 (1976); and G. QUESTER, DETERRENCE BEFORE HIROSHIMA 150 (1966) (the error remained, uncorrected, in a 1986 edition).

Civilians killed in Great Britain have been accounted for as follows:

Bombing	51,509
Flying bombs	6,184
Rockets	2,754
Cross-channel guns	148
Total	60,595

B. COLLIER, THE DEFENCE OF THE UNITED KINGDOM 528 (1957).

From a law of war standpoint, there is a potential for discrepancy in these figures. Civilian workers killed within a legitimate target, such as a military base, munitions plant, or aircraft engine manufacturing plant, are not regarded as "civilian casualties." While this should not be construed so broadly as to include all civilians in an industrial city, as occurred during World War II, reasonable persons could arrive at different numbers, but disagreement would have only a fractional impact on the total numbers. The United States Strategic Bombing Survey, The Effects of Bombing on Health and Medical Services in Japan 5 (1947) notes that the majority of civilian casualties in Germany and Japan were women and children, while placing German civilian casualties at 500,000 and Japanese civilian deaths at 338,000, the latter all occurring in one year. *See, e.g.*, F. IKLE, THE SOCIAL IMPACT OF BOMB DESTRUCTION 205 (1958). The DEUTSCHLAND HEUTE 156 (1958), official statistical publication of the Federal Republic of Germany, provides the following figures:

Losses among German civilians through hostile action:	500,000 dead
Losses among German civilians from the eastern provinces:	1,550,000 dead

See also M. SORGE, THE OTHER PRICE OF HITLER'S WAR 67 (1986).

Obviously not all civilian casualties can be attributed to bombing. The devastation of Berlin by Russian artillery bombardment was so great that the United States Strategic Bombing Survey could not perform an evaluation of the damage done to that city by the Allied strategic air offensive. *A Brief Study of the Effects of Area Bombing on Berlin, Augsurg, Bochum, Leipzig, Hagen, Dortmund, Oberhausen, Schweinfurt, and Bremen*, 39 THE UNITED STATES STRATEGIC BOMBING SURVEY (2d ed. 8, Jan. 1947).

ter Winston Churchill walking amidst the rubble of Coventry,[2] or views the photographs of the massive cathedral of Cologne surrounded by an utterly devastated city.[3] Having directed much of one nation's strategic air offensive and daily witnessed its deadly effects, it is not surprising that Sir Arthur Harris,[4] Marshal of the Royal Air Force (RAF), concluded after the war that, "International law can always be argued pro and con, but in this matter of the use of aircraft in war there is, it so happens, no international law at all."[5] The wartime commander of RAF Bomber Command regrettably was more right in his comment than he was wrong. Rather than a reflection of lawlessness on the part of any or all parties to the conflict, it is more a recognition of the limits of the law in total war. It is an acknowledgement of the failure of nations to come to agreement on practical limitations on the employment of arms during the four decades preceding that conflict, despite reasonable warnings regarding the potential level of destruction.

There has been criticism of the bombing campaigns of World War II, and particularly the Allied strategic air offensive and the United States' bombing campaign against Japan (including the use of atomic bombs against Hiroshima and Nagasaki). This is an inevitable outcome of postwar debate in democracies. The questions posed and answered, in the first part of this article, to the extent possible, are the following:

(1) What was the law of war with regard to aerial bombardment (hereinafter "bombing," for brevity's sake) prior to, and during, World War II?

(2) To what extent did national leaders and/or air forces observe it?

The latter portion of the article will address the legislative endeavors of the 1970s, which produced the 1977 Protocols Additional to the Geneva Conventions of August

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Total German civilian casualties have been placed at 1.5 million [E. ZIEMKE, STALINGRAD TO BERLIN: THE GERMAN DEFEAT IN THE EAST 500 (1968)] in close agreement with the DEUTSCHLAND HEUTE figure cited above. Hence, the Allied strategic air offensive accounted for 20% to 40% of the civilian losses in Germany. It is important to note that it was not the major cause of death, in Germany or elsewhere. In Russia, where strategic (rather than tactical) airpower played an insignificant role, Russian civilian and military losses have been listed as 22 million, of which 10.15 million were civilians. While the very high military losses can be attributed to a number of factors, including inefficient military medical services, high civilian and military losses are directly attributable to Soviet tactics, which throughout the war tended to be extravagant in terms of Soviet lives. ZIEMKI, *id.* at 500.

2. N. LONGMATE, AIR RAID: THE BOMBING OF COVENTRY facing 238 (1976).

3. The attacks on Cologne are described in R. BARKER, THE THOUSAND PLAN (London, 1965); E. TAYLOR, 1000 BOMBER AUF KOLN (Dusseldorf, 1979); W. RANKE, AUGUST SANDER: DIE ZERSTORUNG KOLNS (Mosel, 1945); and E. TAYLOR, OPERATIONS MILLENIUM (London, 1987). Again, a certain perspective is appropriate. During the Allied strategic air offensive, the Cologne Cathedral was struck by fourteen bombs. It is estimated that postwar damage by air pollution, principally automobile exhaust emissions, has caused substantially greater damage. German tourguide to author during visit to Cologne Cathedral, October 1986.

4. Sir Arthur T. Harris, British, 1892–1984; joined the 1st Rhodesian Regiment, 1914–1915; joined the Royal Flying Corps, 1915; Feb. 1942 assumed the position of Commander-in-Chief, Bomber Command, Royal Air Force; retired as Air Chief Marshal, Sept. 1945; promoted to Marshal of The Royal Air Force, Jan. 1946; awarded Baronetcy, 1953. During World War II, he executed Britain's strategic air offense against Germany, including saturation bombing actions, alone carried the bombing offensive into Germany from Sept. 1939 to Jan. 1944; joined by the United States Eighth Bomber Command in the middle of 1943. *See generally* A. HARRIS, BOMBER OFFENSIVE (1947); D. SAWARD, "BOMBER" HARRIS (1984); The Times, London, Apr. 7, 1984, 1c, 10g, 10f, 14; May 25, 1984, 14d; and *cf.* C. MESSENGER, "BOMBER" HARRIS AND THE STRATEGIC BOMBING OFFENSIVE, 1939–1945 (1984).

5. A. HARRIS, *supra* note 4, at 177. Lest this be dismissed as the cynicism of a nonlawyer, it should be noted that Sir Hersch Lauterpacht, one of the preeminent international lawyers of this century (and author of the postwar British manual on the law of war), once opined: "If international law is the weakest point of all law, then the law of war is virtually its vanishing point." For a general historical survey of the law of war relating to aerial bombardment, *see* Parks, *Conventional Aerial Bombing and the Law of War*, 108 U.S. NAVAL INST. PROC. 98–115 (May 1982).

12, 1949, and the 1980 Conventional Weapons Convention, and the United States' military review of certain articles in those treaties that relate to aerial bombardment.

II. BACKGROUND

A. Rendulic Decision

In answering the former questions, the author has endeavored to follow the judgment of the court in one of the postwar war crimes trials. In *United States v. List*,[6] Generaloberst Lothar Rendulic was charged with carrying out a "scorched earth" policy in the Norwegian province of Finnmark. General Rendulic acknowledged his actions, but argued that they were taken in the belief that Russian forces were in hot pursuit of his retreating units. The court, in acquitting General Rendulic of the charge, concluded:

> There is evidence . . . that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. . . .
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> The course of a military operation by the enemy is loaded with uncertainties. . . . It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. . . . [T]he defendant may have erred . . . but he was guilty of no criminal act.[7]

The Rendulic decision is an important guideline, and one not always followed by historians, some of whom, with hindsight and lacking the pressures of command, may have leaped to conclusions unduly critical of bombing during World War II,[8] prompting responses by some participants.[9] The issue is joined once again in two recent books, each of which makes reference to the corollary issues of legality and morality of bombing in World War II. In Michael S. Sherry's *The Rise of American Air Power*,[10] the author intimates that more might have been accomplished between the wars to regulate warfare, while Ronald Schaffer, in *Wings of Judgment*,[11] raises questions about the "moral issue" of American bombing policies during World War II. Both books are well-researched and thought-provoking. While Schaffer's book is more balanced, his very imprecise definition of the moral issue, "a phrase that usually meant . . . the bombing of cities and civilians, though it also referred to air attacks on artifacts of civilization, such as libraries, cathedrals, monasteries, and famous works of art," illustrates the difficulty of defining the subject of law and/or morality, or of determining the bomber's intent. More than reaching judgment, this article will endeavor to identify the legal parameters available to World War II military and civilian leaders, and their moral bases.

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6. XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1296–1297 (1947–48); *See* Mitchell v. Harmony, 54 U.S. (Howard) 115 (1851).

7. *Id.* at 1296–297. Or, as R. Overy says in his preface to THE AIR WAR 1939–1945 xi–xii (London, 1980): "I have concentrated . . . on trying to establish the historical context within which such decisions were made. This account is not about the history of post-war recrimination. It is about the war as it was understood, however imperfectly or unethically, at the time."

8. *See, e.g.*, HASTINGS, BOMBER COMMAND (London, 1979); and BEST, HUMANITY IN WARFARE 279–84 (London, 1980). With regard to the latter, this is a small flaw in a book that otherwise offers a superb treatment of the history of the modern law of war. It is also a point about which the author readily acknowledges that reasonable people can disagree.

9. D. SAWARD, *supra* note 4; and *cf.* C. MESSENGER, *supra* note 4.

10. M SHERRY, THE RISE OFAMERICAN AIR POWER 33–38 (1987).

11. R. SCHAFFER, WINGS OF JUDGMENT (1985). *See also* PASKINS AND DOCKRILL, THE ETHICS OF WAR 1–57 (1979); W. O'BRIEN, THE CONDUCT OF JUST ANDLIMITED WAR 121 (1981); and Anderson, *Air Warfare and Morality*, 3 AIR U. Q. REV. 5–14 (Winter 1949).

B. Just War Tradition

What is legal is not necessarily moral and what is moral is not always legal; but, particularly with regard to the law of war, the two are inextricably intertwined. Historically, civilians seldom have fared well in wars,[12] and it was primarily with their protection in mind that the modern law of war evolved. There is a certain irony in the realization that the twentieth century law of war traces its origins to the Just War Tradition developed by clergy, international lawyers, and philosophers from Western Europe, the principal strategic air battleground in World War II.[13] But with the limitations of the Just War Tradition remain the shortcomings of the modern law of war: while there was general agreement on the propriety of resort to arms (*jus ad bellum*)[14] and limited protection for the innocent (noncombatants) in the hands of a belligerent (a portion of *jus in bello*),[15] the Just War Tradition and the modern law of war generally are silent, or at least reluctantly acquiescent, regarding the actual use of force on the battlefield.[16]

Discrimination. At the heart of the Just War Tradition and the modern law of war lies the principle of discrimination which, in simple terms, means noncombatant immunity. But noncombatant immunity is not without exceptions. Within both the Just War Tradition and the law of war, it has always been permissible to attack combatants even though some noncombatants may be injured or killed; so long as injury to noncombatants is ancillary (indirect and unintentional) to the attack of an otherwise lawful target, the principle of noncombatant immunity is met. There were two other conditions that are important:

a. Noncombatants forfeit their right of protection from intentional injury if they carry out actions in favor of one belligerent over another; and

b. In the siege of a city, injury or death to noncombatants within the besieged city was regarded as permissible in that it created a burden on the besieged commander, or because it was his responsibility as a result of his refusal to surrender. If an offer of surrender were refused, the besieging commander was justified in putting to the sword all within the besieged city, including noncombatant women and children, for their refusal to surrender. While the latter practice had diminished by the nineteenth century, the law of war continued to place responsibility for civilian casualties in the hands of the besieged commander and permitted the besieger to look upon their injury as not only permissible but an effective means of war on the morale of the besieged. As an ancillary of this rule, any action taken by the besieged that placed noncombatants at risk was the responsibility of the besieged commander.[17]

In more recent times the four Geneva Conventions for the Protection of War Victims of August 12, 1949, renounce any dependency on reciprocity in the treatment of prisoners of war, enemy wounded, sick, or shipwrecked, or enemy civilians

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12. *See* R. HARTIGAN, THE FORGOTTEN VICTIM: A HISTORY OF THE CIVILIAN (1982): SMALL, CRUSADING WARFARE, 1097–1193 (1956); B. TUCHMAN, A DISTANT MIRROR (1978); and P. CONTAMINE, WAR IN THE MIDDLE AGES (Oxford, 1984).

13. *See* J. JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR (1981).

14. *Jus ad bellum* is a Latin term meaning "up to the commencement of war." Basically, the proper circumstances to resort to force or war.

15. *Jus in bello* is a Latin term meaning "the law of war during hostilities" once the war has commenced.

16. *See* M. HOWARD, WAR IN EUROPEAN HISTORY (1976); Howard, *Temperamenta Belli: Can War Be Controlled?*, in RESTRAINTS ON WAR 1–16 (M. HOWARD, London, 1979); BEST, *supra* note 8; O'BRIEN, *supra* note 11; and JOHNSON, *supra* note 13.

17. JOHNSON, *supra* note 13, at 196–98, 200–03, 222–23.

in the hands of an occupying power. This renunciation of a portion of the Just War Tradition was not extended to the conduct of hostilities.

One of the great ethical dilemmas that remains unresolved by the law of war is the Just War Tradition that, where a war is clearly just, the general immunity of enemy noncombatants may be overridden in order to protect the very values that ultimately guarantee the safety of such persons.[18] This argument formed the basis for justifications in bombing by both sides during World War II. Objectionable as that argument is by what is perceived to be today's moral standards, the matter remains unresolved. It continues to be an active element in Socialist military doctrine; has been cited by leaders of terrorist organizations, most of whom have been trained in Socialist nations; and has been relied upon by both sides in the Iran-Iraq War of the 1980s as justification for particular military actions, such as the war on each other's cities.

The Just War Tradition condemns indiscriminate bombing; the dilemma over the past century has been in identifying the line where military actions cease being permissible and become indiscriminate. As a leading moralist has noted, under the Just War Tradition "[t]his distinction is not determined by the amount of the devastation or the number of deaths, but by the direction of the action itself, i.e., by what is deliberately intended and directly done."[19]

Nation-State System of War. The Just War Tradition and law of war concepts were confronted with yet another dilemma with the arrival of the Industrial Revolution. Previously battles were open, pitched struggles, or involved an attempt to capture (usually through siege) a heavily defended city. A city or village might remain undefended because it contained nothing of military value, in which case it was open to physical occupation by the enemy. So long as the citizens of the village or city offered no resistance to an enemy force marching through or occupying the area, they were left alone, with one important exception: a naval force could approach an undefended coastal town for provisions and, if refused the supplies requested, could bombard the town to a degree proportionate to the severity of the refusal.

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18. M. WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 251–55 (1977); JOHNSON, *supra* note 13, at 223; and Saundby, *The Ethics of Bombing*, Air Force Magazine June 1967, at 48–53. *Cf.* Lammers, *Area Bombing in World War II: The Argument of Michael Walzer*, J. OF RELIGIOUS ETHICS 96–113 (Spring 1983). Some confusion exists today with respect to *discrimination* because of the attempted injection of the concept of *proportionality* into the law of war. Historically, proportionality in its *jus in bello* sense of matching force against force, is defined in relative terms. Discrimination was of a higher moral priority than proportionality. JOHNSON, *supra* note 13, at 196, in his examination of the arguments of Paul Ramsey. While the concept of proportionality has been urged by some international lawyers, it also has been adopted by some contemporary utilitarian moral philosophers connecting it, in Johnson's words, "to that of the greatest good for the greatest number." JOHNSON, *supra* note 13, at 228. While proponents offer the classic example of disproportionate use of force as evidenced by the destruction of a village of 500 in order to kill a single sniper, they falter in further explanation of the concept. Western nations and the International Committee of the Red Cross sought to codify the concept of proportionality at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 1974 to 1977. The concept was categorically rejected by the Socialist bloc. Ultimately language was drafted in article 51(5)(b) of Protocol I that enables the Western nations to claim the concept is codified therein, while permitting the Socialist nations to deny the same; yet its violation is made a war crime in article 85. The language is so general and subject to contradictory views that under U.S. domestic law it would be constitutionally void for vagueness. As one pundit noted, "Only international lawyers would make something a crime they couldn't define." For this and a number of other reasons, the United States has decided not to become a party to Additional Protocol I.

The important point in the concept of proportionality is consideration of the potential for collateral civilian casualties in the vicinity of a target, which will be discussed later in this article. As Dr. James Turner Johnson has correctly noted, however, "the idea of collateral damage in contemporary limited war thought is a pregnant one." JOHNSON, *supra* note 13, at 221. What is important is that the concept was not even a gleam in its parents' eyes prior to and during World War II.

19. RAMSEY, THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY 154 (1968).

Until the eighteenth century, wars generally were private conflicts, fought between relatively small units. By that time, however, the modern nation-state system was emerging; full-time professional armies were representing those states; and a civilian bureaucracy was supporting the insatiable appetite of an army on the march. The Industrial Revolution was developing components that would link a nation together for reasons that would be as important to commerce in peace as it would be to the defense of the nation when it was threatened. Railroads are one example. The railroads were important to the movement of units from one point to another at speeds greater than allowed by road march. Also, for the first time they enabled a government to organize and mobilize a nation for war. A nation's leaders, in contemplating military operations against another nation, no longer thought of war solely in terms of a confrontation between uniformed battalions on a battlefield largely devoid of civilians; now ways were considered to destroy or capture an enemy nation's economic or industrial capacity to wage war.

These types of operations first were waged during the American Civil War, as Union General William Tecumseh Sherman carried out his famous march to the sea, cutting the Confederacy in half while destroying its industrial resources and denying it the ability to grow cotton for export in order to finance the war.[20] The naval blockade conducted by the U.S. Navy served similar purposes, preventing the import of war materials and denying the Confederacy the ability to export cotton—an action similar to the "tanker war" during the present-day Iran-Iraq War.[21] Economic and industrial targets had become an important element in modern war. Railroads and other lines of communication also had taken on significance, and foreign military observers of the Civil War learned their lessons well.[22]

There was another development as a result of the nation-state system. Nations continued to maintain small standing armies, but relied upon mobilization of the population to provide for their defense. The minutemen who fought the British at Concord, Massachusetts, on April 19, 1775, can trace the basis for their origin to

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20. General Sherman's march to the sea started at Atlanta, Georgia, in November 1864 and ended at Savannah, Georgia, in December 1864. *See generally* B. DAVIS, SHERMAN'S MARCH (1980); R. WHEELER, SHERMAN'S MARCH (1978); J. GLATTHAAR, THE MARCH TO THE SEA AND BEYOND (1985). Or, similarly, the 1865 Union raid by Major General James H. Wilson to Columbus, Georgia, and Selma, Alabama, to attack two of the South's most productive industrial communities. *See* JONES, YANKEE BLITZKRIEG (1976); B. DAVIS, SHERMAN'S MARCH (1980); J. MCDONOUGH and J. JONES, WAR SO TERRIBLE: SHERMAN AND ATLANTA (1987); and E. HAGERMAN, THE AMERICAN CIVIL WAR AND THE ORIGINS OF MODERN WARFARE (1988). Sherman's attack of Confederate railroads was a model for the allied air offensive against German rail lines eighty years later. *See* A. MIERZEHEWSKI, THE COLLAPSE OF THE GERMAN WAR ECONOMY, 1944–1945: ALLIED AIR POWER AND THE GERMAN NATIONAL RAILWAY (London, 1988); *cf.* O. HOEFFDING, GERMAN AIR ATTACKS AGAINST INDUSTRY AND RAILROADS IN RUSSIA, 1941–1945, RAND RM–6206–PR (Santa Monica, 1970).

21. OFFICIAL RECORDS OF THE UNION AND CONFEDERATE NAVIES IN THE WAR OF THE REBELLION (1894–1922), Series I, Vol. 1–27, Series II, Vol. 1–3; V. JONES, THE CIVIL WAR AT SEA Vol. I at 60–122, 165–176, 332–348, Vol. II at 239, 246, 247, 249, 250, 255; H. NASH, A NAVAL HISTORY OF THE CIVIL WAR (1972); 2 C. BOYNTON, THE HISTORY OF THE NAVY DURING THE REBELLION 72–107 (1868).

22. Railroads were employed with great success by the Prussian military during the Franco-Prussian War. M. HOWARD, THE FRANCO-PRUSSION WAR 2–4, 22, 43, 61–2, 230 (London, 1961). *See* M. VAN CREVELD, SUPPLYING WAR 75–108 (Cambridge, 1977); and M. PEARTON, DIPLOMACY, WAR AND TECHNOLOGY SINCE 1830 (1984). Pearton concludes that in the period between 1830 and 1870, railroads "emerged as *the* decisive factor in modern war" at 75 (emphasis in original). The use of railroads was important in one of the conflicts cited by many international lawyers as the point of conception of the modern law of war. At the outbreak of the war between France and Austria that led to the Battle of Solferino, Napoleon III was able to move his forces to Turin by rail in ten days. By foot and horseback, the move would have required two months. PEARTON, *id.* at 67. On Solferino, *see* H. DUNANT, A MEMORY OF SOLFERINO (Geneva, 1862); C. ROTHKOPF, JEAN HENRI DUNANT: FATHER OF THE RED CROSS (1969); and P. TURNBULL, SOLFERINO (1985).

the English Muster Law of 1572, and to the articles of New England confederation published in 1643. But the French Revolution of 1789 generally is credited with taking this concept to its logical conclusion, tying political rights to civic responsibilities in mobilizing the entire population for defense of the nation. Nations provided a sense of identity to its citizens, and an invading army frequently found itself faced with guerrillas—civilians of the invaded nation who would offer armed resistance. From this time came such terms as *francs-tireurs* and *levee en masse*. As Michael Howard notes in commenting on the developments of the nineteenth century, "War was beginning to become total—a conflict not of armies but of populations."[23] Units of civilian guerrillas were used to great effect during the American Civil War, particularly against Union Army supply lines,[24] and France organized its *francs-tireurs* into an Auxiliary Army during the Franco-Prussian War.

The problems of guerrilla warfare are not a part of this article. But the national use of *francs-tireurs*, coupled with the industrial mobilization of a nation for war, illustrates the degree to which warfare had expanded in a nation's utilization of its entire resources to advance its war aims. No longer was warfare merely a matter of a contest pitting soldier against soldier; it had become a national effort. Able-bodied men were conscripted for military service, while all others, men, women, and children, assumed other responsibilities to support the war effort. And it was into this changing environment of war that international lawyers stepped to devise the modern law of war.

C. Lieber's Code: Foundation of Modern Law of War

The first effort began in the United States during its Civil War. Faced with the problems of guerrilla warfare, President Abraham Lincoln, acting through Henry Wager Halleck, General-in-Chief of the Union Armies, tasked Dr. Francis Lieber with the preparation of a code of law for the Union forces. Lieber wrote two documents, one of which addressed the issue of guerrillas and the law of war; the second, adopted by the Union Army as General Orders No. 100, became the first modern statement of the law of war and the foundation for much of the law of war as it was to exist over the next century, including World War II.[25] Several of its provisions relate to the questions posed earlier:

> 14. 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.
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> 15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy. . . .

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23. *See* J. GALVIN, THE MINUTE MEN (2d ed. 1989); W. MILLIS, ARMS AND MEN 13–71 (1981); Strachen, *The Nation in Arms*, in G. BEST, THE PERMANENT REVOLUTION 49–74 (London, 1988); G. BEST, WAR AND SOCIETY IN REVOLUTIONARY EUROPE, 1770–1870 (London, 1982); and HOWARD, *supra* note 16, at 93.

24. SPIES, SCOUTS AND RAIDERS: IRREGULAR OPERATIONS 106–61 (1985); P. STERN, SECRET MISSIONS OF THE CIVIL WAR (1959); W. TIDWELL, COME RETRIBUTION 132–54 (1988). France was to organize its *francs-tireurs* into an Auxiliary Army during the Franco-Prussian War. M. HOWARD, *supra* note 16 at 245, 249–56, 374–75, 377–81, 407, 409, 412.

25. R. HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR (1983); Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L LAW 13–25 (1907).

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and war.

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war.

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

29. Modern times are distinguished from earlier ages by the existence at one and the same time of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace. The more vigorously wars are pursued the better it is for humanity. Sharp wars are brief.[26]

General Orders No. 100 remained the principal law of war reference for the balance of the nineteenth century. Although efforts were made to develop the law of war relating to the conduct of hostilities into a treaty, including a conference held in Brussels in 1874,[27] none met with success. With the exception of a brief treaty for protection of the wounded, the first real multilateral law of war negotiations did not take place until the closing years of the century.

III. THE FIRST HAGUE PEACE CONFERENCE OF 1899

A. Background

On August 24, 1898,[28] acting on behalf of Tsar Nicholas II, Russian Foreign Minister Count Mikhail Muraviev[29] proposed the convening of an international disarmament conference to address issues relating to disarmament, the proscription or regulation of certain modern weapons of war, and establishment of a mechanism for arbitration of international disputes.[30] In a letter dated January 11, 1899,[31] Count Muraviev listed eight proposals, two of which marked the beginning of efforts to regulate aerial bombardment with the latter proposal also calling for a revision of the law of war: 3. . . . prohibition of the discharge of any kind of projectile or explosive from balloons or by similar means. . . . 7. Revision of the declaration concerning the

26. R. HARTIGAN, *supra* note 25, at 48-50. General Orders No. 100, War Dep't, Adjt. General's Office, Washington, D.C., April 24, 1863, section I, ¶ 14–29.

27. D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICT 25–34 (1981); THE LAW OF WAR 194–203 (L. FRIEDMAN, Vol. 1, 1972); P. BORDWELL, LAW OF WAR 101–16 (1908).

28. Russia used the Julian calendar until shortly after the October (actually November) Revolution in 1917 when the Gregorian calendar was adopted. It is the Gregorian calendar that is used today for international purposes. The letter was dated August 12, 1898, (Julian calendar) but the date used in this article and by others is August 24, 1898, (Gregorian calendar).

29. Count Mikhail Muraviev's last name was also spelled Mouravieff in English.

30. INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL REPORTS 1–2 (J. Scott, ed. 1916), [hereinafter INSTRUCTIONS]; F. HOLLS, THE PEACE CONFERENCE AT THE HAGUE 8–10 (1900); THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 xiv–xv (J. Scott, ed. 1915) [hereinafter HAGUE CONVENTIONS].

31. INSTRUCTIONS, *supra* note 30, at 3–5; HOLLS, *supra* note 30, at 24–27; HAGUE CONVENTIONS, *supra* note 30, at xv–xvii. The letter was dated Dec. 30, 1898, by the Julian calendar and Jan. 11, 1899, by the Gregorian calendar.

laws and customs of war elaborated in 1874 by the Conference of Brussels, and not yet ratified.[32]

While disarmament and peace groups were enthusiastic in their support of the Russian call for an international conference, the reaction of governments was underwhelming. Each of the invited nations accepted the invitation with suspicion, and without great expectations. The Russian invitation correctly was seen as lacking in altruism. The Russian Minister of War had determined that Austria, its principal rival, was about to procure an improved field gun capable of firing six rounds per minute, six times the rate of comparable Russian field pieces. The newer gun already was standard in the armies of Germany and France. Faced with the prospect of embarking on a major, costly arms procurement program, the Russian Ministers of War, Finance, and Foreign Affairs considered alternatives. Rather than seek bilateral accommodation with the Austrians, whom the Russians did not trust, a solution was framed in terms of the multilateral negotiations proposed by Count Muraviev.[33] The First Peace Conference was convened in The Hague on May 18, 1899, with delegations present from twenty-six nations.[34]

The work of the conference was divided among three commissions. Commission I addressed disarmament issues and the issues concerning new weapons, and was divided into two subcommissions, one for land warfare and one for naval warfare. The proposal calling for a prohibition on discharge of explosives from airborne vehicles was assigned to the subcommission on land warfare. Commission II addressed the revision and codification of the law of war problems. Commission III reviewed international arbitration, which is not addressed in this article.

B. Commission I

Russian attempts in Commission I to limit force levels and budgets died in subcommission sessions. Proposals by Russia to limit fleets, armor plate, and naval gun sizes also were defeated, as were moves to ban submarines, torpedo boats, and naval mines. Three proposals met with moderate success: a limitation on the use of chemical weapons;[35] a prohibition on expanding (also called dum-dum) bullets;[36] and a five-year moratorium on the launching of projectiles and/or explosives from the air,[37] the latter being within the focus of this article.

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32. INSTRUCTIONS, *supra* note 30, at 4; HOLLS, *supra* note 30, at 26; HAGUE CONVENTIONS, *supra* note 30, at xvii.

33. B. TUCHMAN, THE PROUD TOWER 251–67 (1966); and Hawkins, *Captain Mahan, Admiral Fisher and Arms Control at the Hague, 1899*, 39 NAVAL WAR C. REV. 77–91 (No. 1, January–February 1986). Nations sending delegations were Austria-Hungary, Belgium, Bulgaria, China, Denmark, France, Germany, Great Britain, Greece, Italy, Japan, Luxemburg, Mexico, Montenegro, Netherlands, Persia, Portugal, Romania, Russia, Serbia, Siam, Spain, Sweden and Norway, Switzerland, Turkey, and the United States.

34. F. HOLLS, *supra* note 30, at 36.

35. Hague Declaration (IV, 2) concerning asphyxiating gases (July 29, 1899); SCHINDLER & TOMAN, *supra* note 27, at 50, 99–100; F. HOLLS, *supra* note 30, at 118–20, 377; HAGUE CONVENTIONS, *supra* note 30, at 225–26.

36. Hague Declaration (IV, 3) concerning expanding bullets (July 29, 1899); SCHINDLER & TOMAN, *supra* note 27, at 50, 95; F. HOLLS, *supra* note 30, at 98–117, 377; HAGUE CONVENTIONS, *supra* note 30, at 227–28. For an interesting account of the politics of this treaty, *see* Greenwood, *The Political Factors*, GUN DIGEST 161–68 (34th ed. 1980); *see also*, Spiers, *The Use of the Dum Dum Bullet in Colonial Warfare*, 4 THE J. IMPERIAL AND COMMONWEALTH HIST. 3–14 (1975).

37. Hague Declaration (IV, 1) concerning launching projectiles from the air (July 29, 1899); SCHINDLER & TOMAN, *supra* note 27, at 50, 103–05; F. HOLLS, *supra* note 30, at 95, 377; HAGUE CONVENTIONS, *supra* note 30, at 220–22.

Limitation of Balloon Projectiles Resolution. Balloons had been used for limited military purposes for some time.[38] The use of dirigible airships had been discussed in international conferences in Chicago in 1893 and Paris in 1899,[39] and most delegates undoubtedly had some idea of where their respective national efforts were headed.[40] Many of the smaller or less-developed nations were quick to embrace the proposed prohibition as a way of disarming nations that were either more developed, or possessed a greater capacity for development.[41] Although slow in expressing their respective opposition, the delegates from France, Germany, Great Britain, and the United States were under instructions to oppose the prohibition.[42]

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38. L. KENNETT, A HISTORY OF STRATEGIC BOMBING 1–9 (1982). *See* C. GIBBS-SMITH, THE INVENTION OF THE AEROPLANE 1793-1909 (London, 1966). The first bombing raid took place in 1849, when the Austrians launched unmanned bomb-carrying balloons against Venice. Gibbs-Smith, *Commentary*, in A. HURLEY & R. EHRHART, AIR POWER AND WARFARE 50 (1979). The attacks were not unlike those conducted by the Japanese against the United States during World War II. Penfold, *Japan's Rambling Balloon Barrage*, 73 U.S. NAVAL INST. PROC. 963–65 (August 1947); Frankoski, *The Silent Bombers*, AIR DEF. MAG. 34–36 (April–June 1976). *See* Hidagi, *Attacks Against the U.S. Heartland*, 27 AEROSPACE HISTORIAN 87–93 (Summer 1981); and R. MIKESH, JAPAN'S WORLD WAR II BALLOON BOMB ATTACKS ON NORTH AMERICA (1973). Tethered balloons were employed for observation purposes during the American Civil War, while the French employed untethered manned balloons during the Prussian siege of Paris (September 1870–January 1871). J. FISHER, AIRLIFT 1870 (London, 1965). As early as 1893, British Major J. D. Fullerton of the Royal Engineers presented a paper at a meeting of military engineers in Chicago predicting that aeronautics would create "as great a revolution in the art of war as the discovery of gunpowder," and that "the arrival of the aerial fleet over the enemy capital would probably conclude the campaign." Mason, *Air Power and Warfare, 1903–1941: The British Dimension*, in HURLEY & EHRHART, 22 AIR POWER AND WARFARE. *See* R. BRETT, HISTORY OF BRITISH AVIATION, 1908–1914 (London, 1933).

39. Watt, *Restraints on War in the Air Before 1945*, in M. HOWARD, RESTRAINTS ON WAR 60 (London, 1970).

40. Parkinson, *Aeronautics at the Hague Conference of 1899*, 7 THE AIRPOWER HIST. 106–11, at 108 (Apr. 1960); Watt, *Restraints on War in the Air Before 1945*, in RESTRAINTS ON WAR, *supra* note 39, at 60.

41. Thus General den Beer Poortugael, in the first consideration of the proposed ban, advised the subcommission that the Government of the Netherlands supported the Russian proposal. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, THE CONFERENCE OF 1899 341 (J. Scott, ed., 1920) [hereinafter PROCEEDINGS].

42. For example, the British delegation was under instructions not to agree with any restrictions on the employment of weapons. Memorandum, War Office to Foreign Office (May 17, 1899), contained in BRITISH DOCUMENTS ON THE ORIGINS OF THE WAR 1898–1914 226 (Gooch and Temperley, eds., London, 1927) [hereinafter BRITISH DOCUMENTS]. Instructions from the Secretary of State to the U.S. delegation provided in part:

> The second, third, and fourth articles [being the proposals in Court Muraviev's memorandum, supra n. 31], relating to the non-employment of firearms, explosives, and other destructive agents, the restricted use of existing instruments of destruction, and the prohibition of certain contrivances employed in naval warfare, seem lacking in practicability, and the discussion of these propositions would probably prove provocative of divergence rather than unanimity of view. It is doubtful if wars are to be diminished by rendering them less destructive, for it is the plain lesson of history that the periods of peace have been longer protracted as the cost and destructiveness of war have increased. The expediency of restraining the inventive genius of our people in the direction of devising means of defense is by no means clear, and considering the temptations to which men and nations may be exposed in a time of conflict, it is doubtful if an international agreement to this end would prove effective. The dissent of a single powerful nation might render it altogether nugatory. The delegates are, therefore, enjoined not to give the weight of their influence to the promotion of projects the realization of which is so uncertain.

INSTRUCTIONS, *supra* note 30, at 7–8.

British military reaction following the conference paralleled the American delegation instructions. Lord Wolseley, Commander-in-Chief of the British Army, wrote to the British Secretary of State on Oct. 7, 1899, with the following comments:

> Restrictions on scientific inventions deprive a nation of the advantages which accrue from its scientific men and from the productive capacity of its manufacturing establishments.

The Commission I subcommission on land warfare considered the Russian proposal for a prohibition on the discharge of explosives or projectiles from balloons or by "similar methods" with little formal discussion, adding the word "new" between "similar" and "methods" to clarify the proposal's intent. The proposal was adopted without consideration of a recommendation by the German delegate to limit the prohibition to a term of five years. With the exception of the delegate from Rumania, who reserved his vote in preference for a limitation on the prohibition to a term of five years, and British abstention, the subcommission vote was unanimous in adoption of the resolution.[43]

Crozier's Amendment. Nine days later, however, apparently following consultations with other members of his delegation and reconsideration of the Secretary of State's instructions to the U.S. delegation, the U.S. delegate to the subcommission, Captain William Crozier, an Army artillery officer, attempted to reopen discussion of the prohibition within the subcommission.[44] Crozier noted that:

> [I]t seems to me difficult to justify by a humanitarian motive the prohibition of the use of balloons for the hurling of projectiles or other explosive materials. We are without experience in the use of arms whose employment we propose to prohibit forever. Granting that practical means of using balloons can be invented, who can say that such an invention will not be of a kind to make its use possible at a critical point on the field of battle, at a critical moment of the conflict, under conditions so defined and concentrated that it would decide the victory and thus partake of the quality possessed by all perfected arms of localizing at important points the destruction of life and property and of sparing the sufferings of all who are not at the precise spot where the result is decided. Such use tends to diminish the evils of war and to support the humanitarian considerations which we have in view.
>
> I do not know of machines thus efficient and thus humanitarian, in the incomplete stage of development in which aerostation now is; but is it desirable to shut the door to their possible introduction among the permitted arms? In doing so, would we not be acting entirely in the dark, and would we not run the risk of error inherent in such a manner of procedure? The balloon, as we know it now, is not dirigible; it can carry but little; it is capable of hurling, only on points exactly determined and over which it may pass by chance, indecisive quantities of explosives, which would fall, like useless hailstones, on both combatants and non-combatants alike. Under such conditions it is entirely suitable to forbid its use, but the prohibition should be temporary and not permanent. At a later stage of its development, if it be seen that its less desirable qualities still predominate, there will still be time to extend the prohibition; at present let us confine our action within the limits of our knowledge.
>
> That is why I have the honor to propose the substitution of the following text for the text already voted:
>
> For a period of five years from the date of the signature of this act it is forbidden to employ balloons or other similar means not yet known for the purpose of discharging projectiles or explosives.[45]

It can be proved to the hilt that scientific development of engines of destruction had tended
(a) to make nations hesitate before going to war;
(b) to reduce the percentages of losses in war;
(c) to shorten the lengths of campaigns, and thus to reduce to a minimum the sufferings endured by the inhabitants.

Watt, in RESTRAINTS ON WAR, *supra* note 39, at 60–61.

43. PROCEEDINGS, *supra* note 41, at 342.

44. Captain Alfred Thayer Mahan, USN, was a member of the U.S. delegation and Crozier's co-delegate on Commission I. Mahan represented the United States before the subcommission addressing naval warfare matters, while Crozier was the U.S. representative before the subcommission on land warfare. Mahan was of rather firm opinion on these matters and, there appears no doubt, that Crozier was "counseled" on his responsibilities by Mahan, who was his senior in rank, experience, and knowledge of international affairs. B. TUCHMAN, *supra* note 33, at 262; and Hawkins, *supra* note 33, at 84.

45. PROCEEDINGS, *supra* note 41, at 353–54.

The President of the subcommission declined Captain Crozier's amendment because the proposal had been voted on, and suggested that he raise the matter in the next plenary session of Commission I, to be held two weeks later.

Captain Crozier's presentation at that subsequent meeting was briefer, but to the point: it was correct to limit aerial bombardment at this time,

> Since it is impossible to foresee the place where the projectiles or other substances discharged from a balloon will fall and since they may just as easily hit inoffensive inhabitants as combatants, or destroy a church as easily as a [artillery] battery. However, if it were possible to perfect aerial navigation in such a way as to do away with these defects, the use of balloons might decrease the length of combat and consequently the evils of war as well as the expenses entailed thereby.[46]

Crozier's amendment proposing a five-year moratorium enabled the delegates to take a wait and see attitude toward aeronautical developments and postpone any decision until the Second Hague Peace Conference, while gaining unanimity for the proposal under consideration. Crozier's amendment was accepted by Commission I. Ultimately the Conference changed the original language of the subcommission's resolution "similar new methods" and adopted a Declaration (IV, I) that prohibited: "for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature."[47]

Crozier's action has been credited with saving the prohibition, at least at the first conference.[48] In all likelihood this analysis is correct, for with several major powers unwilling to accept an unlimited prohibition—and it seems certain that it would not have been accepted by France, Germany, Great Britain, or the United States—it is unlikely that other nations would have accepted the prohibition unilaterally. Captain Crozier's amendment also changed the focus of the debate from prohibition of aerial bombardment, a disarmament issue, to regulation of aerial bombing, a law of war area.

C. Disarmament or Deterrence?

Disarmament advocates anticipating the First Hague Peace Conference were dismayed by Count Muraviev's latter proposal set out earlier in this article: "7. Revision of the declaration concerning the laws and customs of war . . . ,"[49] because the law of war constituted an acceptance of the inevitability of war, rather than striving for general disarmament and world peace. The law of war also was viewed with pessimism by some military delegates to the conference, but for different reasons. For these men it seemed impractical to speak of moderation in war.[50]

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46. PROCEEDINGS, *supra* note 41, at 280.

47. Hague Declaration (IV, 1) To prohibit for the term of five years the launching of projectiles and explosives from balloons, and other new methods of a similar nature (July 29, 1988), SCHINDLER & TOMAN, *supra* note 27, at 50, 141–45; F. HOLLS, *supra* note 30, at 377; HAGUE CONVENTIONS, *supra* note 30, at 220–22. The treaty ultimately was ratified by all nations party to the negotiations except Great Britain.

48. Kuhn, *The Beginnings of an Aerial Law*, 4 AM. J. INT'L LAW 118 (1910).

49. F. HOLLS, *supra* note 30, at 26; INSTRUCTIONS, *supra* note 30, at 4; HAGUE CONVENTIONS, *supra* note 30, at xvii.

50. For example, the senior British naval representative to the conference was Vice Admiral Sir John A. Fisher, RN, whose philosophy toward the law of war has been described as follows:

> Fisher's ideas as to war, and especially as to naval war, were all based upon those current in Nelson's time. He was a bit of a barbarian who talked like a savage at times, to the no small scandal of his colleagues at The Hague.
>
> "The humanizing of War!" he declared. "You might as well talk of humanizing Hell! When a silly ass at The Hague got up and talked about the amenities of civilized warfare and putting your

The pessimism had two bases. The first was the philosophy expressed in article 29 of the Lieber Code, that the more vigorously wars are pursued, the briefer they will be, and the less humanity will suffer.[51] This philosophy has never been rejected by any nation, and, in fact, was a part of the basis for U.S. employment of atomic weapons against Hiroshima and Nagasaki in 1945.[52] A corollary is manifested by the theory that a promise of prosecution of a war without moderation may deter aggression by others. This theory of deterrence was adopted by air power advocates and pursued with vigor by a number of nations, commencing with the writings of Giulio Douhet.[53a] It is not the intention of this article to join the debate over the degree to which the between-the-wars airpower planners were influenced by Douhet, or the degree to which airpower contributed to the allied victory in World War II, but rather to illustrate that there existed a philosophy that militated against regulation of warfighting as such.

The second argument against regulations moderating war is more practical. It comes from the degree of control a nation or its military forces has over implementation of the law of war. Where a nation has total control over law of war implementation, the law of war has been moderately successful. But where the law of war largely is dependent upon the good faith of other nations, both promulgation and implementation of the law have been substantially less successful.

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prisoners' feet in hot water and giving them gruel, my reply, I regret to say, was considered totally unfit for publication. As if war could be civilized! If I'm in command when war breaks out I shall issue my orders'':

"The essence of war is violence."

"Moderation in war is imbecility."

"Hit first, hit hard, and hit anywhere." [Footnote omitted.]

He [continued Stead] had the not uncommon notion . . . that nations are deterred from going to war by fear of the atrocities which accompany conflict. He exclaimed impatiently . . . "What you call my truculence is all for peace. If you rub it in, both at home and abroad, that you are ready for instant war with every unit of your strength in the first line, and intend to be first in, and hit your enemy in the belly, and kick him when he is down, and boil your prisoners in oil (if you take any!), and torture his women and children, then people will keep clear of you." [Footnote omitted.]

A. MARDER, THE ANATOMY OF BRITISH SEA POWER 347 (1976), quoting from BACON, FISHER, (I), 75–76, 120–22, 171 (London, 1929). The pessimistic philosophy expressed by Fisher is mirrored in the official instructions to the British and American delegations, BRITISH DOCUMENTS, *supra* note 42, at 226; INSTRUCTIONS, *supra* note 30, at 7–8. Fisher had his predecessors in the U.S. Army. In a letter dated Sept. 4, 1864, to Chief of Staff of the Army General Henry Wager Halleck from General William Tecumseh Sherman, Sherman observed: "If the people raise a howl against my barbarity and cruelty, I will answer that war is war, and not popularity-seeking. If they want peace, they and their relatives must stop the war." W. SHERMAN, MEMOIRS OF W. T. SHERMAN II 111 (1891).

51. HARTIGAN, *supra* note 25, at 50.

52. This article examines the political, diplomatic, military, and legal history of the development of the law of war as it relates to conventional bombing only. Nuclear weapons are *lex specialis*, and the law of war relating to them is substantially less developed. However, their use against Hiroshima and Nagasaki in August 1945 centers on the argument that their employment saved far more lives (by hastening the Japanese decision to surrender) than they cost. For an analysis of this point, *see* S. HARPER, MIRACLE OF DELIVERANCE: THE CASE FOR THE BOMBING OF HIROSHIMA AND NAGASAKI (1985). *See* CLAUSEWITZ, ON WAR 75 (Howard and Paret, eds. and trans. [1976]):"Kind-hearted people might of course think there is some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst." For an excellent discussion that places Clausewitz in perspective with the modern law of war, *see* HOWARD, *supra* note 16. *See also* MARDER, *supra* note 50, at 76.

53a. G. DOUHET, THE COMMAND OF THE AIR 203–07 (R. Kohn & J. Harahan, eds. 1983).

For example, regulations related to the care for and protection of enemy prisoners of war have proved successful because the captor has complete control of the situation. If an enemy soldier resists after capture, or attempts escape, the captor has the ability to resolve the matter to his favor. But this is not the case with rules that affect the employment of force. A rule proposing moderation in the use of weapons systems, ostensibly for the protection of the civilian population of an enemy nation, or the civilians of a friendly nation occupied by an enemy, is dependent upon respect for the law by both the attacker and the defender. But international law has no effective enforcement mechanism, and a malevolent belligerent, whether attacker or defender, stands to gain potentially significant tactical advantages over a law-abiding opponent. It was this concern that made military men reluctant to support the regulation of hostilities. As international law scholar Julius Stone concluded years later, "It is far easier to moralize about air attacks on civilians, and to offer soothing verbal solutions, and to dismiss target area bombing as probably unlawful, than to frame rules for mitigation of human suffering with some hope of belligerent observance amid the realities of modern war."[53b] This problem plagued law of war negotiators at the First Hague Peace Conference, and all succeeding conferences to the present day.

D. Commission II

Commission II was assigned the responsibility for codification of the law of war, which it did with moderate success. The Hague Conference adopted Convention II with Respect to the Laws and Customs of War on Land. Article 23(g) of the Annex to Convention II provided that "it is especially prohibited . . . to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[54]

In applying this principle, a fundamental corollary has been the principle of discrimination; that is, that military violence will be directed toward military targets. The two articles in the Annex of Convention II applicable to aerial bombardment state:

> 25. The attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited.
>
> 27. In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.[55]

The intent of these articles was to codify existing practice, rather than create new law.[56] But there are matters of significance associated with articles 25 and 27.

"Undefended" town. The term was well defined in practice, but remained undefined in article 25 of the Annex of Convention II of the treaty, perhaps because

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53b. J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 627 (1954).

54. SCHINDLER & TOMAN, *supra* note 27, at 76–77; F. HOLLS, *supra* note 30, at 437. Of note is that articles 14 and 15 of the Lieber Code state the same principle. HARTIGAN, *supra* note 25, at 48. What the Lieber Code authorizes, however, Convention II prohibits. This is a manifestation of the fundamental distrust international lawyers have for things military, and a reluctance to permit battlefield commanders any latitude in situations that require a judgment call. This affects the credibility of the law of war in its implementation by the military.

55. SCHINDLER & TOMAN, *supra* note 27, at 77–78; F. HOLLS, *supra* note 30, at 439.

56. J. SCOTT, I THE HAGUE PEACE CONFERENCES OF 1899 and 1907 537 (1939) [hereinafter HAGUE PEACE CONFERENCES].

it was assumed the term was commonly understood. Because the treaty did not define the term, however, it caused a great deal of confusion in the years that followed. One scholar noted the background of the term: "Unfortified cities were not attacked because they were not of sufficient military importance, and all that was necessary to take them was to march in without the necessity of resorting to bombardment."[57] The term had but one meaning, as previously stated: it was a town or city lacking military defenses and open to physical occupation by the enemy. And yet it created problems. When during World War I the zeppelin raids commenced, British defense authorities hesitated in placing antiaircraft guns in and about London for fear that such gun placement would make the city "defended," and, therefore, subject to attack—or, conversely, that the city would be legally immune from attack so long as it contained no gun emplacements.[58]

Either interpretation would have been incorrect. As a German delegate observed, article 25 was not intended to prohibit the intentional destruction of any buildings, when military operations rendered it necessary. His observation met with no objection in the subcommission and was noted in the subcommission's report of July 5, 1899.[59] Yet a misunderstanding of "undefended towns" plagued politicians, military planners, international lawyers, and historians for many years.[60]

The reciprocal nature of the law of war. The law of war succeeds only insofar as it does not provide, or appear to provide, an opportunity for one party to gain a tactical advantage over another. The delegates to the First Hague Peace Conference recognized this in the language of article 27 of the Annex of Convention II, which provides limited protection for certain civilian objects, such as hospitals, museums, and schools, so long as each is not being used for military purposes. Although article 27 essentially addresses minimization of collateral damage, it has a kinship to the prohibition contained in article 23(g) on intentional attack of all civilian property. In retrospect, it would have been wiser for the delegates to have made a clearer connection between the concepts expressed in these two articles.

Issue avoidance. The delegates to the First Hague Peace Conference attempted to codify the law of war only to the extent consensus could be reached. Controversial

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57. Quindry, 2 *Aerial Bombardment of Civilian and Military Objectives*, 2 J. AIR L. & COM. 474–509, at 484 (Oct. 1931). The term "unfortified" was used in the Brussels Rules of 1874, Article 15; it was changed to the broader "undefended" in Article 25 of the Annex of Convention II of 1899. *See* SCHINDLER & TOMAN, *supra* note 27, at 29, 77–78.

58. C. COLE & E. CHEESMAN, THE AIR DEFENCE OF BRITAIN 1914–1918 6 (London, 1984).

59. PROCEEDINGS, *supra* note 41, at 424.

60. In many cases this confusion was the product of inadequate research, usually as a result of reading the language of the treaty only. The intent was clear: "It is to be noticed that this article speaks of undefended, not of unfortified, towns. Only where there are no fortifications, no troops, and no open resistance by the population, does this article apply." BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS 287 (1908). The U.S. Army's law of war manual, which would have provided guidance to Army Air Corps planners through World War II, offered clarification in each of its editions (1914, 1917, 1940, 1944, and 1956). The language was further clarified in 1976 in change 1 to FIELD MANUAL 27–10, The Law of Land Warfare (1976) by addition of the following to paragraph 39:

> b. Interpretation. An undefended place, within the meaning of Article 25, HR, is any inhabited place near or in a zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance. In order to be considered as undefended, the following conditions should be fulfilled:
>
> (1) Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;
> (2) no hostile use shall be made of fixed military installations or establishments;
> (3) no acts of warfare shall be committed by the authorities or by the population; and,
> (4) no activities in support of military operations shall be undertaken.

areas, such as reprisal, were avoided, as was any acknowledgement of the inevitability of collateral or incidental civilian casualties in modern war. The delegates addressed (obliquely) the subject of collateral damage to civilian objects in the admonitory language of article 27; but the issue of collateral civilian casualties was ignored—or avoided. Perhaps this was due in part to the fact that extension of a conflict beyond the immediate battlefield was not contemplated. Yet more could have been said and was said thirty-six years earlier by the Lieber Code: "Art. 15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war."[61]

The First Hague Peace Conference passed into history. After five years, the prohibition on discharge of explosives from balloons or by other new methods lapsed.[62] Moves were afoot for a second conference, but the formal call for a conference had to be delayed for a number of reasons, not the least of which was the conclusion on September 5, 1905, of the Russo-Japanese War. Although President Theodore Roosevelt earlier had been approached to propose a second conference, and actually had begun steps in that direction in 1904, he relinquished that privilege to Tsar Nicholas II following receipt of a request to that effect delivered by the Russian Ambassador to Washington.[63]

IV. THE SECOND HAGUE PEACE CONFERENCE OF 1907

A. Background

A great deal had occurred since the First Hague Peace Conference that would affect the second conference, which convened at The Hague on June 15, 1907. The Wright Brothers had accomplished man's conquest of the air; their efforts, along with those of Alberto Santos-Dumont, were watched carefully in both the public and private sectors. France, Germany, Russia, and Italy had commenced programs for the production of military dirigibles; the threat of attack from the air loomed larger. But domestic politics also had come into play; the Liberal Government of Great Britain was committed to a reduction of its military and naval budgets.

The Tsar's call for a second conference eschewed limitation of armaments issues,[64] as Russia, with recent military defeat behind it, was more interested in undertaking an arms buildup than it had been at the time of the First Hague Peace Conference. While Britain was anxious to add disarmament to the conference agenda, Germany made it clear that its delegates would walk out of the conference if the subject of disarmament were raised. All of these matters have been discussed in greater detail elsewhere,[65] but they set the tone for the conference.

B. Convention II of 1899 and Convention IV of 1907

As with the First Hague Peace Conference of 1899, the work of the Second Hague Peace Conference of 1907 was divided among various commissions. The First Com-

61. HARTIGAN, *supra* note 25, at 48.
62. Hague Declaration (IV, 1) SCHINDLER & TOMAN, *supra* note 27, at 50, 141–45; F. HOLLS, *supra* note 30, at 95, 377; HAGUE CONVENTIONS, *supra* note 30, at 220–22.
63. HAGUE CONVENTIONS, *supra* note 30, at xix–xxix.
64. I THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907 I (J. Scott ed. (1920)) [hereinafter I PROCEEDINGS OF 1907].
65. B. TUCHMAN, *supra* note 33, at 277–88; GELLIN, NO LONGER AN ISLAND (London, 1984), particularly chapter IX; and C. GIBBS-SMITH, THE REBIRTH OF EUROPEAN AVIATION (London, 1974).

mission examined the topics of an international prize court, pacific settlement of international disputes, obligatory arbitration, court of arbitral justice, and limitation of the employment of force for the recovery of ordinary public debt. The Second Commission dealt with land warfare. The Third Commission handled warfare on the sea. The Fourth Commission reviewed juridicial relations incident to the latter. The 1907 Hague Conference adopted thirteen Conventions and one Declaration. The issues assigned to the Second Commission are germane to this article.

The prohibition on delivery of munitions from aerial platforms was considered for renewal. Some opposition to the renewal was expressed, in part because of the restriction on bombardment contained in article 25 of the Annex to Convention II of 1899. Ultimately the prohibition was renewed, but rather than for another set term of five years as it was originally in Declaration (IV, I) of 1899, it was left in effect until the Third Hague Peace Conference. That conference never took place and the prohibition in its subsequent form known as Declaration XIV of 1907,[66] generally is regarded as having no legal significance.[67] Of historical interest (but not significance) is that while France, Germany, Italy, Japan, Russia, and the United States ratified the 1899 prohibition, Great Britain did not; only Great Britain and the United States committed themselves to the 1907 treaty. Because the treaty was only binding in case of war between parties to it, the treaty had no effect in World War I or II.

The prohibition essentially had been supplanted by language amending article 25 of the Annex to Convention II of 1899. In its subsequent form as article 25 of the Annex to Convention IV of 1907, article 25 reads: "The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited. (Emphasis notes the amending language.)"[68]

C. Convention IX of 1907

Attempts to bring naval forces under the rubric of Convention II of 1899 had proved unsuccessful at the First Hague Peace Conference, and became part of the Tsar's agenda for the second conference. This endeavor proved successful, but not without adding to the confusion in the process. Convention IX of 1907 *Concerning Bombardment by Naval Forces in Time of War* provided clearer rules—and authority—than did either Convention II of 1899 or its successor, the 1907 Convention IV, both of which pertain to the *Laws and Customs of War on Land*.[69] While repeating the restrictions on bombardment contained in the 1907 Convention IV (as well as the prohibition on attack of undefended towns, again without definition of the term), article 2 identified particular military objects that could be attacked, and recognized the inevitability of collateral damage in the execution of such attacks. While this created further confusion in interpretation of the law of war, some people believing (erroneously) that naval forces had greater latitude in execution of attacks than ground forces, a review of the negotiating record indicates that the drafters of 1907 Convention IX simply were more equal to the task. With the exception of naval authority to engage in punitive bombardment of an undefended

66. SCHINDLER & TOMAN, *supra* note 27, at 141–46.
67. J. STONE, *supra* note 53, at 623.
68. SCHINDLER & TOMAN, *supra* note 27, at 77–78. Article 27 also was amended to add historic monuments to the list of specially-protected property.
69. SCHINDLER & TOMAN, *supra* note 27, at 54, 723–30.

city if its requisition of supplies were declined, the obligations and authority regarding bombardment essentially were the same—and were intended to be.[70]

Military significance of a target. The 1907 Convention IX was significant for other reasons. It was the first treaty codification, or acknowledgment, that bombardment (or bombing) was related to the military significance of the target rather than whether the city, town, or village in which the target was located was defended.[71] It also served to confirm the permissibility of attacking targets wherever located. It provided the only list of lawful targets contained in any law of war treaty which, while incomplete by World War I, World War II, and modern standards, nonetheless, was an improvement over past and future treaties.[72] Article 2 listed as lawful targets "military works, military or naval establishments, depots of arms or war materiel, workshops or plant(s) which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor." Thus lawful targets were not limited to objects purely military in nature, but included industrial targets of value to the enemy war effort. The list was regarded by the head of the U.S. delegation as declaratory of customary international law as it existed in 1907.[73]

Unavoidable collateral damage. Of equal importance was that the treaty absolved the attacker of responsibility for "unavoidable" collateral damage. This was not new law; this, again, was a codification of the customary practice of nations. What must be realized is that collateral civilian casualties were regarded as the cost of war to a nation rather than the responsibility of the attacker. As one international law scholar of the time noted:

> *Bombardment of the resident portions of towns.*—It has been questioned whether towns separated somewhat from the fortifications which defend them are liable to bombardment. This is a part of the larger question as to whether the portions of towns not used for military purposes are exempt from bombardment. It must be admitted, however, that this is one of the rigors of war which belligerents have held to be so useful as not to be given up. Of its hardship there can be no question, though it cannot compare with that of a siege.[74]

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70. Committee II was responsible for the redraft of the 1989 Hague Convention II (with respect to the laws and customs of war on land) into the 1907 Hague Convention IV (respecting the laws and customs of war on land), while Committee III drafted Hague Convention IX (concerning bombardment by naval forces in time of war). That there was little or no coordination between the two committees is illustrated by the prefatory language in the naval bombardment treaty (Hague Convention IX of 1907), which refers to the Hague Convention II Regulations of 1899, rather than its successor (Hague Convention IV of 1907), then being drafted with only slight change. SCHINDLER & TOMAN, *supra* note 27, at 63–92, 723–29. For additional detail on the confusion created, *see* Carnahan, *The Law of Air Bombardment in Its Historical Context*, 17 A. F. L. REV. 39–49 (1985). The intent to meld land and naval rules dated from efforts of the Institute of International Law at Oxford in 1881. HAGUE PEACE CONFERENCES, *supra* note 56, at 587–98. The U.S. delegation to the Second Hague Peace Conference of 1907 regarded Hague Convention IX as bringing the rules of land and naval warfare into "exact harmony." The Institute of International Law, meeting at Madrid in 1911, concluded that "aerial war is permitted, but on the condition of not presenting greater dangers than land or sea war for the persons or properties of the peaceful population." J. WESTLAKE, II INTERNATIONAL LAW, WAR (Cambridge, 1913). While each of these statements seems to indicate the clear intent of the 1907 conferees to establish one legal regime for bombardment by land and naval forces, the conferees exacerbated the problem with the statement in the Final Act of the 1907 conference expressing the hope that "in the program of the next conference, and that in any case the powers may apply, as far as possible, to war by sea the principles of the convention relative to the laws and customs of war on land." I PROCEEDINGS OF 1907, *supra* note 64, at 289.

71. Williams, *Legitimate Targets in Aerial Bombardment*, 23 AM. J. INT'L LAW 570–81 at 572 (1929).

72. SCHINDLER & TOMAN, *supra* note 27, at 147–57. The Hague Rules of Air Warfare of 1923, though containing a list of lawful targets, were never adopted by any nation.

73. INSTRUCTIONS, *supra* note 30, at 112; report to the Secretary of State of the U.S. Delegation to the Second Hague Conference.

74. BORDWELL, *supra* note 60, at 287.

As previously noted, collateral civilian casualties during a siege were regarded as a burden upon the besieged commander—an inducement to end the siege. Bombardment not connected to a siege but resulting in collateral civilian casualties was not illegal; it was merely a cost of doing the business of war.

D. Technological Changes

From an academician's standpoint, the Second Hague Peace Conference might be regarded as a disaster. Lawyers on the United States delegations to the 1899 and 1907 conferences sought to regulate (if not prohibit) "uncontrollable forces dangerous to neutrals or noncombatants."[75] There had been partial success in that article 1 of Convention VIII of 1907 *Relative to the Laying of Automatic Submarine Contact Mines* required self-neutralization mechanisms on unanchored naval contact mines, on anchored naval contact mines that broke loose from their moorings, or for torpedoes that missed their target. This was not a great international law achievement, however, inasmuch as such a proscription was consistent with prudent military practice; the free-floating mine or torpedo posed a threat to its own forces as much as to enemy or neutral shipping.

An increasing capability for controlled flight had destroyed forever any chance of prohibiting bombing in future conflicts. One international lawyer viewed the outcome of the 1907 Hague Peace Conference as a "direct retrogression from the humanitarian viewpoint" in that the conferees were unable to "restrict the means of warfare to those heretofore employed."[76] This position manifests a fundamental problem with codification of the law of war: some international lawyers want to roll the clock back to the "good old days" of warfare while concluding that any progress in technology must be less humane. Each premise is erroneous. But rather than work with change, there has been—and continues to be—a resistance to change, and codification has suffered accordingly.[77] The result is basic to this article and the questions it raises; the rules codified in 1907 at The Hague were the rules in effect when war broke out thirty-two years later, unchanged by any subsequent treaty. The Hague Peace Conferences of 1899 and 1907 were the first—and last—successful effort at codification of regulations affecting combat operations.[78] There were subse-

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75. KUHN, *supra* note 48, at 119.

76. *Id. See also* HAGUE PEACE CONFERENCES, *supra* note 56, at 653–54.

77. In part, this may be because most international lawyers have little knowledge of military operations, doctrine, and technology. For example, at the 1974–1977 Geneva Diplomatic Conference, the international lawyers who were delegates went to extraordinary lengths to establish a legal regime for protection for medical aircraft operating in a combat environment, finally arriving at provisions that they hailed as a great advance in the law of war. *See*, Solf, *Protection of Medical Aircraft*, 24 U.S. ARMY AVIATION DIG. 15–17 (Apr. 1978); 33–36 (May 1978); 26–29 (June 1978); and 12–19 (July 1978). However, the provisions are highly dependent on agreement between the parties to the conflict in the area in which an aircraft would be flying its mission, which would be virtually impossible on the modern electronic battlefield. When the principal negotiator of these provisions was asked by the author about this dilemma, he confessed that neither he nor any other Geneva negotiator ever considered the potential impact of electronic warfare on their work. He acknowledged that he knew nothing about electronic warfare.

78. Save and except for the 1923 Hague Air Rules, SCHINDLER & TOMAN, *supra* note 27, no attempt was made to amend or update the 1907 Hague law of war treaties until 1974. If one considers the technological advances made in aviation, bombing, and air defenses during the sixty-seven year span between the 1907 Hague Peace Conference and the Geneva Diplomatic Conference that met from 1974 to 1977 to produce the 1977 Additional Protocols I and II, or the advances that occurred from 1907 to 1945, one can appreciate how far behind technology the law of war lagged. The treaty that was to update Hague Conventions IV and IX of 1907, the 1977 Protocol I, was not successful in that endeavor. The United States and France have decided not to become a party to it. By 1988, of the principal participants in World War II, only Italy had ratified Protocol I.

quent treaties dealing with military wounded and sick, hospital ships, prisoners of war, and chemical and bacteriological warfare, but the rules formulated in 1899 and 1907 provided the only law of war guidance available to the military men who planned and executed the air campaigns of World War II.

Efforts to continue codification of the law of war began at the Second Hague Peace Conference. In the *Final Act* of that conference, the conferees recommended that a preparatory committee appointed by governments should begin planning for the Third Hague Peace Conference, which they recommended be held in 1914, two years in advance of the conference.[79] Arrangements for a third conference had begun, but were overcome by the commencement of World War I. This may have been propitious. As Lee Kennett has noted, "In the years leading up to 1914, the major powers had given little attention to the legal and moral implications of the weapons they were developing. Most of them were preoccupied with the technical aspects of bombing."[80]

Had a Third Hague Peace Conference been held on the eve of World War I, there is a strong possibility that the progress in codification of the law relating to aerial bombardment that was accomplished at the first two conferences might have been lost altogether. Conventions IV and IX of 1907 were intended to be no more than a codification of the customary practice of nations and, properly read, relieved an attacker of any responsibility for collateral damage or collateral injury short of indiscriminate bombing. But nations are reticent to regulate a new means of war with rules that might have the potential of hampering its effective employment, or limit its use against an opponent who has no concern for the law of war. At a meeting of the Institute of International Law in 1911, some members continued to press for abolishment of the airplane as a weapon of war, while others urged special rules for its employment. But rules are made by nations, and any such attempt to slow the advance of aviation in the years immediately preceding World War I would have been much the same as the proverbial broom sweeping to hold back the tide.

E. Observations of Early Aerial Campaigns

The aerial bombing campaigns of World War I, the Zeppelin and Gotha offensives, the Allied counteroffensives (executed or planned), and other bombing operations, have been described in other works.[81] It is obvious that law of war considerations

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79. II THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, 289–90 (J. Scott ed. 1909) [hereinafter II HAGUE PEACE CONFERENCES].

80. KENNETT, *supra* note 38, 19–20. *See also* MORROW, BUILDING GERMAN AIRPOWER (1976), and HIGHAM, THE BRITISH RIGID AIRSHIP 1908–1931 (London, 1961).

81. *See* W. RALEIGH & H. JONES, THE WAR IN THE AIR (Oxford, 1922–1927); THE U.S. AIR SERVICE IN WORLD WAR I (Maurer, 1979); C. WISE, CANADIAN AIRMEN AND THE FIRST WORLD WAR (Toronto, 1980); J. MORRIS, THE GERMAN AIR RAIDS ON GREAT BRITAIN 1914–1918 (London, 1920–1969); G. NEUMANN, THE GERMAN AIR FORCE IN THE GREAT WAR (London 1921, 1969); J. CUNEO, WINGED MARS (1942); J. CUNEO, THE AIR WEAPON (1947); Fredette, *Bombers of the Black Cross: German Bombardment Aviation in World War I*, 7 THE AIRPOWER HIST. 165–77 & 205–15 (1960); C. WEBSTER & N. FRANKLAND, I THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939–1945, 34–51 (London, 1961); K. POOLMAN, ZEPPELINS AGAINST LONDON (1961); G. HADDOW & P. GROSZ, THE GERMAN GIANTS (London, 1962); D. ROBINSON, THE ZEPPELIN IN COMBAT (1962); R. FREDETTE, THE SKY ON FIRE (1966); F. MASON, BATTLE OVER BRITAIN 17–40 (London, 1969); H. PENROSE, BRITISH AVIATION: THE GREAT WAR AND ARMISTICE, 1914–1918 (London, 1969); R. HIGHAM, AIR POWER: A CONCISE HISTORY (1972); N. JONES, THE ORIGINS OF STRATEGIC BOMBING (London, 1973); B. POWERS, STRATEGY WITHOUT SLIDE-RULE 11–106 (London, 1976); H. CASTLE, FIRE OVER ENGLAND (London, 1982); C. COLE & E. CHEESMAN, THE AIR DEFENCE OF BRITAIN, 1914–1918 (London, 1984); M. COOPER, THE BIRTH OF INDEPENDENT AIR POWER (London, 1986); and C. WHITE, THE GOTHA SUMMER (London, 1986).

received little (if any) attention, except as a tool for propaganda alleging indiscriminate attacks by the enemy. Several observations can be made about the campaigns conducted by the warring parties, however:

1. The practice of the various nations provided a fairly clear indication of the types of objects regarded as lawful targets: military and naval bases; warehouses, airfields, and docks; lines of communication; and industrial targets that offered a contribution to the enemy's war effort. (The degree of contribution established the priority of attack, not the legality of the target.)

2. While industrialization of the modern European societies and mobilization of their citizenry for "total war" further clouded the distinction between combatant and civilian, bombing operations were regarded as analogous to naval blockade or siege, in which the blockader or besieger saw collateral injury as a natural, inevitable, and lawful consequence of such operations. In the very best case, collateral civilian casualties resulting from the attack of a legitimate target were not regarded as the responsibility of an attacker, as the ability to limit such casualties lay more with the defender or, for that matter, with the civilian population itself. This was the case with regard to civilians in the vicinity of ground combat operations, and no special legal regime to the contrary had been proposed, much less established, for aerial bombardment.[82]

3. Whether a particular operation was regarded as "illegal" or "immoral" depended entirely upon whether the person was the bomber or the "bombee," that is, the recipient of the bombs.

4. Bombing did have an effect upon morale on both sides. German steel manufacturers reported a thirty percent decrease in worker efficiency during the period of air attacks on the Saar and Lorraine Luxembourg in 1916,[83] while British Minister of Munitions, Winston Churchill, in a meeting of the War Cabinet on October 1, 1917, established that German air raids on preceding nights had had a pronounced effect on employee attendance and production at Woolwich Arsenal. As the official British history noted, "the loss of output was out of all proportion to the percentage of employees who stayed away from work."[84] This effect is mentioned not to enter into the debate as to the efficacy of attacks on morale,[85] but to suggest that both sides

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82. For example, following the second Gotha raid on London (7 July 1917), the British War Cabinet, under heavy public pressure to undertake retaliatory actions, sought legal advice regarding the bombing of cities. The responding memorandum of law stated: "No legal duty has been imposed on attacking forces to restrict bombardment to actual fortifications, and the destruction of its public and private buildings has always been regarded as a legitimate means of inducing a town to surrender." Mills, *Bomber Command of the Royal Air Force*, 7 AIR U. Q. REV. 40 (Spring, 1955).

83. WILLIAMS, *supra* note 71, at 581, n.36.

84. 5 RALEIGH & JONES, *supra* note 81 at 86–88. *See* POWERS, *supra* note 81, at 22.

85. Post-World War II critics of the strategic air offensive against Germany have argued that the attack on the morale of the German people was unsuccessful, *see* HASTINGS, *supra* note 8, at 323 and BEST, *supra* note 8, at 283 quoting WRIGHT, ORDEAL OF TOTAL WAR 181 (1968), for the most part relying upon a single paragraph in the *Summary Report (European War)*, THE UNITED STATES STRATEGIC BOMBING SURVEY 16 (1945). However, the assessment by the Morale Division of the U.S. Strategic Bombing Survey (USSBS) was quite specific in concluding that "Bombing seriously depressed the morale of German civilians." *The Effects of Strategic Bombing on German Morale*, THE UNITED STATES STRATEGIC BOMBING SURVEY 1 (1947). Any discrepancy between the two reports may be explained by the fact that John Kenneth Galbraith, a civilian with the USSBS who held strongly antibombing prejudices, was highly influential in the contents of the Summary report and actively sought to downplay the effect of strategic bombing. Galbraith, *After the Air Raids*, 32 AM. HERITAGE 65–80 (Apr./May 1981). *See also* M. ISAAC, STRATEGIC BOMBING IN WORLD WAR TWO: THE STORY OF THE UNITED STATES STRATEGIC BOMBING SURVEY (1976). "The 'area' bombing attacks did have a direct and palpable effect on the morale of the German population, and the German leadership, in response to that impact, seriously skewed Germany's strategy." W. MURRAY, LUFTWAUFFE 283 (1985). Murray's finding is supported by R. Overy in GOERING 77–108, 156–57, 94–97, 226 & 228 (London,

from World War I had experience to indicate there was value in such attacks. Certainly the theory of demoralizing the enemy in this way was consistent with the theory of collateral casualties as a burden on the commander of a besieged area.

5. Suffering visited upon the civilian population occurred more through errors in target identification and/or bombing accuracy than malice aforethought, and were compounded as air defenses improved. Strengthening defenses forced each side to resort to the cover of darkness in carrying out its attacks, which had a concomitant effect on target identification and bombing accuracy. It was a vicious circle of cause and effect that was to repeat itself in World War II and, more recently, in the U.S. air strike against Libya in April 1986.[86]

6. Airpower did not cause the greatest civilian suffering during World War I; the British naval blockade of Germany during the war resulted in the deaths of a far greater number of civilians, especially women, children, and the elderly, than did the strategic bombing offensives of World Wars I and II combined.[87]

7. However inaccurate, bombing was not the least discriminate weapon of World War I. That distinction lay with the German Paris Gun which, firing from distances up to seventy-five miles, could be aimed only at the center of Paris. Used in conjunction with the German offensive of March 1918, it had but one purpose: an attack upon the morale of the citizens of Paris.[88] As its use generally was regarded as lawful by international law scholars, statesmen, and military men of the time, it would be difficult to conclude that the more discriminate bomber was not legal, or that collateral civilian casualties were regarded as something other than an inevitable consequence of war.

Yet postwar periods inevitably bring efforts at modernization of the law of war, as was seen with the two Hague conferences, and the years following "The War to End

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1984). While the effect on morale cannot be disregarded completely as critics suggest, from the standpoint of military efficiency it appears to be an ancillary consideration in the attack of other targets rather than an effect that can be sought independently. *See also* Spaight, *Morale as Objective*, 3 THE ROYAL A. F. Q. 287 (Oct. 1951).

86. For a detailed description of the planning and execution of this attack, *see* Parks, *Crossing the Line*, 112 U.S. NAVAL INST. PROC. 40–52 (Nov. 1986).

87. It is estimated that almost 800,000 German civilians died of starvation as a result of the British naval blockade of Germany during World War I. D. SAWARD, *supra* note 4, at 299. Historian Michael Glover, using German sources, states that the British blockade was responsible for 726,766 deaths between 1915–1918. M. GLOVER, THE VELVET GLOVE 125 (London, 1982). On the blockade in general, *see* L. GUICHARD, THE NAVAL BLOCKADE (1930); A. BELL, A HISTORY OF THE BLOCKADE OF GERMANY (London, 1937); M. SINEY, THE ALLIED BLOCKADE OF GERMANY, 1914–1916 (1957); and R. HOUGH, THE GREAT WAR AT SEA 1914–1918 (London, 1983). As one Royal Air Force officer noted, "No woman or child can escape from the entirely indiscriminate effects of a naval blockade. But every woman and child, and indeed every man, in Germany [during World War II] could have escaped from the area bombing of German cities by decamping to the towns and villages and woods." G. Garrod, *The Ethics of Area Bombing: Correspondence*, CVII J. ROYAL UNITED SERVICE INST. 242 (Aug. 1962).

Curiously, while delegates to the 1974–1977 Diplomatic Conference strove so hard to formulate rules that would prohibit bombing beyond the immediate battlefront, nothing in Protocol I of 1977 would prevent a recurrence of the deaths caused by naval blockade. Article 49(3) provides that the rules stated in Protocol I relating to hostilities do apply to naval warfare to the extent that naval warfare actions may affect the civilian population, and article 54 prohibits starvation as a weapon of warfare, but only to the extent that the attack, destruction, removal, etc. (but not denial) of food is for the *specific purpose* of starvation of the civilian population. Starvation incidental to a total blockade is not prohibited. The relief provisions contained in articles 68–71 of Protocol I and articles 14 and 18(2) of Protocol II are permissive, as events in the 1980s in Ethiopia and the Sudan have shown. An estimated 250,000 people died of hunger and hunger-related diseases in southern Sudan in 1988 because of, in principal measure, delays by the Government of Sadik Mahdi in granting international relief organizations access to that area. Harden, *Life in Sudan Worsened Under Mahdi*, Washington Post, July 1, 1989, at A12. Mahdi was deposed by a *coup d'etat* on June 30, 1989.

88. H. MILLER, THE PARIS GUN (1930).

All Wars'' were no exception. While aerial bombardment may have been regarded as lawful, a bombing phobia had begun that would build until the beginning of World War II. This fear of being bombed would have an effect disproportionate to its military effectiveness.[89] This obsession had a four-fold, contradictory effect on interwar disarmament discussions and military planning that nullified the former while deceiving the latter. Fear of being bombed (a) led to public pressure for a prohibition or regulation of bombing; (b) which could not be accomplished unilaterally or in any way that was dependent upon trust in a ''piece of paper''; (c) this same fear produced a counterargument for bombing as a war deterrent; (d) should deterrence fail, it provided justification for the use of bombing to attack the will (morale) of the nation in order to exploit the obvious fear, the fear of being bombed. This thinking was an enlargement of the conventional acceptance of collateral casualties in a siege as a burden placed upon a defender. Strategic bombing was vertical envelopment of an enemy's military forces to attack a nation's means for waging war.

Coupled with this thinking was the determination by many nations, particularly Great Britain, to avoid a repetition of the battlefield carnage that cost many nations almost a generation of young men; airpower offered a substitute for land battles, which meant that a nation was prepared to substitute the loss of enemy civilian lives for the loss of enemy military and, of course, (in theory) losses among its own military. During the ''no more war'' years of postwar isolationism, it also offered an excuse for nonintervention in European crises; a nation with a small peacetime army has no means with which to intervene on land.[90] But the dependency of each nation on foreign commerce made isolationism virtually impossible. Increasingly that commerce relied upon aviation, which reinforced the potential threat. The hope lay with (in today's vernacular) ''mutual and verifiable'' disarmament or, failing that, an updated law of war treaty to regulate bombing. The moment of opportunity came in the years immediately following World War I. As will be seen, it came—and went.

V. THE TREATY OF VERSAILLES

The conclusion of World War I brought an attempt at unilateral disarmament. Under the Treaty of Versailles, Germany was to dispose of all aviation-related equipment; its military was to be disbanded. Although Germany submitted to the Versailles Treaty, it did not acquiesce totally. Germany stated it was prepared to submit to any limitation of aerial capabilities to which all members of the League of Nations were subjected, a proposal that was rejected by the victorious nations. A game of legal and diplomatic intrigue followed, continuing for almost two years, as (in the words of one historian), ''the Allies attempted to contain Germany's air potential through legal restraints that Germany assiduously tried to avoid.''[91] Other parts of the Treaty of Versailles also suffered from the inability to enforce them. A desire to bring to trial certain former German military officers for war crimes related

89. C. WEBSTER & N. FRANKLAND, *supra* note 81, at 46, which notes that

> [The] exaggeration of the number of casualties which strategic bombing was likely to produce was a major factor in all strategic thinking before the Second World War and exercised a profound influence on the minds of the services, the political chiefs, and being translated into even more sensational language by journalists and publicists, on public opinion at large.

90. M. HOWARD, THE CONTINENTAL COMMITMENT (London, 1972).
91. E. HOMZE, ARMING THE LUFTWAFFE 3 (London, 1976).

to Germany's aerial attacks on Great Britain brought this cautionary advice from the British Air Council:

> [T]he present situation makes it necessary to emphasize the peculiar reverberation of such contemplated prosecutions upon the RAF. These German officers and men are to be tried in time of peace before a court exclusively composed of their ex-enemies for acts which do not differ from those ordered to be carried out by the Royal Air Force upon German towns. The orders given included directions to bomb German towns (where any military objective was situated), to destroy the industrial activities there by bombings during the day, and to weaken the morale of the civilian inhabitants (and thereby their 'will to win') by persistent bomb attacks which would both destroy life (civilian and otherwise) and should, if possible, originate a conflagration which would reduce to ashes the whole town and thereby delete a whole centre of industrial activity.[92]

This highly-legalistic Allied approach to maintaining the peace—or keeping Germany disarmed—failed in virtually every respect, and should have served as a clear indication of the difficulty of arms control or regulation of hostilities through legal documents lacking an effective means of enforcement.

VI. THE WASHINGTON CONFERENCE ON THE LIMITATION OF ARMAMENT OF 1922

Greater, multilateral disarmament steps were envisaged. At the Washington Conference on the Limitation of Armament[93] (popularly known as the Washington Naval Conference) held in Washington, D.C., in 1921, representatives from the United Kingdom, France, Italy, Japan and the United States initially considered a total prohibition on new methods of warfare such as submarines, poisonous gas, and aircraft. But there was distrust among nations who were allies only three years earlier,[94] which ultimately led to a conference conclusion that it was "not at present practicable to impose any effective limitations upon the numbers or characteristics of aircraft, either commercial or military."[95] When it became apparent that prohibitions were unlikely, the delegates turned to the possibility of "rules for control of new agencies of warfare,"[96] suggesting regulation rather than limitation. It was obvious the issue could not receive adequate consideration in the limited time remaining at the conference. The delegates unanimously accepted a recommendation that aircraft should operate only within rules established by a subsequent

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92. As quoted in Maier, *The Relationship Between Air Doctrine and Total War*, presentation before the Air War College, Maxwell Air Force Base, Montgomery, Alabama, September 11, 1980. In fact, the call for war crimes trials met with virtual rejection. *See* WILLIS, PROLOGUE TO NUERNBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982).

93. CONFERENCE ON THE LIMITATION OF ARMAMENT (1922); SCHINDLER & TOMAN, *supra* note 27, at 789–91. The treaty was not ratified by France and thus it did not enter into force. Limitation of Naval Armament (Five-Power Treaty or Washington Treaty), signed Feb. 6, 1922; ratified Aug. 17, 1923; 43 Stat. 1655.

94. Thus in official correspondence to the head of the British delegation (Nov. 23, 1921), it was noted that

> Although good relations between [Great Britain and France] will no doubt continue, the [Committee of Imperial Defence] cannot but view the situation which may arise in a few years' time if the French military proposals are carried out whilest Great Britain is reducing her fleet. The committee regards the comparative air strengths of France and Great Britain as even more serious. . . . The danger to England to attack by a French air force is very great.

DOCUMENTS ON BRITISH FOREIGN POLICY, 1919–1939 498 (First series, Vol. XIV, London, 1966).

95. A. TOYNBEE, SURVEY OF INTERNATIONAL AFFAIRS, 1920–1923 498 (London, 1925).

96. CONFERENCE ON THE LIMITATION OF ARMAMENT, *supra* note 93, at 10. Tentative suggestions by the Secretary of State of the United States with respect to the agenda.

conference.[97] That subsequent conference was to consider a number of issues, including the following:

> (a) Do existing rules of international law adequately cover new methods of attack or defense resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare?
>
> (b) If not so, what changes in existing rules ought to be adopted in consequence thereof as a part of the law of nations?[98]

Thus the first postwar consideration of aerial bombardment ended inconclusively, with the issue passed to a separate conference.[99] The latter conference, desired less by governments than by public opinion, convened in The Hague on December 11, 1922.[100] But if the actions of United States officials were an indication of the approach each nation was to take towards the conference, it was doomed before it began.

VII. THE HAGUE COMMISSION OF JURISTS OF 1923

A. Background

The United States sought to send a strong delegation, headed by Ambassador John Bassett Moore, a member of the Permanent Court of International Justice at The Hague. Military representation was equally impressive and included Rear Admiral W. L. Rodgers, USN, former President of the prestigious Naval War College. But at the outset the U.S. delegation guidance had to be prepared and there was a clear divergence of views between the Army and the Navy. Draft rules relating to aerial bombardment proposed by the Secretary of the Navy were more restrictive than those proffered by the Secretary of War.

Although both sets of draft rules were passed to the U.S. delegation by the Secretary of State, the Navy rules very early became the basis for U.S. delegation negotiation. There were several reasons for this: the Navy rules closely paralleled those proposed by the British delegation. Ambassador Moore's decision appears to have been influenced considerably by Admiral Rodgers, the senior military member of the delegation.[101] The guidance to Ambassador Moore from the Secretary of State

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97. *Id.* at 800.

98. *Id.* at 356.

99. *See* R. BUELL, THE WASHINGTON CONFERENCE 201–39, 417–18 (1922); T. BUCKLEY, THE UNITED STATES AND THE WASHINGTON CONFERENCE 1921–1922, 40, 121–26 (1970); CONFERENCE ON THE LIMITATION OF ARMAMENT, *supra* note 93; and 1 FOREIGN RELATIONS OF THE UNITED STATES, 1922, 228 (1938). For a discussion of international attempts to abolish or limit submarines as combatants, *see* W. MALLISON, JR., STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WARS 31–50 (1968). *See also* Roxburgh, *Submarines at the Washington Conference*, 3 BRITISH YEAR BOOK INT'L L. 150–58 (1922–1923); Douglas, *The Submarine and Washington Conference of 1921*, 26 NAVAL WAR C. REV. 86–97 (Mar.–Apr. 1974); and J. TERRAINE, THE U-BOAT WARS 1916–1945 (1989). Regulation of the machine-gun was equally unsuccessful. *See* J. ELLIS, THE SOCIAL HISTORY OF THE MACHINE GUN (1975).

100. The Washington Conference adopted a resolution for the appointment of a Commission of Jurists. The Commission met at The Hague from December 11, 1922 to February 19, 1923. The charge to the Commission was to prepare rules relating to aerial warfare (part II) and rules concerning the use of radio in time of war (part I). The rules were never legally adopted. *See* SCHINDLER & TOMAN, *supra* note 27, at 147–57.

101. As with all aspects of law and politics, personal relationships often play a key role. As a professor of law at Columbia in 1900, Ambassador Moore began the Naval War College's International Law Studies series that continues to this day. As President of the Naval War College nine years later, Admiral Rodgers became close friends with Ambassador Moore. Acceptance of the Navy draft rules

left it to Moore as delegation head to decide between the Navy and War Department drafts. Admiral Rodgers proved more persuasive than his Army counterpart, Brigadier General William H. Johnston, despite the fact that Major William C. Sherman, an early proponent of long-range aerial bombardment and protege of U.S. Army Brigadier General Billy Mitchell, was General Johnston's aviation advisor on the U.S. delegation.

The point of view of the U.S. Navy and the British was influenced more by the internecine fighting over postwar defense budgets within each nation than by humanitarianism. Both navies had been experimenting with and developing aircraft carriers for more than a decade.[102] While the Royal Naval Air Service had conducted bombing raids during World War I and Brigadier General Mitchell had raised international interest when Martin bombers under his command sank the "unsinkable" German battleship *Ostfriesland*, on July 21, 1921, sixty miles off the Virginia coast,[103] the aircraft-versus-battleship controversy was far from over in either nation or, for that matter, within their respective navies.

Aircraft carrier development in the immediate postwar era was prompted by several events. The Royal Air Force had been established on April 1, 1918, and Marshal of the Royal Air Force Trenchard's strong voice in favor of strategic bombing was beginning to be heard, as was Brigadier General Mitchell's in arguing for an independent air service in the United States. The Washington Naval Conference that had proposed the forthcoming Hague Commission of Jurists of 1923 to regulate aerial warfare, adopted capital ship limitations that ultimately led to the completion of the U.S. battle cruisers *Lexington* and *Saratoga* as aircraft carriers;[104] the decision was greeted with enthusiasm by naval aviators, and was viewed by battleship sailors as a counter to the move for an independent air service. The Royal Navy took similar steps, converting the light battle cruisers *Courageous* and *Glorious*

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was inevitable, too, as they most closely approximated the philosophy of rules developed by the International Law Association in August 1922. Colby, *Aerial Law and War Targets*, 19 AM. J. INT'L L. 713 (1929).

102. Roskill, *The Period of Anglo-American Antagonism, 1919–1929* I NAVAL POLICY BETWEEN THE WARS, 234–68, 356–99, 467–97 (London, 1968); N. POLMAR, AIRCRAFT CARRIERS 1–53 (1969); C. MELHORN, TWO-BLOCK FOX: THE RISE OF THE AIRCRAFT CARRIER, 1911–1929 (1974); and G. TILL, AIR POWER AND THE ROYAL NAVY Chapter 2 (London, 1979). By 1921 the President of the Naval War College, Admiral W. S. Sims, had turned against the battleship and was in favor of the aircraft carrier as the capital ship of the future and so advised Brigadier General Billy Mitchell by letter on April 8, 1921. R. O'CONNELL, OF ARMS AND MEN 271 (1989). The opinion of the President of the Naval War College carried some weight. Along with the Chief of Naval Operations, Commandant of the Marine Corps, and head of the Office of Naval Intelligence, he served as an ex-officio member of the General Board of the United States Navy, which served as an advisory board to the Secretary of the Navy for program planning and the formulation of ship characteristics. S. ROSKILL, *supra*, at 20, 26–27.

103. N. POLMAR, *id.* at 44–45; and A. HURLEY, BILLY MITCHELL: CRUSADER FOR AIR POWER 58–70 (1964). United States Navy opposition to strategic bombing concepts cannot be overstated. This opposition was mission- and budget-related, and would continue until the Japanese attack on Pearl Harbor destroyed the myth of battleship invulnerability, (but would return in the post-World War II interservice debates over aviation roles and missions of the Navy and Air Force). One example will be offered to illustrate the intensity of the debate. On May 12, 1938, Army Air Force B–17 aircraft intercepted the Italian liner *Rex* 776 miles off the East Coast of the United States; the photograph of the B–17 overflight appeared in more than 1,800 newspapers, magazines, and other periodicals. The following day, apparently following Navy protests, Army Chief of Staff Malin Craig directed that thereafter all over-water flights by Air Force aircraft were not to exceed a distance of one hundred miles from the shore—the logic being that attacks at a greater distance were a Navy mission. D. COPP, A FEW GREAT CAPTAINS 418–24 (1980).

104. N. POLMAR, *supra* note 102, at 50. The United States was building two large battle cruisers (*Lexington* and *Saratoga*) when the treaty was signed. The two ships were redesignated as aircraft carriers and assigned to the yet unfilled treaty category for aircraft carrier tonnage. Both were still formidable ships when World War II started.

to aircraft carriers. Both navies essentially regarded the carriers and their aircraft complement as scouting rather than offensive forces. Even if used for bombing operations against land targets, the range of the aircraft was not significantly greater than that of naval gunfire and the weight of the attack was considerably less. Hence, naval "humanitarianism" in the upcoming Hague meetings was fundamental self-protection. There also was a tinge of national security interest. Japan completed its first aircraft carrier, the *Hosho*, in December 1922, and a British test pilot made the first landing on her deck, February 22, 1923, three days after the conclusion of the Hague Commission of Jurists.[105]

But Britain's greatest threat remained France, in that French airpower capabilities were on the rise. Having learned the painful lesson during World War I that Great Britain no longer was an island, the British were quite anxious to place limitations on the ability of any potential enemy to attack the British Isles. For Britain, development of limitations on strategic bombing would serve economic as well as national security purposes, while U.S. interests were limited to the former.

The consideration within the U.S. and British delegations up to this point was with the legality of targets and the depth of the extended battlefield. Another question was the issue of collateral damage to civilian objects or injury or death to civilians. The draft U.S. Army rules provided in part: "In conducting a bombardment [by air], the obligation of a belligerent is discharged if due care is exercised not to injure objects which happen to be in the vicinity of the permitted target. . . ." The U.S. Navy rules stated: "Injuries to non-combatants and to places excluded [by the rules] which is incidental to legitimate bombardment can not be regarded as unlawful, but it shall be the duty of the belligerent conducting a bombardment to exercise due care to confine the injury as much as possible to the objectives not prohibited."

Two noteworthy matters were contained in these drafts. The Navy provision was the first to address the issue of collateral injury to noncombatants, while both the Army and Navy proposals established ordinary care as the standard for an attacker in carrying out an aerial attack.

B. Proposed Rules for Wartime Aviation

The Commission of Jurists and its Military and Naval Advisors convened at The Hague on December 11, 1922, with delegations in attendance from the United Kingdom, United States, France, Italy, Japan, and the Netherlands. Germany, still ostracized by her former enemies, was not invited. The charter enjoined negotiators to consider the regulation of aviation in time of war, to include regulations for aerial bombardment. During the first ten days of meetings, discussion focused on the British and American drafts. Following adjournment for the Christmas and New Year's holidays, a subcommittee was formed to address separately the issues related to aviation. The Subcommittee on Aviation met from January 8 through the balance of the month, at which time plenary sessions of the Commission resumed.

C. Aerial Bombardment

John Bassett Moore, writing after the conference, observed that "From the begin-

105. N. POLMAR, *supra* note 102, 35–37; Cox, *The Rise and Fall of the Imperial Japanese Air Forces, reprinted in* 27 AEROSPACE HIST. 74–86 (June 1980); H. JENTSCHURA, D. JUNG, & P. MICKEL, WARSHIPS OF THE IMPERIAL JAPANESE FLEET 1969–1945, 40–42 (1977); R. LAYMAN, BEFORE THE AIRCRAFT CARRIER 83–90 (1989). Layman details early aircraft carrier developments throughout the world in this treatise.

ning of the sessions, . . . it was generally felt that perhaps the severest test of the possibility of a general agreement would be found in the efforts of the Commission to regulate the subject of bombardment from the air."[106] Although similar in effect, the British and American drafts differed in their approach to the issue. The British proposal phrased its draft in terms of attacks upon "military objectives," without defining the term, while the U.S. draft designated specific objects which might be bombed while avoiding the use of "military objective" or "military target." As Ambassador Moore observed, "The British delegation set great store by the phrase 'military objective' as having a limitative effect, while the delegation of the United States thought the phrase left too much to the discretion of the individual commander."[107]

While all subcommittee members favored adopting rules that would protect the civilian population, there was disagreement as to the best way in which to reach this objective and as to the terms by which these rules should be expressed. Japan and the Netherlands were in favor of the greatest restriction on bombing, including a total prohibition on bombing outside the immediate area of military operations. Subcommittee members were unanimous in accepting the principle that enemy forces, military works, lines of military communication, military or naval bases, and depots of arms, ammunition, or war materiel could be attacked. But no draft formula gained a majority of votes; the fundamental difficulty was "the determination of the conditions under which the bombardment of objects, intrinsically liable to attack, was to be forbidden, when they were found in centers of population."[108]

D. Analysis of the Arguments

The issue as described begs the question in two respects. First, it assumes that a lawful target situated in a populated area should be protected from attack. Such a rule would invite mischief on the part of a defender, who could resolve target vulnerability problems simply by constructing high-value targets in populated areas, or encouraging urban growth around preexisting targets. The United States learned this to its regret—and at the cost of many aircraft and the loss of many American lives—in the Rolling Thunder bombing campaign conducted against North Vietnam from 1965 to 1968. At the outset of that campaign Secretary of Defense Robert McNamara placed off-limits targets located in populated areas, and personally selected all fixed targets authorized for attack. In response, the North Vietnamese stored war materiel, parked military convoys, and located air defense sites (fighter aircraft, antiaircraft guns, and surface-to-air missile sites) in populated areas, making them immune from attack under the restrictions established and openly publicized by Secretary McNamara.[109]

The second error was the assumption that responsibility for avoidance of collateral civilian casualties or damage to civilian objects should be shifted to the attacker. It is

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106. J. MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS 182, 194 (1924).

107. *Id.* at 194. In this regard the Ambassador's philosophy suffered from a philosophical deficiency. Commanders generally work in a "target-rich" environment, and targeting doctrine over the years has emphasized attack on those targets posing the greatest threat, or which would result in the greatest damage to the enemies' war effort. The doctrinal philosophy encourages efficiency in the selection of targets and employment of the commander's military assets, while arguing against attack on nonmilitary targets or indiscriminate attack on the civilian population.

108. *Id.* at 197.

109. Parks, *Rolling Thunder and the Law of War*, 33 AIR U. REV. 2–23 (Jan.–Feb. 1982). For a pilot's view of the devastating effect of these restrictions, *see* J. BROUGHTON, THUD RIDGE (1969); J. BROUGHTON, GOING DOWNTOWN (1988); and J. NICHOLAS & B. TILLMAN, ON YANKEE STATION (1986).

a shared obligation of the attacker, defender, and the civilian population. The objective of a defender's antiair forces is to protect military targets from attack through defenses that either destroy attacking aircraft or cause those aircraft to miss the target; the bomb that misses its intended target (or the crashing aircraft) may cause damage to civilian objects or injury to civilians in the vicinity of the target. Thus, if a defender has succeeded in forcing the attacker to miss the target, in so doing he knowingly has placed his civilian population at greater risk.

In this sense, a collateral error exists because there is an assumption that responsibility for incidental damage or injury always can be attributed to someone; yet when an attacking force is carrying out a lawful attack on a legitimate target, and the defender is using its antiair capabilities lawfully to defend targets, responsibility for collateral damage, injury, or death usually will be shared, or may be attributable only to the fog of war. In many cases the actions of the attacker may be consistent with the law of war, yet actions of the defender will cause the attack to result in collateral civilian casualties. The actions of the defender are an intervening cause for which the attacker is not responsible.

This concept, though unstated as such, has been recognized in naval and land warfare for centuries. Thus, a naval blockade may prevent food from reaching an enemy, though the modern law of war admonishes that a blockade should not be intended to starve the civilian population. The nation executing the blockade agrees to permit sufficient food for the civilian population, which the defender promptly gives to his military; and the civilian population starves. The nation executing the blockade, when faulted for starving innocent civilians, would counter that it was the intervening action of the defender that caused the civilians to starve. That defense would be appropriate. Yet for inexplicable reasons the general public, diplomats, and international lawyers have had difficulty in applying this same concept to the actions of a defender in an aerial attack.[110]

Finally, the civilian population and individual civilians must assume some common sense responsibility for the risks of war. The individual civilian who continues to live adjacent to a factory or other facility that clearly would be a lawful target must assume a certain degree of risk for his or her decision. Both Germany and Great Britain recognized this during World War II by evacuating nonessential personnel from cities or areas containing military targets, or by requiring those who remained to construct individual air raid protection or move to air raid shelters during an attack.[111]

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110. The difficulty has been caused in large measure by the necessity for secrecy of nations at war in the struggle for measures, countermeasures, counter-countermeasures, etc., particularly in highly sensitive areas such as electronic warfare. It has been only over the past decade that much of the electronic warfare battle of World War II has been revealed. *See* Jones, *Scientific Intelligence*, 567 J. ROYAL UNITED SER. INST. 352–69 (Aug. 1947); R. JONES, MOST SECRET WAR: BRITISH SCIENTIFIC INTELLIGENCE 1939–1945 (London, 1978); A. PRICE, INSTRUMENTS OF DARKNESS (London, 1978); M. STREETLY, CONFOUND AND DESTROY (London, 1978); and A. PRICE, I THE HISTORY OF U.S. ELECTRONIC WARFARE (1984).

An example from the World War II electronic battlefield suggests the difficulty of accountability. On May 31, 1941, 90 Luftwaffe aircraft set out to conduct a night attack on Bristol and Liverpool, depending upon ground-based radio beams (*Knickebein*) for guidance to their target areas. But British countermeasures jammed the radio beams, possibly causing one attacker to bomb Dublin in neutral Ireland, killing 34 civilians. Winston Churchill attributed this attack to British countermeasures based upon a suggestion made to him in 1946 by R. V. Jones. W. CHURCHILL, THEIR FINEST HOUR 389 (London, 1949). The evidence of a causal relationship is inconclusive, further illustrating the problems of accountability in the fog of war. *Cf.* A. PRICE, *supra*, at 37; and R. FISK, IN TIME OF WAR 435 (1983).

111. *See* T. O'BRIEN, CIVIL DEFENCE (London, 1955); *Civil Defense Division—Final Report*, THE UNITED STATES STRATEGIC BOMBING SURVEY (1945); and STANFORD RESEARCH INSTITUTE, APPENDIXES

E. The Hague Aerial Bombardment Rules

The delegates at The Hague in February 1923 had difficulty reconciling these problems with a desire to improve protection for the civilian population. The Aviation Subcommittee turned the matter over to the overall committee, which reduced the issue to two drafts, one Italian, one American, in which there was substantial difference.[112] Following a plea to all conferees by Ambassador Moore, the elected chairman of the Commission, the delegates worked for the next five hours to draft the following, which were adopted unanimously.[113]

> Art. 22. Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.
>
> Art. 23. Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.
>
> Art. 24. (1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.
>
> (2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.
>
> (3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.
>
> (4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment having regard to the danger thus caused to the civilian population.[114]

F. Analysis of the Rules

Problems of Codification. The problem of aerial bombardment was the most important and the most difficult with which the Commission had to deal. Nations generally agree with the principle of discrimination, from the standpoints of military efficiency and humanitarianism. But there were in 1923, and remain today, fundamental problems with codification of appropriate language that would be equally applicable to all nations, under all circumstances, and that would not provide a tactical or strategic advantage to one nation over another, nor establish rules for aerial bombardment that are fundamentally different from those applicable to land-based artillery or naval gunfire. The Hague Air Rules, adopted by the Commission upon conclusion of its meetings on February 19, 1923, were unsuccessful in accomplishing this. While espousing humanitarian rules, in the words of Admiral Rodgers,

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1 THROUGH 7 TO THE HAMBURG POLICE PRESIDENT'S REPORT ON THE LARGE SCALE AIR ATTACKS ON HAMBURG, GERMANY 39–271 (1968), which contains civil defense materials for one German city. *See also* R. INGLIS, THE CHILDREN'S WAR: EVACUATION 1939–1945 (London, 1989).

112. J. MOORE, *supra* note 106, at 197–99.

113. J. MOORE, *supra* note 106, at 199–201.

114. SCHINDLER & TOMAN, *supra* note 27, at 142.

"each nation seemed chiefly guided by the principle of promoting its own national policies, and its position in the world. . . . Each national delegation was a unit in standing for a code which should favor its national situation."[115]

Differing Viewpoints. The formulation of balanced, practical rules also suffered from a fundamental gap between the international lawyers who constituted the Commission and their technical (military) advisors. As Admiral Rodgers observed,

> The majority of commissioners had little or no technical acquaintance with the art and practice of war. Some seemed inclined to believe that the course of war, even when great national emotions were aroused, might be guided by the phrases of a code of rules previously agreed upon. They did not appear always to realize that at any time the code of accepted rules of warfare is based almost entirely on past experience and that when a new war arises, new social, economic, and belligerent conditions will make the existing code more or less unsuitable to meet the exigencies of the situation as developed in the course of the current war.[116]

As the 1923 Hague Air Rules[117] never were adopted by any nation, they were an immediate and total failure. This occurred in part because of a skepticism towards the law of war that existed during the interwar period,[118] but in the main because international lawyers endeavored to draft a set of rules that were totally at odds with state practice, technological advances, and military thinking.[119]

Aerial Law of War, 1923. If it is possible to summarize the law of war as it existed at that time, it could be reduced to two principles: (a) that the indiscriminate (that is, intentional) attack of the civilian population as such was prohibited, but that (b) a legitimate military objective could be attacked wherever located so long as ordinary care was exercised in its attack; that is, that collateral civilian casualties were not the concern of the attacker but, by state practice, were regarded as an inevitable consequence of bombardment and a legitimate way to destroy an enemy's will to resist. The historic distinction of noncombatant immunity had been tied to the range of artillery; anything within artillery range was regarded as part of the battle-

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115. Rodgers, *The Laws of War Concerning Aviation and Radio*, 17 AM. J. INT'L L. 629–40, at 633 (1923).

116. *Id.* at 633.

117. SCHINDLER & TOMAN, *supra* note 27, at 147–57.

118. *See* J. Spaight, *The Doctrine of Air Force Necessity*, 6 BRITISH YEAR BOOK INT'L L. 4 (1925): "To imagine that, because of any paper rule, this foundation [attack of a military target, wherever located without concern for collateral civilian casualties] will not be attacked is to dwell in a fool's paradise. . . . No restrictive covenant can avail to prevent that which is the nature of things."

Similarly, international lawyer J. W. Garner, addressing the Grotius Society in London on January 15, 1936, observed:

> Since the World War . . . there has been a disposition to neglect the law of war and to abandon, in the main, further effort to rehabilitate and strengthen it. As everyone knows, the law of war was very much discredited by the events of the World War. Mankind generally lost faith in its utility. Many persons spoke of it more or less contemptuously as the "so-called" law of war, as if a rule of conduct embodied in a convention dealing with war is any less a rule of law than one embodied in a convention dealing with matters of peace. University professors dropped the subject from their courses, and even text writers omitted it from their books, or at least passed it over lightly. As you know, the curatorium of The Hague Academy of International Law has not permitted the law of war to be discussed at any sessions of the Academy.

Garner, *The Outlook for the Law of War and of Neutrality*, 22 TRANSACTIONS OF THE GROTIUS SOCIETY 1 (1936).

119. Colby, *supra* note 101, at 713: "In August, 1922, the International Law Association at its meeting in Buenos Aires, declared that the radius of operations of military aircraft ought to be restricted, and thus attempted to take from armies all the advantage which an aircraft . . . permits. These were vain and fruitless efforts to send the science of war backward in its steps." The work of the International Law Association undoubtedly formed a part of the basis for Ambassador Moore's support for the Navy draft, and in fact may have been a basis for the Navy draft.

field and at risk. The battlefield was extended by the industrialization of nation-states and by a capacity for attack of military objects beyond artillery range. The Hague Air Rules of 1923 attempted to stem this tide in the following ways.

Prohibiting Terrorization. In the practice of land and naval warfare, destruction of civilian objects was regarded as lawful as a psychological means for impressing upon an enemy nation the prudence of surrender. While a line between the attack on morale and terrorization existed—the former being ancillary, the latter intentional—the principal distinction lay in military efficiency. It would be inefficient to shell or bomb merely to terrorize, but an attack on morale ancillary to the bombardment of military targets was efficient, lawful, and an accepted practice. Article 22 was perceived as limiting this practice with respect to airplanes, but not for land artillery or naval bombardment. Such a proposal doubtless was viewed at the time as not only a constraint on air operations, but by land and naval warfare authorities as a dangerous precedent for their operations.

Limiting the Range of Attack. While article 24(4) applied to aerial bombing the same degree of permissibility for widespread destruction given land bombardment, effective use of aircraft was limited by this article to the range of artillery, or certainly was perceived that way.[120]

Military Objective. There is no dispute that the purpose of all bombardment, whether ground, naval, or air, was and remains to attack military objectives. Articles 24(1) and (2) were potentially troubling for several reasons:

(1) For the first time, article 24(1) impressed upon an attacker an obligation for concern for collateral civilian casualties in the attack of individual targets. However praiseworthy this may appear in today's peacetime environment, this was a 180-degree change of course in then-existing bombardment philosophy. Again, while it applied only to aerial bombardment, it could not have escaped notice as a precedent by land and naval authorities.

(2) The term military objective used in article 24(1) was undefined. As Webster and Frankland correctly noted,

> Part of the argument centered upon the difference between 'military' and 'civilian' targets and developed somewhat along the lines of the conventions which had been attached to military and naval warfare. There was a school of thought which demanded that bombing should be restricted to 'military targets' which could be destroyed without undue risk to 'civilian' life or property. This argument turned upon what was meant by the term 'military target.' Clearly, a tank on the battlefield was a military target, but was a tank on the assembly line in a factory a civilian target? Clearly a soldier in the front line was a military target, but was a worker engaged in the manufacture of his rifle a civilian target? There was also the question of what constituted 'undue risk' to civilian life and property. A battleship at sea, it might be assumed, would be manned only by naval personnel and a badly aimed bomb would be unlikely to fall anywhere other than in the water. But the same battleship in port might have civilian workers on board and a badly aimed bomb might destroy anything from a warehouse to a church.
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> Obviously a strict interpretation of these obscure questions meant the absolute prohibition of strategic bombing and the confinement of all operations to the actual area of land fighting or to war ships at sea. . . . In modern war between major powers there is, after all, practically nothing worth attacking which does not have some bearing upon the national war effort.[121]

This attempt at limitation on the attack of military objectives (or targets, a term regarded as synonymous) must be viewed through the eyes of airpower planners of

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120. *See* Chambliss, *Air Bombardment Regulation*, 60 U.S. NAVAL INST. PROC. 1577–81 (Nov. 1934).

121. I C. WEBSTER & N. FRANKLAND, *supra* note 81, at 14–15.

the time. Writing five years after the 1923 Hague conference, Air Marshal Trenchard commented:

> To attack the armed forces is . . . to attack the enemy at his strongest point. On the other hand, by attacking the sources from which these armed forces are maintained infinitely more effect is obtained. In the course of a day's attack upon the aerodromes of the enemy perhaps 50 aeroplanes could be destroyed; whereas a modern industrial state will produce 100 in a day—production will far more than replace any destruction we can hope to do in the forward zone. On the other hand, by attacking the enemy's factories, then output is reduced by a much greater proportion.[122]

Writing in the same vein, also in 1928, G. F. Milne, Chief of the Imperial General Staff said:

> [Military] objectives will, naturally, differ from time to time, and their relative importance can only be measured by the influence they happen to be exerting at any given moment. For instance, when an enemy is concentrating for an attack, the dislocation of his railways and other means of communication may produce results which will influence the course of the war far more than will the bombardment of some of his munition factories.[123]

Air Marshal Trenchard's and Sir Milne's statements were consistent with the law of war as it existed, in that they emphasized the efficient use of military force. They also illustrated the dynamic nature of targeting, as the value of a potential military objective may vary depending upon the circumstances ruling at the time. But Trenchard accomplished what the negotiators at The Hague failed to do; he defined military objective as:

> any objectives which will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight.[124]

Trenchard and others, whether military officers or international lawyers, understood these deficiencies in the Hague Air Rules, and for that reason condemnation of the rules was virtually unanimous.[125]

(3) The limited nature of the list of military objectives contained in article 23(2) was inconsistent with the practice of nations as well as military thinking. James Maloney Spaight, a member of the British delegation to the 1922–23 Hague conferences and employee of the Air Ministry, illustrated the deficiency of the list in his 1924 book, *Air Power and War Rights*.[126] He provided a three-page list of targets attacked during World War I, such as an aqueduct; blast furnaces; electric works; gas works; iron works and foundries; magneto works; motor works; steel works; and petroleum, oil, and lubricant production, manufacturing, storage facilities, that would be excluded from attack by article 23(2).[127] One need only carry out a quick mental review of targets attacked by all parties during World War II (or regarded as lawful today) to see the shortcomings of the list contained in article 23(2).

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122. IV C. WEBSTER & N. FRANKLAND, *supra* note 81, at 74.
123. *Id.* at 78.
124. *Id.* at 74. The term "military objective" remained undefined in the law of war for another half century. Ultimately it was defined in article 52(2) of Additional Protocol I of 1977 to the Geneva Conventions of 1949 as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." *See* SCHINDLER & TOMAN, *supra* note 27, at 305–523, 551–618.
125. *See* Colby, *supra* note 101; Quindry, *supra* note 57, at 474–509; and particularly J. SPAIGHT, AIR POWER AND WAR RIGHTS 226–59 (London, 1924).
126. J. SPAIGHT, *supra* note 125.
127. *Id.* at 233–35.

(4) Article 24(2) further limited attack to military forces, thereby turning a blind eye to the important role played by civilians directly supporting a nation's war effort. This insistence upon maintenance of an obsolete distinction did not escape criticism by international lawyers of that era, and further contributed to the demise of the 1923 Hague Air Rules.[128]

Risk of Collateral Civilian Casualties. Article 22(3), in prohibiting the attack of the targets listed in article 22(2) if indiscriminate bombardment (another undefined term) could not be avoided, was a substantial shift in responsibility for avoidance of collateral civilian casualties from the defender and the civilian (however that term may be defined) to the attacker. Thus, bombing of military objectives beyond the tactical battlefield became dependent upon effect or result rather than intent. Two historical examples illustrate the difficulty of such a rule:

(1) During the 1864 Union siege of Atlanta, General J. B. Hood, commanding general of the Confederate forces defending Atlanta, wrote to Union General W. T. Sherman to condemn shelling that resulted in civilian casualties. Sherman replied, criticizing Hood for his failure to evacuate the civilians from Atlanta while placing his defenses "on a line so close to town that every cannon-shot and many musket-shots from our line of investment, that overshot its mark, went into the habitations of women and children."[129]

(2) As noted by one critic, during World War I "Two British [airplanes] were out to raid Brussels. . . . They came in sight of a Zeppelin and brought it down. The debris fell upon a convent near Ghent, and killed three nuns. Such are the consequences of war."[130]

There are at least two difficulties with the rule set forth in article 22(3). The first is that it placed a burden to avoid indiscriminate attack upon an attacker, even though the means that might lead to an "indiscriminate" attack were not within his exclusive control. The second concerns the potential for assessment of an attack based upon results rather than intent, a concept seriously flawed, as one critic observed at that time:

> The question is a question of accuracy and not a question of intent. No belligerent should be required to forfeit the normal percentage of hits which might be expected on his target, simply because there will be a percentage of 'misses.' The percentage of 'hits' is a military calculation. By his effective five per cent he may destroy his 'military objective' wherever the other ninety-five per cent may go. By it he may be able to win the war. It is not a question of an intention to hit civilians instead of military depots, or of an intention to terrorize generally. Like the actuary figuring expectant mortality for a life insurance company, he cannot foretell what will happen in any individual case, [footnote omitted] but he can tell what his average will be. His intent is to place 'the maximum number of hits' on his target according to his average accuracy.[131]

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128. *See* Garner, *International Regulation of Air Warfare*, 3 AIR L. REV. 103–26, at 117 (Apr. 1932). *See also* J. STONE, *supra* note 53, at 338, where he observes:

> The bounds between the legitimate pursuit of victory, and the infliction of suffering unnecessary to victory, may in words seem clear and settled. Concretely, however, they have been revolutionized in the last half century. When air supremacy becomes a critical factor in victory, and when sixty civilians and masses of industrial equipment must stand behind each plane in the air, the humane principle of civilian immunity retreats before the search of victory by the cheapest and quickest means.

129. W. SHERMAN, *supra* note 50, at 112–29, contains the entire exchange of correspondence.

130. Colby, *supra* note 101, at 705.

131. Colby, *supra* note 101, at 710; and Quindry, *supra* note 57, at 500–01, which noted that in a 1927 United States Air Corps peacetime test by aircraft against a bridge four hundred feet wide (approximately 120 meters), it was estimated that only 11% of the bombs would strike the target. In the

But the potential difficulty of this concept was perhaps best explained by Air Marshal Trenchard:

> As regards the question of legality, no authority would contend it is unlawful to bomb military objectives, wherever situated. . . . Such objectives may be situated in centres of population in which their destruction from the Air will result in casualties also to the neighboring civilian population, in the same way as the long-range bombardment of a defended coastal town by a naval force results also in the incidental destruction of civilian life and property. The fact that air attack may have that result is no reason for regarding the bombing as illegitimate provided all reasonable care is taken to confine the scope of the bombing to the military objective. Otherwise a belligerent would be able to secure complete immunity for his war manufactures and depots merely by locating them in a large city, which would, in effect, become *neutral* territory—a position which the opposing belligerent would never accept.[132]

G. The Result

The 1923 Hague Air Rules suffered an ignominious death, doomed from the outset by language that established rules for black-and-white situations in a combat environment permeated by shades of gray. While Japan and the United States expressed some support for their adoption, the European nations were more cautious owing to their distrust of and proximity to one another. As aircraft capabilities grew, national security concerns increased. The launching of the U.S. aircraft carrier *Lexington* in 1925 changed the marginal support for the 1923 Hague Air Rules by the United States to nonsupport, as the big ship caught the public's fancy and, with it, increased interest in the importance of aviation to national security.[133] Rapidly the 1923 Hague Air Rules drifted into obscurity, adopted by no nation, and completely ignored by most aviation historians.[134]

The 1923 Hague Air Rules were the first, last, and only effort at regulation of aerial bombardment before World War II. Nations expressed interest in forms of restraint on other occasions, most associated with the Geneva Disarmament Conference, and all were illusory if not contrived. The details of this busy but legislatively unproductive period are provided elsewhere, and will not be elaborated here.[135] Writing on the eve of World War II and sixteen years after his participation in the conference that produced the 1923 Hague Air Rules, Vice Admiral W. L. Rodgers concluded:

> The extensive use of airplanes in bombing cities and noncombatants is not likely to be controlled by pre-war agreements. In former times centers of industry and accumulations of supplies were small, and being scattered in many places, most of them were inaccessible to the enemy. Now

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actual bombing tests, 27% of the bombs struck the target. Quindry commented: "Even under these conditions, where the bombs are dropped from a relatively low altitude [6,000 feet, or 1,800 meters] and by especially trained personnel, a great majority of them will hit only in the vicinity of the objective."

132. IV C. WEBSTER & N. FRANKLAND, *supra* note 81, at 73.

133. R. BILSTEIN, FLIGHT PATTERNS 25 (Athens, 1983).

134. The records of the Commission are contained in COMMISSION OF JURISTS TO CONSIDER AND REPORT UPON THE REVISION OF THE RULES OF WARFARE (The Hague, 1923). *See also* Brune, *An Effort to Regulate Aerial Bombing: The Hague Commission of Jurists, 1922–23*, 29 AEROSPACE HIST. 183–85 (Sept. 1982); and Wyman, *The First Air Rules of Warfare*, 35 AIR U. REV. 94–102 (Mar.–Apr. 1984).

135. H. HYDE, BRITISH AIR POLICY BETWEEN THE WARS (London, 1976); B. POWERS, *supra* note 81, at 107–207; U. BIALER, THE SHADOW OF THE BOMBER: THE FEAR OF AIR ATTACK AND BRITISH POLITICS 1932–1939 (London, 1980); L. KENNETT, *supra* note 38, at 58–71; M. SMITH, BRITISH AIR STRATEGY BETWEEN THE WARS (London, 1984); W. MURRAY, STRATEGY FOR DEFEAT: THE LUFTWAFFE, 1933–1945 (Maxwell Air Force Base, Ala., 1983); W. MURRAY, LUFTWAFFE, *supra* note 85; R. OVERY, GOERING 37 (London, 1984). But *cf.* N. JONES, THE BEGINNINGS OF STRATEGIC AIR POWER (London, 1987).

they are larger and more concentrated and everywhere accessible to airplane attack. In many cases they will be worth attacking and will suffer because their destruction will tend to end the war. The incidental presence of property and noncombatants will confer no immunity on property capable of aiding the national resistance.[136]

VIII. LAST-DITCH EFFORTS

As the war clouds over Europe darkened, and with the experience of the wars in China, Spain, and Ethiopia in mind, several last-ditch efforts were made to establish bombing standards. During debate in the House of Commons on June 21, 1938, British Prime Minister Neville Chamberlain suggested three basic rules for bombing.

1. It is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations.

2. Targets which are aimed at from the air must be legitimate military objectives and must be capable of identification.

3. Reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighborhood is not bombed.[137]

Although these rules contain a number of flaws,[138] they were adopted by a nonbinding League of Nations resolution on September 30, 1938.[139] On the commencement of general hostilities on September 1, 1939, President Franklin D. Roosevelt sent the following message to the warring nations: "I am . . . addressing this urgent brief to every government which may be engaged in hostilities publicly to affirm its determination that its armed forces shall in no event, and under no

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136. Rodgers, *Future International Laws of War*, 33 AM. J. INT'L L. 441–51, at 450 (1939). Admiral Rodgers was not alone in his views. International lawyer J. W. Garner observed in 1936:

> The fact of the matter is the law of war . . . is . . . in a some what chaotic state, and when the next great war comes, if unhappily it does come—it will have to be carried on in large measure without rules that have been agreed upon, or with rules which have not been settled and as to the meaning of which there has been no argument. As to air warfare I think we can say there is practically no conventional International Law dealing with it.

Garner, *supra* note 118, at 5. In fact, the British Air Raid Precautions Committee expressed no confidence in the unadopted 1923 Hague Air Rules or in the law of war for protection of the civilian population against air attack. T. O'BRIEN, *supra* note 111, at 18. For further temper of the times, *see also* H. HYDE & G. NUTTALL, AIR DEFENSE AND THE CIVIL POPULATION (London, 1937); J. SPAIGHT, AIR POWER IN THE NEXT WAR (London, 1938); H. THUILLIER, GAS IN THE NEXT WAR (London, 1939); and L. HART, THE DEFENCE OF BRITAIN (London, 1939). As Williamson Murray notes, "British alarms over the 'growing air threat' and hopes of realizing an air limitation agreement between the European powers were a useful diplomatic tool that allowed Hitler to manipulate the island power." W. MURRAY LUFTWAFFE, *supra* note 85, at 16. *See also* W. MURRAY, THE CHANGE IN THE EUROPEAN BALANCE OF POWER, 1938–1939 (Princeton, 1984), for further description of this period. *See also* J. Spaight, *The Chaotic State of the International Law Governing Bombardment*, 9 THE A.F.Q. 24–32 1938.

137. J. SPAIGHT, AIR POWER AND WAR RIGHTS 257–58 (3d ed., London, 1947).

138. While the first rule is an accurate reflection of the law as it existed at the time as well as today, the difficulty with the last two rules lay in their favoring a defender (who would endeavor to camouflage and defend targets) over an attacker (who was required to identify that which the defender was concealing, dispersing, and defending). Although "reasonable care" may be an appropriate standard suggesting good-faith intent or effort on the part of an attacker, "carelessness" (or "negligence," as the League of Nations resolution was worded) is a less-than-perfect legal standard so long as an attacker is not in control of all elements affecting his degree of care.

139. LEAGUE OF NATIONS OFFICIAL JOURNAL Document A.69, 1938 IX, 15–16 (Special Supplement 182 [1938]). SCHINDLER & TOMAN, *supra* note 27, at 221–22.

circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities."[140]

Although most nations responded favorably, an affirmative response to such a plea is not a legally binding act; neither the Chamberlain/League of Nations rules nor the Roosevelt pledge were to have any effect on the conduct of the aerial bombing campaigns of World War II.[141] Klaus Maier provides a succinct summary for the interwar legislative process: "Attempts to limit air war by international agreement failed, because the conflicting national interests and divergent concepts for the use of air power could not be reconciled."[142]

IX. DETERMINING THE LAW: OTHER SOURCES

There are other ways of determining what the law of war relating to aerial bombardment was during World War II. Each will be addressed briefly.

A. Court Decisions

In 1927, a Greco-German Mixed Arbitral Tribunal constituted in accordance with the Versailles Peace Treaty considered a claim against Germany for compensation on account of damage suffered as the result of the aerial bombing of Salonica by German aircraft in January 1916. As a result of the bombing, nonmilitary goods belonging to the plaintiff were destroyed. Judgment was rendered in favor of the plaintiff on the basis that German authorities failed to provide warning of the impending attack, as required by article 26 of Hague Convention IV of 1907. But for the failure to warn, the German attack would have been lawful, and the collateral damage to plaintiff's goods would have been a consequence of war for which the plaintiff could not have recovered damages. The case is of little value in determination of the issue before us.[143]

Although Professor Telford Taylor has intimated that the 1940 Luftwaffe attacks on Britain were illegal,[144] this was not the position he took as the Chief Counsel for War Crimes at the Nuernberg War Crimes Trials. In his final report, then-Brigadier General Taylor observed:

> In the course of preparing the indictment for the first Nuernberg trial, it became apparent that . . . 'combat crimes' would prove of considerably less importance. . . . Many of the provisions of the Hague Conventions [of 1907] regarding unlawful means of combat . . . were antiquarian. Others had been observed only partially during the First World War and almost completely disregarded during the Second World War. . . . If the first badly bombed cities—Warsaw, Rotterdam, Belgrade, and London—suffered at the hands of the Germans and not the Allies, nonetheless the ruins of German and Japanese cities were the results not of reprisal but of deliberate policy, and bore witness that aerial bombardment of cities and factories has become a recognized part of modern warfare as carried on by all nations.

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140. I FOREIGN RELATIONS OF THE U.S., 1939, 541–42 (1956).

141. *Id.* at 542–57. *See* J. SPAIGHT, *supra* note 137, 259–63 for a critical analysis.

142. Maier, *Total War and German Air Doctrine Before the Second World War*, in THE GERMAN MILITARY IN THE AGE OF TOTAL WAR 211 (W. Deist, ed. 1985).

143. *Coenca Brothers v. Germany* (1927), in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 570–72 (McNair and Lauterpacht, eds. London, 1931) [hereinafter ANNUAL DIGEST]. The warning requirement in article 26 of the Annex to Hague IV of 1907 states that "the officer in command of an attacking force must, before commencing a bombardment, except in cases of an assault, do all in his power to warn the authorities." At the time of the German attack, Greece was neutral. Once hostilities have begun, in actual practice the warning requirement is less of an issue due to the exception for assaults. *See also Kereadolu v. Germany* 516 ANNUAL DIGEST (1930).

144. T. TAYLOR, THE BREAKING WAVE 112–18 (1967).

> The indictment in the first Nuernberg trial, accordingly, contained no charges against the defendants arising out of their conduct of the war in the air.[145]

The Charter of the Nuernberg International Military Tribunal listed "indiscriminate bombing" as a crime recognizable by the Tribunal, but in practice the United Nations War Crimes Commission routinely rejected cases alleging indiscriminate bombing if the bombarded towns or cities contained military objectives.[146]

B. Law of War Manuals

Another way of determining the law of war at a particular period of time—such as in the decade immediately preceding World War II—is to look at the law of war manuals of the military services of the nations involved in that conflict. While military law of war manuals are not regarded as policy statements binding upon a nation and its military forces, they are at least an indication of a nation's probable interpretation of the law of war. Were an air staff planner to wonder if the plans he was writing were consistent with the law of war, in all likelihood he would go to the law of war manual. A review of available materials for the period provides the following information:

United States. The principal law of war manual for operations on or over land was *U.S. Army Field Manual* 27–10, "Rules of Land Warfare." There were two editions available to planners: the 1914 edition (updated to 1917) and the 1940 edition. Other than defining what constituted a "defended place," neither manual provided much information beyond that actually contained in Hague Convention IV of 1907. Guidance to members of the U.S. Army Air Corps preparing the various war plans, then, would have been minimal at best.[147]

In May of 1941, the U.S. Navy issued "Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare." Two paragraphs provided guidance to the reader who consulted the manual:

> 229. Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring noncombatants is prohibited. In any bombardment every practicable precaution should be taken to avoid injury to civilians.
>
> 230. The bombardment of enemy troop concentrations, communication centers, lines of communications, military or naval establishments, depots of arms or war material, workshops,

145. T. TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 65 (1949).

146. Brand, *The War Crimes Trials and the Laws of War*, 26 THE BRITISH YEAR BOOK INT'L L. 414–27, at 419 (1949). The issue of legality of bombing was raised in other ways in some trials, as in the charge against former Luftwaffe chief Hermann Goering of devastation of towns, not justified by military necessity, in violation of the law of war. Indictment (Count Three), in I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 42–43 & 61–62 (1947). The issue was considered in volume IX at 175–78, 214–19, and is summarized in R. CONOT, JUSTICE OF NUREMBERG 334–35 (1983).

147. The United States Air Force was not formed as a separate service until September 18, 1947. U.S. Army Air Corps planners would have looked to the Army law of war manual for guidance. A separate U.S. Air Force manual on the law of war was not completed until November 19, 1976, more than three decades following the conclusion of the war, and then only after considerable resistance by the Air Staff. There were lone crusaders. *See* DeSaussure, *International Law and Aerial Bombing*, 3 AIR U. Q. REV. 23–34 (Fall 1962); DeSaussure, *The Laws of Air Warfare: Are There Any?*, 12 A. F. L. REV. 242–51 (Fall 1970); DeSaussure, *The Laws of Air Warfare: Are There Any?*, 23 NAVAL WAR C. REV. 35–47 (Feb. 1971); DeSaussure, *The Laws of Air Warfare: Are There Any?*, 5 INT'L LAW 527–48 (July 1971). Colonel DeSaussure was an original moving force behind an Air Force law of war manual.

plants, and factories actually used for the manufacture of war material wherever situated is not prohibited.[148]

United Kingdom. The British *Manual of Military Law* was revised in 1929, with amendments to January 1936. There are no separate paragraphs addressing aerial bombardment. However, in the paragraphs regarding bombardments, assaults, and sieges, paragraph 122 states:

> No legal duty exists for the attacking force to limit bombardment to the fortifications or defended border only. On the contrary, destruction of private and public buildings by bombardment has always been, and still is, considered lawful, as it is one of the means to impress upon the local authorities the advisability of surrender.[149]

The Royal Air Force was a separate service, with its own separate law manual, and employed one of the leading experts on the law of war.[150] Yet the preface to the second (1933) edition of the British *Manual of Air Force Law* (reprinted without change in 1939) stated: "It has not yet been found possible to include in this volume a chapter relating to air warfare corresponding to the chapter on the law and usages of war on land in the Manual of Military Law."[151]

Germany. Although there was no separate Luftwaffe law of war manual, in 1936 the Luftwaffe issued service directive L. Dv. 16 entitled *The Conduct of the Air War* (Die Luftkriegfuhrung). While paragraph 186 stated unequivocally that "Attacks on cities for the purpose of terrorizing the civilian population are absolutely forbidden," the directive acknowledged that the single most important task of the Luftwaffe was an offensive against (a) the combat strength of the enemy, and (b) its population's will to resist. In order to accomplish this, the Luftwaffe should carry out offensive operations against the enemy's population and country at its most sensitive points, including economic targets. Although the directive was reissued with minor changes in 1940, these statements remained without change.[152]

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148. "Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare," at 229–30.

149. MANUAL OF MILITARY LAW 1929, Amendment No. 12 (Jan. 1936) at 31. An Australian legal scholar of the time concluded:

> The law of war is to-day under a cloud. It is highly doubtful whether it can any longer be called 'law.' The 1929 Edition of the British Manual of Military Law recognizes this and is not able to do more than repeat the rules as they existed in 1914.

LEWIS, AUSTRALIAN MILITARY LAW 214 (1936).

The 1958 BRITISH MANUAL OF MILITARY LAW, which is the current manual, contains the following:

> The title of this Part of the Manual, 'The Law of War on Land,' makes it clear that it is not concerned with the law of warfare at sea or with aerial warfare. Nevertheless, the rules governing land combat will apply to members of naval and air forces when employed in combat duties on land.

By 1988, forty-nine years after the start of World War II, the Royal Air Force still does not have a law of war manual, despite the fact that Hague Convention IV (to which the United Kingdom has been a party since November 27, 1909) requires that each party "issue instructions to their armed forces which shall be in conformity with the Regulations respecting the laws and customs of war on land." (article 1).

150. James Maloney Spaight was the author of *Air Power and War Rights*. First published in 1924, a second edition was published in 1933. Each was far more comprehensive than any law of war manual used by any military service at that time.

151. MANUAL OF AIR FORCE LAW (2d ed. London, 1933).

152. D. IRVING, THE RISE AND FALL OF THE LUFTWAFFE 46–47 (1973); E. HOMZE, ARMING THE LUFTWAFFE 131–32 (London, 1976); W. DEIST, THE WERMACHT AND GERMAN REARMAMENT 64–65

Italy. On July 8, 1938, the Italian Government issued its first law of war manual. A report summarized its provisions of interest to the air planner of that time:

> On its face, the law repudiates the Douhet theory by defining the conditions of valid bombardment: bombardment of 'enemy objectives' is permitted when their total or partial destruction may benefit military operations . . .; bombardment of cities and other inhabited areas is permitted when there exists a 'reasonable presumption' that they harbor military preparations or supplies . . .; but bombardment 'for the sole purpose of punishing civil populations or of destroying or damaging properties of nonmilitary importance,' is in every case prohibited.[153]

There were dissenting voices to this language, and the report concludes: "The almost universal affection of Italian airmen for the theory of Douhet makes it unlikely that [these articles] will be observed in a strict sense. In this affection they have been joined by Il Duce."[154]

C. Experts on International Law

Another secondary source for determination of the law is the writing of recognized experts on international law. While the writings of a number of international lawyers (and nonlawyers as well) have been cited in these pages for specific points, only two individuals stand out as authorities in the period prior to World War II. Interestingly enough, neither was a lawyer.

Royse. One recognized authority is M. W. Royse,[155] whose *Aerial Bombardment and the International Regulation of Warfare* was published in 1928.[156] Royse was a pragmatist; while he relied upon the historical practice of nations for precedent, he also brought combat aviation experience into his analysis and writing. In examining the general history of bombardment, for example, Royse cuts to the central point: "The history of bombardment regulation shows a distinct utilitarian development, in which the idea of military effectiveness dominates, and in which the doctrines of permissible violence and social sanction are of secondary importance as checks or influences."[157]

(Toronto, 1981); M. COOPER, THE GERMAN AIR FORCE 1933–1945 39–42 (London, 1981); and W. MURRAY, THE CHANGE IN THE EUROPEAN BALANCE OF POWER 1938–39, 1939–40 (1984). It was not difficult to "split the difference" between bombing the civilian population of an enemy solely for the purpose of terrorizing it and bombing economic and industrial targets, incidentally terrorizing the civilian population. This apparently was given serious consideration by the Luftwaffe. In May, 1933, Dr. Robert Knauss completed a major study for Erhard Milch, the state secretary in the new German Air Ministry. Knauss argued that not only should modern industrial centers be attacked in order to destroy an enemy nation's economic capability to wage war, but that population centers offered the possibility of attacking morale directly. Knauss suggested that "the terrorizing of the enemy's chief cities and industrial regions through bombing would lead that much more quickly to a collapse of the social and political rifts that cleave his society." W. MURRAY, *supra*, at 38, 40. The 1936 service directive is not inconsistent with Knauss's proposals.

153. Steiner, *Italian War and Neutrality Legislation*, 33 AM. J. INT'L L. 151–57 (1939).

154. *Id.* at 153.

155. Dr. Royse served as a United States Marine Corps aviator in World War I, obtained his Ph.D. in international relations from Columbia following the war, and served with the Office of Strategic Services during World War II. Between the wars and following World War II, he enjoyed a distinguished university teaching career.

156. M. ROYSE, AERIAL BOMBARDMENT AND INTERNATIONAL REGULATION OF WARFARE (1928). *See also* M. ROYSE, LA PROTECTION DES POPULATIONS CIVILES CONTRE LES BOMBARDMENTS 72–116 (Geneva, 1930).

157. M. ROYSE, LA PROTECTION DES POPULATIONS CIVILES CONTRE LES BOMBARDMENTS 147 (Geneva, 1930).

After examining the history of the modern law of war up to and including the Hague Air Rules of 1923, Royse concludes:

> There are thus no conventional rules in actual force which directly affect aerial bombardment. At the present time the only restrictions bearing on such operations are those general and rather vague limitations known as the customary practices of war.
>
> It cannot reasonably be affirmed to-day that it is wrongful or illegal to bombard a military objective, fairly regarded as such, by all available means of attack; nor does a military objective lose that character merely because it is situated in the midst of a crowded city remote from the immediate zone of land operations. Military objectives are likely to be hunted down and attacked, and the fact that the incidental harm may fall upon non-combatants and that the incidental destruction of property may at times approximate devastation probably will be accepted, as heretofore, as an unavoidable incident of warfare. The problem of regulation and its discussion will, as heretofore, hinge upon the question of what may properly be regarded as a military objective, and the question of the military importance of its destruction, viewed in relation to its situation and the probable effects of an attack upon it. In other words, the test in the future, as in the past, will be purely utilitarian.[158]

Participating in a conference of experts held by the International Committee of the Red Cross in 1930,[159] Royse offered a number of points that summarize the law as it seems to have existed in the decade preceding World War II as well as during the period of that conflict:

- The civilian population is not totally immune from the effects of bombardment, whether land, naval or air; indeed, the rules and practices of warfare do not protect civil populations against incidental bombardment even when such bombardment means wholesale destruction of property and civilian life.
- The extent to which civil populations are legally protected against bombardment has never been precisely determined; there is no agreement among jurists as to the extent of violence on the plea of military necessity.
- The law of war is based upon the practice of nations. In that regard, during World War I demoralization of the enemy by means of widespread bombardment was accepted by the military services as part of the functions of the aviation bombardment groups, as it was for artillery.
- To base the legitimacy of a means of warfare upon the extent of its incidental damage to civil populations would be a distinct innovation in the regulation of warfare on land.
- To interpret indiscriminate bombardment on the basis of incidental damage to non-combatant populations would thus, in effect, illegitimize aerial bombardment, since the permissible objectives would almost invariably be found surrounded by civil populations.
- At no time has the effective operation of vital weapons been limited by international regulations. It is therefore hardly likely that air power will be so restricted.[160]

In every respect, Royse was proved right.

Spaight. James Maloney Spaight published his first law of war text, *War Rights on Land*,[161] in 1911; his last was the third edition of his *Air Power and War Rights*,[162] published in 1947. Like Royce, Spaight was a pragmatist. He excelled as

158. *Id.* at 238, 241.
159. *Id.*
160. *Id.* at 73–74, 79.
161. J. SPAIGHT, WAR RIGHTS ON LAND (London, 1911).
162. J. SPAIGHT, *supra* note 137.

a writer on the law of war as he paid close attention to the other primary source of international law: history, or the practice of nations. Each of his three editions of *Air Power and War Rights*[163] is worthy of close scrutiny. Consideration here is limited to the second edition, published in 1933, as it reflects Spaight's thinking closest in time to World War II; had air planners sought to consult a standard work, it would have been Spaight's second edition. Spaight broadens the list of military objectives contained in the unadopted Hague Air Rules of 1923, as he did in his first edition,[164] and acknowledges that a legitimate target may be attacked wherever located,[165] but concludes: "If a military objective is situated in such a densely populated neighborhood, or if the circumstances of the case are otherwise such that any attack upon it from the air is likely to involve a disastrous loss of non-combatant life, aircraft are bound to abstain from bombardment."[166]

Spaight qualifies this conclusion in two ways, first by noting the quasi-military nature of men and women in munitions factories. He cites other legal authorities who acknowledge these persons may be regarded as auxiliary services of the armies while at work, but notes a split of opinion as to whether they may be attacked at home.[167] As to bombing of civilian property, he recognizes the historical practice that permitted general devastation, and the limitation contained in Hague Convention IV of 1907 regarding a connection between intentional destruction and military necessity. Then he ties destruction of civilian property to military utility (that is, efficiency) and the degree of risk to innocent civilians—again, the concept of "disastrous loss of non-combatant life" noted above.[168] While recognizing the impact of antiaircraft fire and weather on bombing operations,[169] Spaight errs in assuming that night bombing would be more accurate.[170] Beyond the concept noted in this paragraph, Spaight reached no conclusions.

In June 1945, perhaps in response to the controversy that surrounded the destruction of Dresden,[171] Spaight prepared an extraordinary document that until recently remained classified. Entitled *International Law of the Air, 1939–1945*,[172] it was intended as a confidential supplement to the second edition of his *Air Power and War Rights*.[173] Although Spaight published a substantially-rewritten third and final edition of *Air Power and War Rights*[174] in 1947, it lacks the comprehensiveness of

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163. J. SPAIGHT, AIR POWER AND WAR RIGHTS (London, 1924); J. SPAIGHT, AIR POWER AND WAR RIGHTS (2d ed. London, 1933); J. SPAIGHT, *supra* note 137.

164. J. SPAIGHT, AIR POWER AND WAR RIGHTS 233–35 (2d ed. London, 1933).

165. *Id.* at 195–210.

166. *Id.* at 210. While this may reflect emergent thinking of scholars of the time, it did not constitute an obligation accepted by nations. A single scenario suggests the impracticality of the rule. Assume a bomber force battles its way to its target deep in enemy territory, only to find the enemy has obscured the target—located in the midst of a populated area—with smoke. It would be foolhardy to think that the bombers would not bomb anyway, regardless of the consequences to the civilian population. Any other action would encourage a defender to continue his actions in order to frustrate any bombing.

167. *Id.* at 211.

168. *Id.* at 239–47.

169. *Id.* at 222–26, 253–54.

170. *Id.* at 247–52.

171. III C. WEBSTER & N. FRANKLAND, *supra* note 81, at 108–09, 112–13; E. RICHARDS, PORTAL 191–92 (London, 1977); M. Clodfeller, *Culmination Dresden: 1945*, 26 AEROSPACE HIST. 134–47 (Sept. 1979); J. TERRAIN, THE RIGHT OF THE LINE 677–78 (London, 1985); and M. GILBERT, ROAD TO VICTORY: WINSTON S. CHURCHILL 1941–45, 1257–58 (London, 1986). For a comprehensive analysis of the decision to bomb Dresden, *see* M. Smith, Jr., *The Bombing of Dresden Reconsidered: A Study in Wartime Decision-Making* (unpublished dissertation, Boston University, 1971).

172. J. SPAIGHT, INTERNATIONAL LAW OF THE AIR 1939–45, British Public Records Office [PRO] file AIR 41/5.

173. J. SPAIGHT, *supra* note 164.

174. J. SPAIGHT, *supra* note 137.

the confidential supplement. That supplement will be examined briefly, primarily to illustrate the chaotic state of the law of war as it related to aerial bombing in the opening phases of and, indeed, throughout the whole of World War II.

As early as 1937 British authorities began considering what Royal Air Force bombing policy should be if war with Germany were to begin. It is clear that British bombing policy was driven primarily by self interest and not by law of war or humanitarian concerns. In Spaight's words, "Our policy before the war and for the first nine months of the war was inspired by the consideration that the less bombing there was, the better for us. We were apprehensive about the effect of heavy attacks on London, and . . . we were not in a position to return blow for blow."[175]

Malkin Report. During the period of pre-war consideration, policies were proposed that were not always consistent with ongoing plans. Thus, a memorandum prepared by the Air Staff and circulated by the Secretary of State (Lord Swinton) to the Cabinet on March 1, 1938, supported a three-ton weight limitation on bomber aircraft. The limitation was consistent with the proposal made by the British Government to the ill-fated Geneva Disarmament Conference five years earlier in 1933. However, the weight limitation proposed in the 1938 Air Staff memorandum had been overcome by events in that the Air Council three years earlier, in 1935, had approved the construction of the Stirling, Halifax, and (via the Manchester) Lancaster bombers at weights substantially in excess of the three-ton weight limitation.[176]

On July 7, 1938, a call was issued by the Limitation of Armaments Sub-Committee of the Committee of Imperial Defence for a report on certain legal aspects of the issue of bombing, to be conducted under the chairmanship of Sir William Malkin, the Legal Adviser to the Foreign Office. After referring to the previously discussed three principles that had been laid down by Prime Minister Chamberlain in the House of Commons on June 21, 1938, the committee rejected a total prohibition on bombing and any restriction limiting bombing to the immediate area of military or naval operations. It then proposed the following rule:

> Air bombardment is only legitimate in the following circumstances:
> (1) Against warships, including transports and fleet auxiliaries, at sea;
> (2) On land, in accordance with the following rules:
>
> Any objective on land which may legitimately be bombarded under the rules applicable to land warfare, may be bombarded from the air if it is within the range of medium artillery, which for this purpose should be taken as ten miles from any of the forces of the belligerent who effects the bombardment or his allies.
>
> In addition, the following objectives on land may be bombarded, provided that they are either anywhere on territory occupied by an invader or within a radius of fifty miles of the nearest troops or air forces of the belligerent carrying out the bombardment or of his allies: —
>
> (a) Enemy troops and air forces;

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175. J. SPAIGHT, *supra* note 172, at D–1. *See also* J. BUTLER, II GRAND STRATEGY, App. I(a) 567–68 (London, 1957); and I C. WEBSTER & N. FRANKLAND, *supra* note 81, at 134–35.

176. J. SPAIGHT, *supra* note 172, at D–1 to D–3. The prototype two-engine Avro Manchester, built in response to Air Ministry Specification had an empty weight of 25,959 pounds. B. ROBERTSON, LANCASTER – THE STORY OF A FAMOUS BOMBER 13/36, 124 (London, 1964). By 1937 Air Ministry officials were talking in terms of building bombers weighing between 50,000 and 90,000 pounds by spring 1941. M. POSTON, D. HAY, & J. SCOTT, DESIGN AND DEVELOPMENT OF WEAPONS 78–79, 92–93, 124–126 (London, 1964) [hereinafter M. POSTON]. In fact the Air Ministry in the opening months of 1938 developed a paper on the ideal bomber, the weight of which was substantially greater than that proposed by the British Secretary of State. J. SLESSOR, THE CENTRAL BLUE 174–78 (1957). By way of contrast, Boeing B–17 models in the prewar era had an empty weight between 21,000 and 29,000 pounds. E. JABLONSKI, FLYING FORTRESS 310–11 (1965). Hence it is unlikely that the proposal would have been greeted with any enthusiasm in the United States.

(b) Ammunition dumps, military supply depots, artillery parks and similar well defined aggregations of distinctly military equipment, stores or supplies;
(c) Supply columns and other means of transport which are engaged in transporting supplies to or from the depots etc. mentioned under (b).[177]

The Malkin Report went on to make several other recommendations, one of which was to prohibit bombing of military objectives between sunset and sunrise, except in the immediate vicinity of the operations of land forces or against warships at sea. At least two major problems existed with the Malkin Report. Offered as a quasi-legal opinion, the list of targets nonetheless was fully at odds with target lists then being developed by the Air Ministry as part of Bomber Command war plans. For example, the Air Ministry on October 1, 1937, sent to Bomber Command a series of thirteen plans, called W.A. (Western Air) plans, with instructions to concentrate their planning on the first three. Some W.A. plans were:

(1) W.A. 1: the attack on the German Air Striking Force and its maintenance organization, to which was later added the German aircraft industry, originally listed under W.A. 6;

(2) W.A. 4: the attack on German military rail, canal, and road communications (a) during the period of the concentration of the armies, and (b) to delay a German invasion of the Low Countries and France;

(3) W.A. 5: the attack on the German War Industry including the supply of oil with priority to that in the Ruhr, Rhineland and Saar.[178]

Spaight noted the second way in which the Malkin Report was in conflict with contemporary planning. The Air Staff's heavy bomber construction program at the time of the Malkin Report (Scheme L) called for a force of forty-seven heavy bomber squadrons which were to be used solely as night bombers. Shortly thereafter and undoubtedly because of these fundamental differences, the Malkin proposals were dropped in their entirety.

X. THE AIR WAR PLANNERS OF WORLD WAR II

A. Air Ministry Policy

On September 15, 1938, the Air Ministry issued instructions to Bomber Command which began by quoting the Prime Minister's three principles. Acknowledging that those principles might prejudice otherwise legitimate courses of action, the instructions nonetheless advised that bombing would be limited to objectives that

177. J. SPAIGHT, *supra* note 172, at D–4. Uri Bialer notes that the Subcommittee on Limitation of Armaments "was unanimous in its view that Britain's interests would best be served by a [new] legal convention, despite its equally unanimous opinion that the convention would not be observed for long after an outbreak of war . . . . For this purpose, [the Malkin Committee] . . . was specifically charged with determining the degree of immunity which Britain should aim for, and the manner in which she should attempt to improve the draft [1923] Hague [Air] Rules." U. BIALER, *supra* note 135, at 119–20. Thus the Malkin list was not one of lawful targets, but limitations Britain hoped Germany would agree to until Britain obtained bomber parity. One reason that the Malkin Report failed to attract support was the fear that Britain's request would be met by a German demand to accept a similar limitation on belligerent rights at sea, where Britain enjoyed superiority. U. BIALER, *supra* note 135, at 121. *See also* Bialer, *"Humanization" of Air Warfare in British Foreign Policy on the Eve of the Second World War*, 13. J. CONTEMP. HIST. 79–96 (Jan. 1978).

178. J. SPAIGHT, *supra* note 172, at D–5. *See also* I C. WEBSTER & N. FRANKLAND, *supra* note 81, at 94. The Western Air Plans continued to undergo revisions and refinement. Their form as of September 1, 1939, is contained in IV C. WEBSTER & N. FRANKLAND, ANNEXES AND APPENDICES, Appendix 6.

were manifestly and unmistakably military in the narrowest interpretation of the term; and that even such objectives should not be attacked "unless [they can be] attacked with a reasonable expectation of damage being confined to them." The Air Ministry considered it vital in the opening phases of a war to avoid any action which could be represented as an attack on the civil population, in view both of the effect on neutral opinion and of the importance of ensuring that the enemy is given no genuine pretext for retaliatory action.

The Chief of Air Staff, in forwarding the instructions to the Secretary of State, stated "I feel sure that this instruction will not last very long, but we obviously cannot be the first to 'take the gloves off.' "[179] These limitations clearly were taken for policy reasons and not because they were considered to represent the current state of the law of war.

Additional proposals were considered over the next year. All chose to forego the attack of any target which entailed the possible loss of civilian lives, regardless of the cause of the loss of life. All considered targets or target categories as they had been identified in Hague Convention IX of 1907 or the 1923 Hague Air Rules, though without any geographic restriction related to proximity to land operations. All were premised on the Prime Minister's three principles, with elaboration of the second principle ("Objectives . . . must be identifiable.") to the effect that "the governing principle is that it is illegal to bomb a populated area in the hope of hitting a legitimate target which is known to be in the area but which cannot be precisely located and identified." These became part of Air Council Instructions issued on August 22, 1939, less than two weeks before Germany's invasion of Poland.

Although much of the guidance contained in the Air Council Instructions was couched in terms of the law of war, on October 16, 1939, the Chief of the Air Staff sent a message that the Royal Air Force was "no longer bound by [the Air Council Instructions] nor . . . [President] Roosevelt's appeal," because of the Luftwaffe actions in Poland. Continuing, he advised that, "Our action is now governed by expediency, i.e., what it suits us to do having regard to (a) the need to conserve our resources, (b) possible enemy retaliatory action, and (c) our need still to take into account to some extent influential neutral opinion." In considering the Prime Minister's three principles, the third ("civilian populations in the neighborhood will not be bombarded through negligence") was moderated where air attacks were in proximity to land operations, undoubtedly in recognition of the likelihood of increased air defenses in those areas. The realities of war were beginning to have an effect on a subject that heretofore had been dealt with only in hypothetical terms.

Five days later, the British Chiefs of Staff formally adopted an air policy that continued to take a "wait and see" attitude. While recognizing that Germany's weakest spot was the Ruhr Valley and its vital industries, their memorandum concluded:

> We should not be the first to 'take the gloves off.' From that it follows that until and unless Germany, by killing large numbers of civilians, either by indiscriminate air attack on France or Great Britain, or in the course of a violation, gives the necessary justification, there could be no question of attacking the Ruhr, or anything other than strictly military objectives.[180]

B. Policy Revision

The bombing policy was revised on June 4, 1940, following Germany's invasion

179. J. SPAIGHT, *supra* note 172, at D–8.
180. *Id.* at D–18.

of Denmark and Norway on April 9 and the Low Countries on May 10. The third of the Prime Minister's principles was amended to "The attack must be made with reasonable care to avoid undue loss of civil life in the vicinity of the target." This standard is important, as while it seems to consider the concept of proportionality, previously discussed, at the same time it recognized that an attacker in the heat of battle should only be held to a standard of due care. The new instructions were, in part, as follows:

> 2. The action of armies is well established by practice. Commanders of land forces will use every reasonable precaution to avoid undue loss of civilian life by artillery bombardment.
> 3. Bombardment by naval and air forces is to be confined to military objectives and must be subject to the following general principles:
> (a) The intentional bombardment of [the] civil population as such is illegal.
> (b) It must be possible to identify the objective.
> (c) The attack must be made with reasonable care to avoid undue loss of civil life in the vicinity of the target.
> (d) The provisions of [the] Red Cross Conventions are to be observed.

In paragraph 4, a new list of authorized targets was provided, with the note that military was to be interpreted in the broadest sense of the word:

> (a) Military forces, including naval auxiliaries of whatever description and whether or not attendant on the fleet; troop transports and military supply ships whether at sea or in port. This does not include merchant ships, whether defensively armed or not. *Note*: Areas in which all shipping can be treated as enemy transports or military supply ships will be specifically notified.
> (b) Military works and fortifications.
> (c) Military establishments and depots, including barracks, camps, billets and naval dockyards; aerodromes, whether designated military or civil; stores and dumps of military supplies.
> (d) Shipyards, factories and other establishments engaged in the manufacture, assembly or repair of military material, equipment or supplies, [and] power stations ancillary thereto; fuel and oil producing plants, refineries and storage installations.
> (e) Lines of communication and transportation and means of intercommunication serving military purposes.
> (f) Provided that the principles set out in paragraph 3 above are observed, other objectives, the destruction of which is an immediate military necessity, may be attacked for particular purposes.
> 5. In the case of naval bombardment of objectives in a town, warning should be given if the safety of the attacking force or the success of the operation is not jeopardized by so doing.[181]

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181. *Id.* at D–21. Significant in these instructions is the military's conclusion that the warning requirement contained in article 26 of the annex to Hague Convention IV of 1907 and article 6 of Hague Convention IX of 1907 did not apply to aerial bombardment of the targets listed in the memorandum. Article 26 of the annex to Hague Convention IV states: "The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn authorities." Article 6 of Hague Convention IX provides: "If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities."

The effectiveness of aerial attack of a target was (and remains) dependent upon myriad factors, not the least of which is surprise and a commensurate diminishment of enemy air defenses. No doubt this played significantly in the British decision against application of the warning requirement to aerial bombardment. The 1977 Protocol I relaxed the warning requirement while simultaneously aligning it with the customary practice of nations in this century. Article 57 (2)(c) provides: "Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit." This language actually *realigned* the law of war with customary international law before the codification of Hague Conventions IV and IX. In General Orders No. 100, *see supra* note 26, Francis Lieber had summarized the practice of nations in rule 19 of that regulation:

> Commanders, whenever admissible, [must] inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

Thereafter, Bomber Command became the recipient of a series of messages identifying either target categories or specific targets authorized for attack. These included aircraft depots, aircraft assembly factories, oil plants, aluminum factories, power plants, particular warships at particular locations, aircraft factories, an optical instrument factory, aerodromes in occupied territory from which England was being attacked, anti-invasion objectives (barges, ships, etc.), and railway marshalling yards.

By September the city of Berlin had slipped onto the list, in response to Luftwaffe attacks on London. Although few specific targets were identified, Spaight observes that "as a result of experience afforded by the German raids on London, it was considered that gas and electrical plants in Berlin and its environs were the most profitable targets." Although a list of Berlin power stations and coal gas works were contained in an appendix, given the extremely limited capability of RAF crews for target identification at night, the value of their incorporation into the target authorization is questionable. The Prime Minister's second principle had to accommodate to the harsh realities of war.[182]

C. Spaight

Spaight's classified supplement continues at length through the rest of the war. Much of the subsequent information has been discussed in the myriad volumes on the strategic air offensive[183] and, as with World War I, it is not the purpose of this article to discuss that history at this time. The value of the Spaight supplement lies in its examination of the various documents produced by the British Government during the two years prior to commencement of hostilities and the initial phases of World War II. While British desires to limit bombing were not entirely altruistic, neither was the government of Great Britain possessed of any greater knowledge as to what the law of war related to aerial bombardment might be. The Malkin Report clearly shows the degree to which the thinking of international lawyers had failed to keep pace with changes in warfare and technology. Except for the limitation on the intentional attack of the civilian population, the Prime Minister's widely-trumpeted principles for the limitation of aerial bombardment, subsequently adopted by the

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At the same time, the British were quite familiar with the early warning capabilities of radar, which they would put to good use only weeks later upon commencement of the Battle of Britain. It is entirely possible that they believed that radar obviated the necessity for advance warning. Significantly, they did not believe that protection for the civilian population of an enemy nation rested exclusively with the attacker; neither do article 26 of the annex to Hague Convention IV, article 6 of Hague Convention IX, nor article 57 (2)(c) suggest such.

182. J. SPAIGHT, *supra* note 172, at D–21 to D–25.

183. *See also* W. CRAVEN & J. CATE, Vol. 1–8 THE ARMY AIR FORCES IN WORLD WAR II, (1948–1954); J. ROSS, ROYAL NEW ZEALAND AIR FORCE, NEW ZEALAND IN THE SECOND WORLD WAR 1939–45 (Wellington, 1955); J. HERRINGTON, AIR WAR AGAINST GERMANY & ITALY, 1939–1943 (Canberra, 1954); J. HERRINGTON, AIR POWER OVER EUROPE, 1944–1945 (Canberra, 1963); G. ODGERS, AIR WAR AGAINST JAPAN, 1943–1945 (Canberra, 1957); D. GILLISON, ROYAL AUSTRALIAN AIR FORCE, 1939–1942 (Canberra, 1962); N. FRANKLAND, THE BOMBING OFFENSIVE AGAINST GERMANY (London, 1965); A. VERRIER, THE BOMBER OFFENSIVE (London, 1968); A. REVIE, THE LOST COMMAND (London, 1971); D. COPP, FORGED IN FIRE (1982); N. LONGMATE, THE BOMBERS: THE RAF OFFENSIVE AGAINST GERMANY, 1939–1945 (London, 1983); D. SAWARD, VICTORY DENIED (London, 1986); and C. SHORES, B. CULL & N. MALIZIA, AIR WAR FOR YUGOSLAVIA, GREECE, AND CRETE, 1940–41 (London, 1987). Examination of the practice of the principal parties to World War II—Germany, Italy, Japan, the Soviet Union, Great Britain, and the United States—reveals no distinction in their employment of airpower *vis-à-vis* concern for collateral damage or collateral civilian casualties; any distinction that existed was in capability rather than intent.

League of Nations, were forced to undergo substantial modification in the face of combat if they were to remain any sort of guidance.

D. Temper of the Times

One further indication of the state of the law of war existed prior to World War II. It is not one traditionally considered by international lawyers, but it certainly is critical to the questions addressed in this article. That factor is the temper of the times. The expectation in Great Britain and Europe was that, were war to break out, the initial phases would consist primarily of massive aerial attacks—in all likelihood with chemicals—upon cities and the civilian population as such. Private citizens fully expected it; governments planned for it through the development of air raid precaution plans, evacuation plans, and plans for the treatment of massive numbers of casualties that far exceeded the numbers experienced once war actually began. At the beginning of 1938, for example, Great Britain had manufactured and stored 19,500,000 gas mask canisters (filters) and 1,500,000 gas masks for the civilian population, and was assembling 150,000 gas masks per week. In April 1939, the British Ministry of Health prepared and issued to local authorities 1,000,000 burial forms in anticipation of civilian deaths from bombing. As one official history notes:

> During these [pre-war] years there was not, in essential outline, any substantial difference between the views held by the man in the street and by the officials in the social service departments as to the character of a future war. . . . . The general view which had emerged by 1938, . . . contained the following basic features. At the outset . . . London would be subjected to concentrated and intensive aerial air attack by bombers operating from Germany. In the first twenty-four hours the Germans might attempt to drop as much as 3,500 tons [of bombs]. Subsequently, and for a period of weeks, the daily weight of attack might average 700 tons . . . . It was thought that high explosive [bombs] would be employed to a greater extent than incendiary bombs, while the use of gas was considered possible.[184]

Beginning as early as 1924—a period when peace initiatives were much at hand, and fear of war very much distant—various British Government offices had begun planning for the eventuality that war might occur again. In that year official British estimates anticipated a casualty ratio of fifty civilian deaths per ton of bombs dropped on Great Britain. That figure increased steadily over the years prior to World War II, eventually reaching seventy-two civilian casualties per ton of bombs based upon Italian air raids upon Barcelona, Spain, in March 1938, when forty-two tons of bombs allegedly resulted in 3000 civilian casualties.[185]

In 1925 the nations of the world had negotiated the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of

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184. R. TITMUSS, PROBLEMS OF SOCIAL POLICY 8, 10 (London, 1950). *See also* U. BIALER, *supra* note 135, at 145. German air raid precautions are contained in the CIVIL DEFENSE DIVISION: FINAL REPORT, 48 UNITED STATES STRATEGIC BOMBING SURVEY, 2d ed., (1947). For a summary of British and European concerns and measures to alleviate them, *see* R. OVERY, *supra* note 7, at 25. British Prime Minister Chamberlain continued to press for some form of law of war restriction during this era, but expressed serious doubt that any agreed restrictions would survive the opening days of a conflict with Germany. U. BIALER, *supra* note 135, at 115. While Hitler feared any attack on German civilians because it might lead to a second "stab-in-the-back," in 1938 he was quite willing to use the threat of strategic bombing by the Luftwaffe as a diplomatic tool. R: OVERY, *supra* note 7, at 18, 24. This tended to confirm public and official fears that any war would commence with the bombing of cities.

185. R. OVERY, *supra* note 7, at 14. The actual casualty figures were lower, amounting to 1300 civilians killed, or 30.95 civilian deaths per ton of bombs. H. THOMAS, THE SPANISH CIVIL WAR 806–07 (rev. ed. 1977). Unlike Guernica, Barcelona was defended by antiaircraft guns. *See infra* note 188. But Mussolini was intent on causing as much devastation as possible, in part to impress Hitler.

Bacteriological Methods of Warfare.[186] In 1928 the League of Nations had produced the Kellogg-Briand Treaty outlawing resort to war.[187] Yet simultaneously Great Britain and the European nations were anticipating the worst; not merely war, but war in which civilian populations would be subjected to aerial attack, possibly with chemical munitions.

There existed a mood that affected both governments and individual citizens. It was exacerbated by the popular press, particularly in its reports on the Spanish Civil War, the Japanese bombing of Nanking, China, and Italian air force operations in Abysinnia, Ethiopia, (which included the employment of chemical weapons) and by books written by military "experts" (some less expert than others) forecasting the worst. One historian observed that "Concern that the civilian population would form a likely target in future war was both widespread and deeply felt."[188] As Winston Churchill commented, "We had entered a period when the weapon [the airplane] which had played a considerable part in the previous war had become obsessive in men's minds, and also a prime military factor. Ministers had to imagine the most frightful scenes of ruin and slaughter in London if we quarreled with the German dictator."[189]

The point to be made is a simple one: neither governments nor individual citizens placed much faith, if any, in the law of war (if the latter even knew of its existence) to prevent war or the aerial attacks upon the civilian population that were anticipated by all. No international lawyer stepped forward to say, "Don't worry—the law of

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186. SCHINDLER & TOMAN, *supra* note 27, at 115. Although chemical weapons were used by Italy in Abyssinia and by Japan in China prior to World War II, their use between 1939 and 1945 was deterred by the danger of retaliation in kind, rather than by the existence of the 1925 Geneva Protocol. *See* Harris, *British Preparations for Offensive Chemical Warfare, 1935–1939*, 125. J. ROYAL UNITED SERVICES INST. 56–42 (June 1980); and van Courtland Moon, *Chemical Weapons and Deterrence: The World War II Experience*, 8 INT'L SECURITY 3–35, 36–54 (Spring 1984).

187. 46 Stat. 2343; T.S. 796. Contained in *U.S. Army Pamphlet 27–161–2*, II INT'L L. 300–01 (Washington, 1962).

188. U. BIALER, *supra* note 135, at 2. Few events captured the attention of the world and fueled the fear of bombing as much as the three-hour German Condor Legion aerial attack on the Basque town of Guernica on April 27, 1937. The air assault destroyed the center of the town, killing at least 100 civilians and perhaps as many as 1000. Initial German denials of responsibility did little for the credibility of subsequent statements that the destruction occurred because of errant bombing by inexperienced crews. The first admission of German responsibility did not come until eight years after World War II. A. GALLAND DIE ERSTEN UND DIE LETZEN 42–43 (Darmstadt, 1953). Galland came to Spain as part of the Condor Legion two weeks after the attack on Guernica. Curiously English-language editions of Galland's book inexplicably omitted this important chapter. A recent edition contains this chapter. *See* THE FIRST AND THE LAST 26 (Mesa, Arizona, 1986). As Telford Taylor has noted, "[Nationalist General Emilio] Mola's earlier threat to 'raze all Vizcaya [the province in which Guernica is located] to the ground,' the preceding attack on Durango [on March 31, in which 250 civilians were killed], the duration of the Guernica bombing, the false denials of German responsibility, and the later German raids on Barcelona do little to support the apologia." T. TAYLOR, MUNICH: THE PRICE OF PEACE 286–87 (1979). *See also* G. THOMAS & M. MORGAN-WATTS, GUERNICA (1976); and H. THOMAS, THE SPANISH CIVIL WAR, *supra* note 185, at 624–29. The point here is not the cause of the bombing of Guernica, but the significant impact that it had on private citizens and foreign governments as to the likely nature of any future war. The bombing had a substantial effect on public debate in the Western world, particularly in Great Britain and the United States. *See* H. SOUTHWORTH, GUERNICA! GUERNICA! A STUDY OF JOURNALISM, DIPLOMACY, PROPAGANDA, AND HISTORY 89 (1977). The United States issued a formal note of protest to Japan about the Japanese plan to bomb Nanking. *U.S. Note to Japan*, N. Y. Times, 19 (Sept. 23, 1937). The note did not prevent the attacks. *See Hull Backs League in Rebuking Japan*, N. Y. Times, 8 (Sept. 29, 1937). The League of Nations rules with regard to aerial bombardment were adopted as a direct result of the Japanese bombing of Nanking. *See supra* note 139. For a discussion of Italian air operations in Abyssinia, *see* Spencer, *Some Legal Aspects of Aircraft in Belligerent Operations*, PROC. AM. SOC'Y INT'L L. 95–135 (1937); A. DEL BOCA, THE ETHIOPIAN WAR 1935–1941 (1965); J. DUGAN & L. LAFORE, DAYS OF EMPEROR AND CLOWN: THE ITALO-ETHIOPIAN WAR 1935–1936 (1973); and A. MOCKLER, HAILE SELASSIE'S WAR: THE ITALIAN-ETHIOPIAN CAMPAIGN, 1935–1941 (1984).

189. W. CHURCHILL, I THE SECOND WORLD WAR, THE GATHERING STORM 115 (London, 1948).

war will protect you." In fact, as previously indicated, international lawyers of that era doubted the applicability of the law of war to modern warfare and particularly to aerial bombardment. As Churchill observed in an earlier debate, "The only direct measure of defence on a great scale was to possess the power to inflict simultaneously upon the enemy as much damage as he himself could inflict."[190]

It was within this framework that air planners conducted their preparations for the war that was to come—with little to no confidence in the ability of the law of war to ameliorate the suffering and damage anticipated, and a substantial vacuum in the law of war when it came to delineating what law actually applied to aerial bombardment. But air planners of that era were not alone in this regard; their views were shared by private citizens, international lawyers, and government leaders. In the years preceding World War II, the credibility of the law of war to protect the civilian population from aerial attack was, at best, substantially lacking.

XI. PROBLEMS OF THE AIR WAR PLANNERS OF WORLD WAR II

An air planner in any nation in the interwar era as well as during World War II would have had a difficult time determining the law governing aerial bombardment. He would have found it impossible to find clear, well-defined, express language prohibiting or permitting the actions he was contemplating; at best, he would have found considerable disagreement and confusion among scholars. He would have been unable to find a comprehensive list of objects that legitimately could be considered military objects; and, in particular, he would not have been able to find appropriate language explaining the distinction between combatants and noncombatants in contemporary terms. While these may be attributable to a failure of diplomacy, it is the opinion of the author that the last must be laid directly at the feet of international lawyers and moral philosophers who failed to adjust international law and moral thinking to major technological changes in society and warfare. International law Professor Philip C. Jessup warned in 1941 of the danger of such torpidity in the development of the law relating to bombing, noting presciently that the "law often lags behind facts, but if it does not correspond to facts it is eventually nullified or modified."[191] Such was the fate that befell the law of war relating to aerial bombardment during World War II.

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190. M. GILBERT, WINSTON S. CHURCHILL: THE PROPHET OF TRUTH, 1922–1939 573 (London, 1976). *See also* Spaight, *The Chaotic State of the International Law Governing Bombardment*, 9 THE A.F.Q. 24–32 (1938).

Commenting on this period and the thinking of the average man on the street, British historian Noble Frankland noted that "[W]ar normally ensues when international regulation has failed. The scale of weapons and the ruthlessness of their application depends not upon international agreements reached before the outbreak of the war, but upon the will and determination of those employing the weapons." Letter to author, February 16, 1979.

191. Jessup, *International Law and Totalitarian War*, 35 AM. J. INT'L L. 329 (April 1941).

It is at this point that some international lawyers may turn to the famous Martens clause contained within the Preamble to Hague Convention II of 1899 and Hague Convention IV of 1907 which states:

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

SCHINDLER & TOMAN, *supra* note 27, at 70.

Such an answer not only begs the question, but reveals the inadequacy of the codified law of war as it existed during World War II and today. It provides no guidance to military personnel planning combat operations.

As a boy, the author went to see a postseason football bowl game. This game pitted an individual who had been selected as the best running back in college football against a nationally-recognized defensive player. In the second half, the two players met in a bone-jarring collision that could be heard above the roar of the 60,000 fans. As they were carried, unconscious, from the playing field, the announcer declared that "This was a case of the irresistible force meeting the immovable object." In World War II, a similar collision occurred between the bombing doctrine and tactics of all nations and the basic humanitarian concept of discrimination; the innocent civilian suffered as a result.

How did this happen? The preceding pages have suggested some problems. Except for the fundamental prohibition on the attack of the civilian population as such—and reasonable people may differ on the degree to which this was honored—the law of war was not even on the World War II playing field, and moral principles can be asserted to support or condemn the actions that occurred. But the principal source of international law, the practice of nations, clearly illustrates the failure of the law of war to come to grips with changes that had taken place not only in weapons but in warfare itself. Warfare underwent revolutionary technological changes during the twentieth century to which the law of war has yet to adjust. Speaking of the submarine, airplane, and nuclear weapons, international lawyer Julius Stone summarized the predicament:

> A factor in the weakness of modern war-law springs from rapid technological development in new and transformed weapons, . . . [which] doubly depress the role of law. On the one hand they outmode existing rules; on the other, when the new weapons are wholly new, like the airplane or the atom bomb, the problem of regulation finds the rudimentary organs of international legislation at their most impotent. The weapons come into use in a kind of legal vacuum. The more destructive they are, the stronger is the pressure of public opinion in most countries to limit or even outlaw them. But also, the more effective they are, the more rarely can legislation by agreement be achieved, so long as only one State or block of States thinks it has or may get a decisive lead in the weapon.[192]

Thus occurred the legal vacuum that existed before and throughout World War II. Of course, the vacuum was not total. All nations agreed for humanitarian and utilitarian purposes that indiscriminate bombardment—whether by land, naval, or air forces—was prohibited. But the acknowledged and apparently accepted philosophy of discrimination was qualified by these events of World War II. A long-standing practice of nations was that collateral civilian casualties were not only an inevitable result of bombardment, but the cost to a nation of engaging in war; their avoidance was the principal responsibility of the defender, who had exclusive control over the civilian population. An equally long-standing principle was that collateral civilian casualties, as a result either of general bombardment or inaccurate bombardment, were a way in which the morale of an enemy nation could be affected, legally. Discrimination was the sole standard in law and the ethics of war. Against that vague, undefined standard were legal/moral counterarguments that efficient brutality in war deterred war or hastened the conclusion of hostilities, and a more brutal campaign could and should be waged against an unjust or immoral opponent.

Neither of these counterarguments had been rejected by the law of war at the outset of World War II. There has been some qualification of the first since World War II by the limited war theory articulated within some Western democracies, but then again none of these nations has been confronted with a threat equal to that

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192. J. STONE, *supra* note 53, at 349–50.

experienced during World War II. The limited war theory has not been accepted by the non-Western World, as illustrated by actions by both sides in the Iran-Iraq War and Soviet operations in Afghanistan.[193] The second counterargument remains a valid moral point, and is a fundamental concept overriding the law of war in many non-Christian nations, as well as in Socialist military doctrine.[194] Neither counterargument can be brushed aside easily.

The principle of discrimination was at the time of World War II, and remains today, conditioned by the commingling of military objectives with the civilian population, as well as the fundamental failure of the law of war to acknowledge that the traditional distinction between the combatant and noncombatant was obsolete, and had been for the century preceding World War II. Also, legitimate actions taken by the defender, such as dispersion of war materials and/or production facilities, camouflage or other ruses, and air defenses, could result and are intended to result in a bombing force being less precise, thereby placing the defender's civilian population at greater risk.

This last point is quite important, but generally is neglected in evaluating a bombing mission or campaign, or actions taken by an attacker to compensate for the defender's efforts. For example, each major bombing campaign during World War II found the attacker forced to resort to the cover of darkness in order to minimize the effectiveness of enemy defenses, with a concomitant decrease in bombing accuracy.[195]

In this regard something must be said about "indiscriminate" bombing, as the term has been used rather promiscuously by many historians, international lawyers, and other writers. The term indiscriminate is without legal definition; a standard dictionary definition is "not marked by discrimination; not marked by careful distinction."[196] Unfortunately, such definition contributes little to answering the question as to whether the law regarding discrimination was followed by bomber forces during World War II. Three observations can be made:

1. In considering "careful distinction," the standard was one of ordinary care by

193. Thus while the Vietnam War was fought as a limited war by the United States, it was regarded as total war by the North Vietnamese. The 1982 Falklands-Malvinas War was fought as a limited war by both sides, but on a battlefield virtually devoid of civilians. The Arab-Israeli Wars have been fought against a background of superpower influence in which each has encouraged constraint by the combatant nations in order to avoid superpower confrontation. Use of chemical weapons—weapons regarded as prohibited under international law, and a weapon to which no nation resorted during World War II—by Iraq and Iran in their conflict, the Soviet Union in Afghanistan, Vietnam in Southeast Asia, and Cuba in Angola, and the rejection by Third World leaders of any constraint on the use of chemical weapons at an international conference convened to discuss the problem of chemical weapons, held in Paris in January 1989, *see* Tesko, *Chemical Warfare Treaty/Chemical Warfare Threats: It's Not Just the Soviets Anymore*, LXXIV NAT'L DEF. 31–33 (April 1989), not only illustrates the philosophical distinction with which non-Western nations view international law and the law of war, but the lack of an enforcement mechanism available to the law of war.

194. The law of war essentially remains a Western concept. Although the 1949 Geneva Conventions for the Protection of War Victims are law of war treaties to which more than 95% of the nations of the world are party, even these fundamental treaties enjoy limited acceptance in practice outside the Western world.

195. Although 1937 plans called for RAF Bomber Command to carry out night operations only, initial Bomber Command operations (except for leaflet dropping) were conducted in daylight, with catastrophic losses to enemy defenses. This lead to the policy of night operations. *See* I C. WEBSTER & N. FRANKLAND, *supra* note 81, at 138–39, 141; HASTINGS, *supra* note 8, at 60–61. After equally valiant daylight bombing efforts during the Battle of Britain, the Luftwaffe turned to night bombing in the winter of 1940–1941. *See* F. MASON, *supra* note 81, at 648; and J. FOREMAN, BATTLE OF BRITAIN: THE FORGOTTEN MONTHS (London, 1988). For U.S. bombing operations against Japan, *see* H. HANSELL, JR., THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY AND JAPAN 183 (1986); and LEMAY & YENNE, SUPERFORTRESS: THE B–29 AND AMERICAN AIR POWER 120 (1987).

196. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1976).

a reasonable man under the same or similar circumstances. No greater standard of care has been proposed in the years that have passed since World War II.

2. In the race to condemn aerial bombardment, many have failed to take into proper account the effect of a defender's actions. If a bomb is dropped and misses the target, the bomber is guilty of indiscriminate bombing. This is an untenable position even by today's bombing standards. It holds World War II bomber crews to a higher standard of bombing accuracy than is justified by the facts, holds aerial bombardment to a higher standard than artillery or naval gunfire, and in particular fails to take into account intervening actions by a defender that prevent—and are intended to prevent—a bomber from bombing as accurately as possible.[197]

3. History also offers evidence of state practice that is not always consistent. Luftwaffe briefing photographs and documents for air raids on the A. V. Roe Supermarine aircraft factory, the Thornycroft boat building premises and the "British Mex. Petroleum Company" in Southampton in December 1940, suggest a desire properly to identify target locations.[198] Strong evidence has been offered that prior to 1942 the Luftwaffe exercised more than ordinary care in its bombing raids.[199] Yet in addition to Hitler's and Goering's view of the Luftwaffe as a weapon of intimidation and terror, plans were drawn to attack civilian populations,[200] and a leading historian of the Luftwaffe has observed that whether or not the bombing of Rotterdam was a mistake, Germany did not hesitate to note the connection between its bombing on 14 May and the surrender of all Dutch military forces the following day.[201] Similar contradictory evidence between a desire to place bombs squarely on legitimate military targets and a disdain for accuracy or care for the possibility of collateral civilian casualties can be found in the records of every other World War II air power. While state practice thus becomes important, it is difficult to ascertain a bombing policy merely by seeing where a bomb struck, because of the myriad factors that influence or may influence its eventual point of impact, as will be discussed.

Did indiscriminate bombing occur during World War II? Of course, and each

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197. *See*, KALSHOVEN, BELLIGERENT REPRISALS 164–65, 168–69 (Leyden, 1971), in which the author concludes that the Luftwaffe bombing of London on 24 August 1940 and RAF Bomber Command's response against German cities were (based solely on results, dismissing intent, while acknowledging enemy defenses) "indiscriminate." Historically bombing accuracy diminishes by 200% once an aircraft is taken under fire. Thus, an aircraft whose normal Circular Error Probable (the radius of a circle within which half of the bombs are expected to fall) is, for example, 500 meters would increase to 1500 meters once the aircraft is taken under attack.

198. F. MASON, *supra* note 81, at 414. The book contains a number of illustrations of Luftwaffe target documents.

199. Horst Boog, "Luftwaffe and Unterschiedsloser Bombenkrieg bis 1942," at the "Conference on the Air War in World War II," Militargeschichtliches Forschungsamt, Freiburg im Breisgau, Federal Republic of Germany (Sept. 1, 1988).

200. W. MURRAY, *supra* note 85, at 21 notes that Nazi plans for the invasion of Czechoslovakia assigned the following tasks to its two air fleets: (a) destruction of the Czech air force, (b) hinderance of the mobilization and movement of reserves, (c) support of the army's advance, and (d) attack of the enemy population.

Likewise, Generaloberst Alfred Jodl in June 1940 offered three avenues for a direct attack on England: (a) an offensive by air and sea against British shipping combined with air attacks against centers of industry, (b) terror attacks by air against population centers, and (c) finally, a landing operation aimed at occupying England. W. MURRAY, STRATEGY FOR DEFEAT: THE LUFTWAFFE, 1933–1945 45 (Maxwell Air Force Base, Alabama, 1983).

In contrast, Horst Boog lists the following tasks: first, to annihilate the enemy air force by attacks on its ground organization and industrial base rather than fighting it in the air; second, to support the operations of the Army and Navy; and third, to bomb the centers of war potential in the rear of enemy territory. H. Boog *Higher Command and Leadership in the German Luftwaffe, 1939–1945*, in A. HURLEY & R. EHRHART, *supra* note 38, at 147. The last task was strategic (in the sense the term was used during World War II), and mirrors the mission of RAF Bomber Command.

201. W. MURRAY, *supra* note 85, at 40.

major participant was guilty of it at one time or another. The fundamental distinction between bombing forces was one of capability and emphasis more than intent.[202] This author agrees with the conclusion of Royse that the general measure of discrimination is tied to military utility or effectiveness, that is, that bomber forces should bomb as accurately as possible given their capabilities and opposition. Bomber forces during World War II generally endeavored to perform their respective missions at a level that made the most effective use of their capabilities, subject to conditions over the target (enemy defenses, wind, and weather). Certainly there are exceptions. Allied bomber forces exercised a greater standard of care in an effort to minimize civilian casualties in Nazi-occupied nations than they did in their attack of targets in Germany. But attempts by some critics to set a time during the war at which bombing forces could have become more discriminate are open to challenge.[203]

In this regard, even if more precise standards had existed during World War II, the law of war is not a suicide pact. It does not require that an attacker employ the most discriminate force available to him. Were that the case, RAF Bomber Command (for example) would have been obliged to fly precision-bombing missions exclusively once it demonstrated its capability to do so with the 1943 dams raids by No. 617 Squadron,[204] or a nation would be required to sacrifice commando units rather than employ bomber aircraft in attack of military objectives where there is a risk of collateral civilian casualties. No such obligation exists in the law of war.

XII. AIR WAR LAW: 1945

The destruction wrought in the process of World War II was a product not only of the condition of total war, but also the absence of clear legal standards. However, based upon the practice of nations during that conflict, and dismissing actions taken as "reprisals" (whether or not reprisals in fact) that require more detailed evaluation

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202. As British historian R. J. Overy notes,

> It is worth looking at the German decision to plan for strategic bombing in more detail because this was an area of particular failure during the war. In fact so unsuccessful was it that most historians have dismissed altogether the idea that the Luftwaffe prepared for war in the same way as the Royal Air Force and the United States Army Air Forces. Yet at the Nuremberg trials Goering protested that his intention had been from the outset to create an air force for independent bombing operations, and that tactical army support was secondary.

R. OVERY, *supra* note 85, at 85, 106.

203. *See* BEST, *supra* note 8, at 280. He selects mid-1944 as that point in the war when RAF Bomber Command in particular should have been more discriminate in its attacks. *Cf.* TERRAINE, THE RIGHT OF THE LINE 678 (London, 1985), in which, speaking of a later time (February 1945), he remarks:

> [O]nly the luxury of hindsight and the detachment of non-participation can undervalue the enormous sense of that weight of time, the intense desire to bring the whole business to an end as quickly as possible, that possessed not merely Bomber Command, or the Royal Air Force, but virtually the whole nation.

The supposition also ignores other outside influences, such as weather. While U.S. B–17 crews fought valiantly to make their case for daylight precision bombing, in the closing months of 1944, using radar bombing through 10/10ths cloud, bombing accuracy decreased. Against Japan, for a variety of reasons, bombing efforts were not directed against precise industrial targets, but against urban areas—as RAF Bomber Command had been carrying out its attacks over Germany. *See* Gary J. Shandroff, The Evolution of Area Bombing in American Doctrine and Practice (New York University, 1972) (unpublished dissertation).

204. As described in BRICKHILL, THE DAM BUSTERS (London, 1951); EULER, ALS DEUTSCHLANDS DAMME BRACHEN (Stuttgart, 1978); COOPER, THE MEN WHO BREACHED THE DAMS (London, 1982), and SWEETMAN, OPERATION CHASTISE (London, 1982).

than space allows at this time, certain fundamental principles can be found interwoven throughout the aerial bombing campaigns of the warring nations:

a. The intentional attack of the civilian population generally was regarded as prohibited, in large measure owing to the military inefficiency of such attacks or greater priority of attack of specific targets related to the enemy's war effort. However, collateral injury to the civilian population or damage to civilian objects was the "price of doing business," *i.e.*, waging war. While there was some belief that such collateral injury or damage was a means for attack on the morale of the nation, this may well have been an afterthought to explain away the inherent inaccuracy of bombing.

b. To the degree that there was concern for collateral civilian casualties, it was regarded as a mutual obligation shared by the attacker, defender, and the individual civilian. The primary responsibility for protection of the civilian population rested squarely with the defender, and each nation exercised this responsibility through elaborate civil defense procedures.

c. Where collateral civilian casualties occurred, they could be attributed to myriad factors, not the least of which was the intensity of enemy defenses. Other factors included weather, enemy deception, dispersal of targets, and their commingling with the civilian population as a natural consequence of industrialization and urban growth.

d. Lawful targets were regarded as: military equipment, units, and bases; economic targets; power sources (coal, oil, electric, hydroelectric); industry (war supporting manufacturing, export and/or import); transportation (equipment, lines of communication, and petroleum, oil, and other lubricants necessary for transportation); command and control; geographic; personnel; military; and civilians taking part in the hostilities, including civilians working in industries directly related to the war effort.

If international legal standards were to be codified, it remained the responsibility of the nations of the world to do so. Subsequent negotiation of law of war treaties provided mixed help.

XIII. 1949 GENEVA CONVENTIONS

On September 4, 1945, only days after the conclusion of World War II, the International Committee of the Red Cross (ICRC) addressed a letter to the U.S. Department of State and to the foreign offices of Great Britain, the Soviet Union, China, and France, inviting each to send representatives to Geneva to discuss informally with the ICRC proposals for possible revision of international conventions relating to prisoners of war and civilian internees. Following these preliminary discussions, the ICRC planned to invite other governments to participate, to include the nations of the British Commonwealth, Belgium, Brazil, Czechoslovakia, the Netherlands, Norway, Poland, and Yugoslavia.

The ICRC had an underlying purpose for acting immediately after the cessation of hostilities. Its desire was to take advantage of the expertise developed by nations during the war and capitalize upon it before those participating specialists had returned to their civilian professions or lost sight of their wartime activities.

The U.S. Secretary of State agreed with the ICRC premise, and accepted its invitation by letter dated February 5, 1946. In preparation for the ICRC meeting, an interdepartmental Prisoner of War Committee was established. The committee was

comprised of representatives from the Departments of State, War, Navy, and Justice, and the American National Red Cross. Members of the Post Office Department participated when matters relating to communications and mail were discussed. Seventeen formal meetings of the U.S. interdepartmental committee were held between July 1, 1946, and February 28, 1947. Although the committee's title suggests a primary interest in prisoner of war matters, its discussion was broader.

The ICRC held a preliminary conference of National Red Cross Societies for the study of issues related to the 1929 Geneva Conventions at its headquarters in Geneva in July 1946. Subsequently the ICRC convened a meeting of government experts who met in Geneva from April 14 to 26, 1947. Of the eighteen nations invited, sixteen accepted the invitation; fifteen (Australia, Belgium, Brazil, Canada, China, Czechoslovakia, France, Great Britain, India, Netherlands, New Zealand, Norway, Poland, Union of South Africa, and the United States) attended. The Soviet Union and Yugoslavia declined the invitation, while the Greek delegation was unable to attend when its aircraft was accidentally destroyed.

Despite the absence of the Soviet Union, the dissolution of the wartime alliance between Great Britain, the United States, and the Soviet Union was apparent, as Poland (the delegation having arrived a week late, apparently because it was awaiting instructions from Moscow) introduced a resolution condemning war and the new weapons of war. Poland made other proposals that would provide a basis for refusal to apply any prospective conventions that would be developed from any conferences on political grounds in the event of future hostilities. While unsuccessful, in retrospect the Polish effort was a harbinger of future Socialist application of the law of war.[205]

Although there was no agreement as to dates for a future diplomatic conference, the meeting of government representatives did produce reports regarding the modernization of the 1929 Geneva Conventions Relating to the Wounded and Sick in Armies in the Field and to Prisoners of War. The ICRC in turn produced four draft conventions that were introduced at the XVIIth International Red Cross Conference at Stockholm in August 1948. After their approval by that conference, the drafts were taken as the basis for discussions at the Diplomatic Conference convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims, held in Geneva from April 21 to August 12, 1949.

That conference produced four conventions that served to revise the 1929 Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field; the 1907 Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention; and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War; and to create a new treaty to deal with the protection of civilians in time of war. The four treaties are known collectively as the Geneva Conventions for the Protection of War Victims of August 12, 1949.[206] While the four 1949 Geneva

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205. The preceding summary is contained in the Report to the Secretary of State of the U.S. Delegation to the Meeting of Government Experts (Aug. 26, 1947).

206. The four conventions are: Geneva Convention for the Protection of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; the Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. The records of the negotiations are contained in Final Record of the Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims (Berne, 1950). *See* G. DRAPER, THE RED CROSS CONVENTIONS (1958).

Conventions primarily address war victims in the hands of a belligerent, they do include several provisions germane to this article.

Article 19 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS) provides:

> Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked.
>
> The responsible authorities shall ensure that the said medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

Similar language is contained in article 18, paragraph 5 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC): "In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives."

Although the language is different, the provisions have the same intent, that is, to provide protection to hospitals and other medical equipment and establishments from the collateral effects of war. The provisions are important in their recognition of the *shared* responsibility for limiting collateral damage or, put another way, for not placing the responsibility for limiting collateral damages or injury exclusively on an attacker. The commentaries published by the ICRC on these two conventions make this clear.[207] But one commentary also noted that a hospital's "proximity must not appear to be an indirect attempt to protect a military objective from attack."[208] Article 28 of the GC is more direct, declaring that "The presence of a

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207. COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD [hereinafter GWS COMMENTARY] 198–99 (Geneva, 1952); and COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR [hereinafter GC COMMENTARY] 152–53 (Geneva, 1958).

208. GWS COMMENTARY, *supra* note 207, at 199. Pictet, the editor of GC COMMENTARY, notes that "It will no longer be possible to change the location of many civilian hospitals already in existence. . . . In such cases the precautionary measure will consist in seeing that no military objectives are sited in the vicinity, and, if they are already there, that they are removed if possible." Pictet notes on the same page that:

> The legal protection accorded to . . . hospitals must be accompanied by practical measures to ensure that they are situated as far as possible from military objectives and to protect them from the accidental consequences of attacks on such objectives. If that is not done the protection is very likely to be illusory, even if the hospitals are clearly marked.

Id. at 153.

Pictet's statement was a fair prediction. During Linebacker II bombing operations against North Vietnam (18–29 December 1972), the Bach Mai Military Storage Complex was targeted for attack. The target was roughly twenty square miles in area, and included the Bach Mai military airfield in its center. Adjacent to the airfield was the 940-bed (unmarked) Bach Mai Hospital. A cell of three B–52 bombers was assigned the attack of the storage complex. The crews established a line of attack that paralleled (rather than passed over) the Bach Mai Hospital, in order to avoid damage to it. At the time of the attack of the military complex, the third B–52 in the cell had fallen five miles behind the other two. losing its mutual electronic countermeasures protection. As it crossed the bomb release line, it was hit by two Soviet SA–2 surface-to-air missiles. As the aircraft descended, out of control, some of its bombs struck the Bach Mai Hospital. While initial North Vietnamese reports suggested massive damage and injury to patients and staff (including some American prisoners of war), U.S. photographic assessment revealed the damage to be minimal. Subsequently North Vietnam acknowledged that the patients and medical staff had been evacuated prior to the commencement of Linebacker II operations, and that there were no American prisoners of war at the hospital at the time it was struck by the errant bombs. Nonetheless, a 1982 CBS *60 Minutes* program celebrating the tenth anniversary of the end of U.S. involvement in the Vietnam War resurrected the erroneous version of the hospital's damage. *See* Parks, *Linebacker and the Law of War*, 34 A. U. REV. 2, 22–23, 25 (Jan.–Feb. 1983).

protected person may not be used to render certain points or areas immune from military operations."[209]

The Geneva Convention Relative to the Treatment of Prisoners of War (GPW) establishes rather comprehensive protection for prisoners of war, providing:

> No prisoner of war may at any time be sent to, or detained in, areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.
>
> Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favor of the population shall also apply to them.
>
> Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner-of-war camps.
>
> Whenever military considerations permit, prisoner-of-war camps shall be indicated in the daytime by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner-of-war camps shall be marked as such.

Similar language in article 83 of the GC provided like protection for civilian internees.[210]

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209. Pictet's GC COMMENTARY makes it clear why this provision was incorporated into the GC:

> During the last World War public opinion was shocked by certain instances . . . of belligerents compelling civilians to remain in places of strategic importance (such as railway stations, viaducts, dams, power stations or factories), or to accompany military convoys, or again, to serve as a protective screen for . . . fighting troops. Such practices, the object of which is to divert enemy fire, have rightly been condemned as cruel and barbaric.

GC COMMENTARY, *supra* note 207, at 208. Pictet states that the prohibition applies "to the belligerents' own territory as well as to occupied territory, to small sites as well as to wide areas." *Id.* at 209. A dilemma surrounding this last statement is the fact that the Soviet Union and other socialist nations traditionally have asserted that the law of war does not bind them with regard to actions any of them may take in defense of their own territory, and that any claim to the contrary is not consistent with the sovereignty of the state. During the Rolling Thunder bombing campaign against North Vietnam (2 March 1965 to 1 November 1968), for example, the Government of North Vietnam made generous use of its civilian population and civilian objects, including hospitals, as a screen from attack of otherwise legitimate targets. *See* Parks, *supra* note 109, at 2-23.

210. Article 23, GPW, is contained in SCHINDLER & TOMAN, *supra* note 27, at 439; article 83, GC, is in SCHINDLER & TOMAN, *supra* note 27, at 526. The experience of the inadvertent attack of or damage to prisoner of war (POW) camps during World War II prompted the addition regarding marking. While there was some question during the negotiations as to the practicality of this requirement in the age of modern, high-speed jet aircraft, the advantage lies in being able to mark the location of prisoner of war camps on target intelligence maps for planning purposes in developing strike plans for attack of a target in the vicinity of a POW camp.

There is at least one instance of an aerial attack of a POW camp because it was not marked as such. Prisoner of War Camp Eight, located in Kang-Dong, North Korea, was struck by bombs from United Nations aircraft at 2100 on January 14, 1952. Twenty POWs were killed and fifty-five injured. A United Nations Command investigation revealed that the camp was unmarked, and had been struck while United Nations aircraft were carrying out attacks against military targets in the immediate vicinity of the camp. A strong protest was lodged by the United Nations Command, which included a demand that all POW camps and civilian internee camps be marked so as to be visible from the air. Although the North Koreans did not mark the camps, they did provide data showing the locations of their POW camps. 10 DIGEST OF INTERNATIONAL LAW 410 (Marjorie M. Whiteman, ed. 1968).

Pictet recognizes one difficulty with the requirement regarding notification of the location of POW camps, in that this may allow an enemy to stage a rescue operation against the camp. He dismisses this excuse on the basis that parties to World War II knew where each other's camps were located even

The 1949 Geneva Conventions for the Protection of War Victims contain language that is pragmatic and balanced, because they were written by individuals experienced in war. Responsibility for minimizing risk to hospitals (military or civilian), prisoner of war camps, and civilian internee camps was placed squarely in the hands of the party who could best control it, i.e., the defender, although the attacker had a clear obligation to avoid the intentional attack of any of these objects. The responsibility of the "defender," however, extended to taking action not only to avoid use of any of these protected objects as a shield for military operations, but also to minimize risk to their damage (or injury to protected persons within them) incidental to lawful military operations by an attacker.

XIV. 1954 HAGUE CONVENTION

A variety of law of war treaties contain provisions for the protection of cultural property. Damage done to cultural property during World War II prompted the Netherlands following the war to recommend the negotiation of a new convention for cultural property only.[211] A committee of government experts was convened by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1952 to draft a convention. After receipt of the experts' draft, UNESCO sponsored a conference at The Hague from 21 April to 14 May, 1954. Attended by representatives from fifty-six nations, the conference produced the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its annexed Regulations for the Execution of the Convention.[212]

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when they were not marked. His dismissal of this excuse does not entirely dispose of the possibility of a raid or rescue operation on a POW camp, as happened in World War II and in the 1970 American rescue mission against the abandoned Son Tay POW camp in North Vietnam. For example, on January 30, 1945, elements of the U.S. Army's 6th Ranger Battalion, reinforced by Alamo Scouts and Filipino guerrillas, rescued 511 United States and Allied POWs from a Japanese POW camp near Cabanatuan on Luzon in the Philippine Islands. The rescue mission is described in F. JOHNSON, RAID ON CABANATUAN (1978), and M. KING, RANGERS: SELECTED COMBAT OPERATIONS IN WORLD WAR II 55–71 (1985). On February 23, 1945, the U.S. Army's 1st Battalion, 511th Parachute Infantry conducted an airborne and amphibious assault on a Japanese compound at Los Banos in Luzon, where 2147 United States and Allied civilians were interned. *See* G. DEVLIN, PARATROOPER! 597–610 (1979); A. ARTHUR, DELIVERANCE AT LOS BANOS (1985); and E. FLANAGAN, JR., THE LOS BANOS RAID (1986). The 1970 Son Tay rescue mission is described in B. SCHEMMER, THE RAID (1975).

The prohibition on use of POWs to shield military objectives from attack is a different issue. On 19 May 1967, U.S. Air Force aircraft successfully attacked the Hanoi Thermal Power Plant, placing it out of commission. Immediately thereafter, the North Vietnamese established a small prisoner of war facility (nicknamed *Dirty Bird* by American POWs because of its filth) in a building adjacent to the Hanoi Thermal Power Plant, and made sure that U.S authorities were made aware of the presence of American POWs next to the power plant. One prisoner, Captain George G. McKnight, USAF, was made to work outside the *Dirty Bird* so that he would be observed by officials from the Canadian Embassy in Hanoi, as the North Vietnamese knew the Canadians would report their observations to United States authorities. It was from *Dirty Bird*'s solitary cells that Navy Lieutenant George T. Coker and Captain McKnight staged an unsuccessful escape attempt during the night of October 11–12, 1967. *See* J. HUBBELL, P.O.W. 304, 355–60 (1976). The Hanoi Thermal Power Plant remained off limits until the December 1972 Linebacker II bombing operations, when U.S. Air Force F-4 Phantom aircraft disabled the power plant using laser-guided bombs.

211. Previously protection for cultural property existed in articles in general law of war treaties, such as articles 27 and 56 of the Annex to Hague Convention IV of 1907 and article 5 of Hague Convention IX. In 1935, a regional agreement known as the Roerich Pact (SCHINDLER & TOMAN, *supra* note 27, at 737) was promulgated for the American nations. This was the first treaty devoted exclusively to the protection of cultural property in time of war.

212. Contained in SCHINDLER & TOMAN, *supra* note 27, at 745. *See* A. ROBERTS & R. GUELFF, DOCUMENTS ON THE LAWS OF WAR 339–70 (Oxford, 1982). The United States is not a party to the 1954 Hague Cultural Property Convention because of military objections made by the Joint Chiefs of Staff. However, the United States Army, which would have primary responsibility for its implementation

Protection of cultural property always has been dependent upon its not being used for military purposes. Thus article 27 of the Annex to Hague Convention IV of 1907 provides: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, *provided they are not being used at the time for military purposes.*"[213]

The language of article 27 also is significant in that it is neutral, that is, the obligation to minimize damage to cultural property is shared by the attacker and the defender. The defender's responsibility does not end merely with marking any such object with "distinctive and visible signs,"[214] but extends to other appropriate, commensense measures. Thus during the 1941–1944 German siege of Leningrad, the Russian defenders heavily sandbagged and covered with timbers the famous "bronze horseman" equestrian statue of Peter the Great, and the statues of General Mikhail Kutuzov and General Aleksandr Suvorov, conquerors of Napoleon, and took a number of other major steps to protect their cultural property.[215] Article 3 of

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among the armed services, integrated the treaty into its doctrine as early as 1955. The details of the 1954 Hague Cultural Property Convention are taught in law of war and civil affairs courses offered by the United States armed services.

213. SCHINDLER & TOMAN, *supra* note 27, at 84 (emphasis added). Article 5 of Hague Convention IX Concerning Bombardment by Naval Forces in Time of War is similar, its concluding phrase stating "on the understanding that they are not used at the same time for military purposes." *Id.* at 813. Paragraph 7 of article 26 of the stillborn 1923 Hague Rules of Aerial Warfare provided that "A state . . . must abstain from using the monument and the surrounding zone for military purposes, or for the benefit in any way whatever of its military organization, or from committing within such monument or zone any act with a military purpose in view." *Id.* at 211.

214. Article 27 of Hague IV does not specify the type of distinctive or visible marking, but the second paragraph of article 5 of Hague IX states that "It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white." *Id.* at 813. The same distinctive marking was called for in article 25 of the unadopted 1923 Hague Rules of Air Warfare, but improved the provision contained in Hague IX. The former specified that the upper portion of the marking had to be black, while the Hague Air Rules anticipated the potential for confusion in combat by specifying that either could be on top, so long as the markings were the two black and white triangles.

215. H. SALISBURY, THE 900 DAYS: THE SIEGE OF LENINGRAD 176 (1969). By the ninth day of the war (July 1) more than one-third (a half million objects) of the great art treasures of Leningrad's incomparable Hermitage Museum had been packed and evacuated from the city. *Id.* at 129–30, 148–49. Salisbury further describes Russian efforts in Leningrad:

> Within a month the Leningrad Public Library had shipped off 360,000 of its most priceless items (out of a collection of 9,000,000). Voltaire's Library, the Pushkin archives and the incunabula had gone off in July [1941, the first full month of the German invasion]. Now the attic had been filled with sand and the most precious remaining books were removed to the cellars. The main reading room was closed, and a smaller room on the first floor was opened for 150 readers. The card catalogue, the information bureau, the print collections, had been put in the subbasement, and many treasures had been transferred to the gloomy subterranean galleries of the Peter and Paul Fortress and the Alexander Nevsky catacombs.
>
> Some fifty-two boxes of treasures from the great Pushkin palaces of Catherine and Alexander had been shipped out before the Germans swept in. The valuables of the Russian Museum were sent to Gorky and then . . . on to Perm by river barge.
>
> During the second half of July most of the animals in the Zoological Gardens had been evacuated. So had the Lenfilm studios, the scientific institutes of the Academy of Science and other institutes, totaling ninety-two in all.
>
> Most of the great artistic ensembles had now left Leningrad. The Philharmonic and the Pushkin Drama Theater went to Novosibirsk, the Conservatory to Tashkent, the Mariinsky Opera and Ballet to Perm, the Maly Opera to Orenburg. Two great trains, on July 1 and July 20, had carried off the treasures of the Hermitage and a third was being prepared.

the 1954 Hague Cultural Property Convention continues this obligation, stating: "The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate."[216]

Paragraph 1 of Article 4 of the 1954 Hague Cultural Property Convention codifies the mutual obligation for the protection of cultural property, providing:

> The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or by the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.[217]

The 1954 Cultural Property Convention makes a distinction between ordinary cultural property and cultural property entitled to special protection. The latter includes a limited number of refuges intended to shelter movable cultural property in the

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Id. at 258. Similar actions were taken by other nations. *See* M. SIMON, BATTLE OF THE LOUVRE: THE STRUGGLE TO SAVE FRENCH ART IN WORLD WAR II (1971).

The responsibility was mutual, falling both on attacker and defender, and at times members of the attacking force had to be reminded of their obligation. For example, on December 29, 1943, General Dwight D. Eisenhower, United States Army, who was then serving as Commander in Chief, Allied Forces, circulated General Order No. 65 to all commanders regarding the protection of historical monuments in Italy:

> Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. We are bound to respect those monuments so far as war allows.
>
> If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count infinitely more and the buildings must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operational needs. Nothing can stand against the argument of military necessity. But the phrase "military necessity" is sometimes used where it would be more truthful to speak of military convenience or even personal convenience. I do not want it to cloak slackness or indifference.
>
> It is a responsibility of higher commanders to determine through [Allied Military Government] officers the locations of historical monuments whether they be immediately ahead of our front lines or in areas occupied by us. This information passed to lower echelons through normal channels places the responsibility on all commanders of complying with the spirit of this letter.

10 DIGEST OF INTERNATIONAL LAW 438 (Marjorie M. Whiteman, ed. 1968). Eisenhower's order preceded the attacks on Monte Cassino, which ultimately led to the bombing of the abbey on top of the mountain on February 15, 1944. For discussion of that event, *see* M. BLUMENSON, U.S. ARMY IN WORLD WAR II, SALERNO TO CASSINO 395–418 (1969). *See also* III THE ARMY AIR FORCES IN WORLD WAR II, *Europe - Argument to V-E Day* 362–64 (W. Craven & J. Cate, eds. 1951), (Argument is a code name used during World War II); M. BLUMENSON, MARK CLARK 183–90 (1984); D. HAPGOOD & D. RICHARDSON, MONTE CASSINO (1984); and J. PARTON, *Air Force Spoken Here* GENERAL IRA EAKER & THE COMMAND OF THE AIR 359–64 (1986). The Combined Chiefs of Staff had issued a similar order on January 10, 1943, stating that "[c]onsistent with military necessity, the position of the church and of all religious institutions shall be respected and all efforts made to preserve the local archives, historical and classical monuments and objects of art." M. BLUMENSON, U.S. ARMY IN WORLD WAR II, SALERNO TO CASSINO, *supra*, at 395. While the bombing of the abbey at Monte Cassino remains one of the great controversies of World War II, the histories cited illustrate the difficulty of command decision making in the fog of war. For some further historical perspective, particularly as it relates to ground forces and their use or abuse of cultural property, *see* Haines, *Who Gives a Damn About Medieval Walls?*, 8 PROLOGUE 97–106 (Summer 1976).

216. SCHINDLER & TOMAN, *supra* note 27, at 173.

217. *Id.*

event of armed conflict, as well as centers containing monuments and other immovable cultural property of very great importance.[218] But specific conditions were placed upon providing special protection for such property. The property could receive special protection only if it is:

> situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication [and is] . . . not used for military purposes.[219]

Recognizing that a cultural object may already be located in proximity to military bases or other objects that would constitute lawful targets, paragraph 5 of article 8 provides for its being given special protection "if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom. In that event, such diversion shall be prepared in time of peace."

In the event a belligerent undertakes activities that violate the provisions of the convention related to special protection, the cultural object can lose its protection. However, article 11 provides that the decision to revoke that protection "can be established only by the officer commanding a force the equivalent of a division in size or larger."[220]

The five law of war treaties (the four Geneva Conventions and the Hague Convention) negotiated during the decade following World War II, took a pragmatic view with regard to the changes in warfare brought about by aircraft as each addressed matters of concern within its respective scope. Responsibility for the protection of persons or objects in the main lay with the defender, not the attacker, in that it was recognized that the former had the greatest control over the persons or objects for whom or for which protection was sought. Each of the treaties also recognized the inevitability of collateral damage incidental to the conduct of military operations, particularly in the give-and-take between attacker and defender, and discouraged the placing of military objects in the vicinity of protected persons or objects, or vice-versa. As will be seen, this approach was abandoned in the negotiation of the 1977 Protocols Additional to the Geneva Conventions for the Protection of War Victims, and the burden essentially shifted entirely to the attacker despite clear evidence that many nations in the intervening years regularly used hospitals, cultural objects, civilian objects, and the civilian population to shield lawful targets from attack.

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218. Article 8, paragraph 1.

219. Paragraphs (a) and (b), article 8. Paragraph 3 of article 8 states that a center containing monuments entitled to special protection "shall be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the center." Paragraph 2 requires that "A refuge for movable cultural property may also be placed under special protection, wherever its location, if it is so constructed that, in all probability, it will not be damaged by bombs."

220. To date, very little property has been registered under the special property provisions, undoubtedly because of the high standard required of the applicant. Conversely, the level at which a decision may be taken to revoke that protection where special property is abused is relatively low, and in fact lower than the level at which the decision was made to bomb the abbey at Monte Cassino. This is not intended to suggest that Monte Cassino necessarily would have been entitled to the special protection envisioned by article 8, but rather to illustrate that the greatest responsibility for the protection of cultural property lies with the belligerent claiming that protection (and potential defender), rather than with an attacking force or belligerent carrying out military operations in the vicinity of that property.

XV. POST WORLD WAR II DEVELOPMENTS

The period following World War II led not to a permanent peace but to a number of major conflicts, including the action in Korea,[221] the Algerian war for independence,[222] the civil war in Nigeria,[223] the wars in Vietnam,[224] the guerrilla war in Malaya and other British wars,[225] the Arab-Israeli conflicts,[226] and the myriad internal conflicts that continue to plague the world.

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221. On the use of airpower in Korea, *see* R. FUTRELL, THE UNITED STATES AIR FORCE IN KOREA, 1950–1953 (1961); AIRPOWER: THE DECISIVE FORCE IN KOREA (1957); and R. HALLION, THE NAVAL AIR WAR IN KOREA (1986).

222. *See* A. HORNE, A SAVAGE WAR OF PEACE (1978); and J. TALBOTT, THE WAR WITHOUT A NAME (1980).

223. *See* J. DE ST. JORRE, THE BROTHERS' WAR (1972); J. STREMLAU, THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967–1970 (1977); D. JACOBS, THE BRUTALITY OF NATIONS (1987); and STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE (SIPRI) YEARBOOK 1968/69, 381–414 (Stockholm, 1970). Few conflicts have witnessed a more abusive use of airpower against the civilian population than Nigerian operations against the secessionist Biafra, and it revealed one of several dichotomies that was to be codified into the two 1977 Protocols. While Third World nations were anxious to incorporate into Protocol I restrictions on the use of airpower against them by other nations, they had no desire for limits on their use of airpower (or any other form of force) in their suppression of internal threats. Another dichotomy concerned the employment of mercenaries. Nigeria made extensive use of mercenaries during its civil war, including employment of many as pilots. Nigerian Air Force pilots were poorly trained, and in particular were unable to fly at night, the time when most relief shipments were flown into the beleagured Biafran nation; mercenaries were needed by Nigeria to interdict nighttime relief flights. But mercenaries fighting for Biafra left an indelible imprint on the Government of Nigeria, and it campaigned long and hard for the condemnation of mercenaries that exists in article 47 of Protocol I. Article 47 potentially limits the use of mercenaries by one nation against another, but does not prevent a nation from using them within its own territory in its defense against either an internal or external threat. *See* Parks, *Mercenaries and the Law of War*, in TERRORISM, POLITICAL VIOLENCE AND WORLD ORDER (Henry H. Han, ed. 1984).

224. The French campaigns against the Viet Minh are summarized in E. HAMMER, THE STRUGGLE FOR INDOCHINA, 1940–1954 (1954); E. O'BALLANCE, THE INDO-CHINA WAR, 1945–1954 (1961); B. FALL, STREET WITHOUT JOY (1961); J. ROY, THE BATTLE OF DIENBIENPHU (1963); B. FALL, HELL IN A VERY SMALL PLACE (1966); B. FALL, THE TWO VIET NAMS (1963); and J. BUTTINGER, VIETNAM: A DRAGON EMBATTLED (1967).

The use of U.S. airpower in the war in South Vietnam is contained in J. SCHLIGHT, THE WAR IN SOUTH VIETNAM: THE YEARS OF THE OFFENSIVE, 1965–1968 (1988); and D. MROZEK, AIR POWER & THE GROUND WAR IN VIETNAM (1989). The use of U.S. Air Force gunships throughout Southeast Asia is contained in J. BALLARD, DEVELOPMENT AND EMPLOYMENT OF FIXED-WING GUNSHIPS, 1962–1972 (1982).

The official history of the "out country" campaigns, *i.e.*, Laos, Cambodia, and North Vietnam is in preparation by Dr. Wayne Thompson, Office of Air Force History; no publication date has been announced. In 1980 Jacob Van Staaveren of the Office of Air Force History completed an official volume entitled INTERDICTION IN SOUTHERN LAOS, 1960–1968. Although cleared for open publication by the four military services, the Joint Chiefs of Staff, the Office of the Secretary of Defense, and the Central Intelligence Agency, it remains classified because of unspecified objections by the Department of State. *But see* C. ROBBINS, THE RAVENS (1987).

For the bombing campaigns against North Vietnam, *see* J. BROUGHTON, THUD RIDGE, *supra* note 109; W. MOMYER, AIR POWER IN THREE WARS (1978); U. SHARP, STRATEGY FOR DEFEAT (1978); P. MERSKY & N. POLMAR, THE NAVAL AIR WAR IN VIETNAM (1981); G. BASEL, PAK SIX (1987); J. NICHOLS & B. TILLMAN, *supra* note 109; J. BROUGHTON, GOING DOWNTOWN, *supra* note 109; M. CLODFELTER, THE LIMITS OF AIRPOWER (1989); J. ETHEL & A. PRICE, ONE DAY IN A LONG WAR: MAY 10, 1972, AIR WAR, NORTH VIETNAM (1989); Parks, *supra* note 109; and Parks, *supra* note 208.

225. The successful British campaign in Malaya is discussed in R. CLUTTERBUCK, THE LONG LONG WAR (1966); E. O'BALLANCE, MALAYA: THE COMMUNIST INSURGENT WAR, 1948–1960 (1966); N. BARBER, THE WAR OF THE RUNNING DOGS (1971) and R. STUBBS, HEARTS AND MINDS IN GUERRILLA WARFARE: THE MALAYAN EMERGENCY, 1948–1960 (1989). British military campaigns following World War II but preceding the 1974–1977 Diplomatic Conference that produced the 1977 Protocols are reported in M. DEWAR, BRUSH FIRE WARS (London, 1984).

226. *See* E. O'BALLANCE, THE ARAB-ISRAELI WAR, 1948 (London, 1956); E. O'BALLANCE, THE SINAI CAMPAIGN OF 1956 (1960); D. KURZMAN, GENESIS 1948: THE FIRST ARAB-ISRAELI WAR (1970); W. STEPHENSON, ZANEK! A CHRONICLE OF THE ISRAELI AIR FORCE (1971); E. O'BALLANCE, THE THIRD ARAB-ISRAELI WAR (London, 1972); E. O'BALLANCE, ARAB GUERRILLA POWER (1973);

Internal conflicts posed a particular problem. Primarily a product of the postwar period of decolonialization, they constitute the greatest threat to innocent civilians. The four Geneva Conventions of 1949 had taken a step to endeavor to interject the law of war into the internal conflict environment with article 3 common to each of them.[227] But more needed to be done. Moreover, a need existed to update the rules governing hostilities, rules not revised since the Hague Conventions of 1907, particularly in light of the progress that had been made in aircraft. The law clearly was far behind technology.

A. ICRC Draft Rules

In the early 1950s, the ICRC decided to extend its role beyond protection for war victims in the hands of a party to a conflict. The ICRC undertook to venture into areas regarding the conduct of hostilities that traditionally had been a part of the Hague law. In particular, members of the ICRC sought to regulate, if not prohibit, the employment of aerial bombardment beyond the immediate battlefield; in this regard the ICRC modified its traditional role of protection for war victims to take on a disarmament perspective. Disarmament and the law of war are simultaneously similar and dissimilar, and the dissimilarities would later operate to the disadvantage of advancement of the law of war in the 1977 Protocols. As will be seen, an ICRC fixation on attainment of restrictions on aerial bombardment took precedence over practical measures that might have enhanced the protection of the civilian population, to the detriment of the law of war. The early frustration of the ICRC with aerial bombing is illustrated by the following hypothetical scenario postulated by a leading member of the ICRC:

> Here are two villages in an occupied country. Detachments of the enemy are going through them. Unidentified inhabitants shoot down some fifteen soldiers. A rapid police inquiry naturally produces nothing. To identify the assailants would require long interrogations and probably torture, since it is a matter of extracting information from patriots, conscious of serving a sacred cause. Moreover, other columns are arriving and there can be no question of conducting enquiries for weeks. The [division] commander will simply consider 'the enemy' is present in these two villages. He has a few planes at his disposal; he causes one of the villages to be bombed flat and several hundred people are killed. In the case of the other, he orders . . . the execution of 25 people.
>
> Faced with these two series of homicides, what will be the attitude of justice? There is no room for hypotheses: the law is perfectly clear. The pilots who wiped out the village, and their officers, will be charged with no crime. On the other hand, the soldiers, members of the firing squad and officers who took no part in the execution . . . of the 25 inhabitants of the second village, will be found guilty of homicide.

E. O'BALLANCE, THE ELECTRONIC WAR IN THE MIDDLE EAST, 1968–1970 (London, 1974); C. HERZOG, THE WAR OF ATONEMENT (1975); E. WEIZMAN, ON EAGLES' WINGS (1976); E. O'BALLANCE, NO VICTOR, NO VANQUISHED: THE YOM KIPPUR WAR (London, 1978); T. DUPUY, ELUSIVE VICTORY: THE ARAB-ISRAELI WARS, 1947–1974 (1978); Shlaim & Tanter, *Decision Process, Choice, and Consequences: Israel's Deep-Penetration Bombings in Egypt, 1970*, 30 WORLD POLITICS 483–517 (July 1978); Y. BAR-SIMON-TOV, THE ISRAELI-EGYPTIAN WAR OF ATTRITION, 1969–1970 (1980); and C. HERZOG, THE ARAB-ISRAELI WARS (1982).

227. Common article 3 is contained in SCHINDLER & TOMAN, *supra* note 27, at 376 (for the GWS). Although it provides minimal protection for persons taking no part in the hostilities or suspected of taking part in the hostilities, it was a major step forward in the law of war. To date, however, effective implementation of this minimal protection has been limited. In fact, the record of the 1949 Geneva Conventions is open to mixed evaluation. At the time this article was written, 167 of the 171 nations of the world are parties to the four 1949 Geneva Conventions; more nations are parties to the 1949 Geneva Conventions than are members of the United Nations. However, this count is misleading, as there has been virtually no implementation of even the most basic requirements of those four treaties in 98% of those nations. Third World implementation is nonexistent in all but one or two nations.

> From this state of the law there can be drawn only one precious, but amoral, axiom: Never carry out executions or destructions with the care of a craftsman. But long live wholesale massacre![228]

In 1956 the ICRC produced its Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.[229] Following so closely on the 1949 Geneva Conventions, the draft rules were adventurous in extending their applicability equally to international armed conflicts *and* internal conflicts;[230] the ICRC clearly recognized the danger posed to the civilian population by the latter.

Discussion of several of the provisions contained in the Draft Rules germane to this article will be deferred until they are considered in the form in which they ultimately appeared in the 1977 Protocol I.[231] However, some provisions merit consideration at this time, because their form changed considerably during negotiation of the 1977 Protocols or were dropped entirely.

Article 6 of the Draft Rules provided in part:

> Attacks directed against the civilian population as such, whether with the object of terrorizing it or for any other reason, are prohibited.
>
> It is forbidden to attack dwellings, installations or means of transport, which are for the *exclusive use of*, or occupied by, *the civilian population*.
>
> Nevertheless, should members of the civilian population . . . be within or in close proximity to a military objective they must accept the risks resulting from an attack directed against that objective. [Emphasis added]

The article is significant in two respects. First, it protected from international attack only those objects used exclusively by the civilian population, thereby recognizing the legality of attack on civilian objects, the potential use of which may be of value to a nation's war effort or which may be used simultaneously for military and

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228. P. BOISSIER, L'EPEE ET LA BALANCE 55–56 (Geneva, 1953), translation by Professor Geoffrey Best. Boissier's statement is legally incorrect while indicating the bias that existed (and continues to exist) at the ICRC regarding aerial bombardment. While the pilots have a right to carry out an order on the assumption that it is lawful unless it is patently illegal—and Boissier's hypothetical situation does not suggest to the contrary, although pilots normally would not receive a mission assignment to "bomb a village" as such—the commander who orders the mission is directing acts of murder for which he could be held accountable. At best they are reprisals against the civilian population, which are prohibited by article 33 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC). The means used does not make an otherwise illegal act legitimate.

There are three other matters of interest in the hypothetical. Boissier purposely selects aircraft as the means for attack of the village, although artillery could have been used for the same (illegal) purpose; this illustrates the ICRC fixation against aerial bombardment. The hypothetical ignores customary international law and the domestic law of the nation to which the military commander belongs. Such an attack clearly would have been a violation of customary law and, in the United States, charges could have been brought against the commander in question for violations of article 118 (murder), Uniform Code of Military Justice. Finally, Boissier's suggestion that the commander in question would resort to torture of civilians in an attempt to gain information as to the identity of the attackers of his forces manifests Boissier's skepticism with the law of war as such, because torture of civilians in occupied territory is expressly prohibited by articles 31 and 32, GC.

229. SCHINDLER & TOMAN, *supra* note 27, at 251–57.

230. Article 2 of the Draft Rules provides that:

The present rules shall apply:

(a) In the event of declared war or any other armed conflict, even if the state of war is not recognized by one of the Parties to the conflict. [This language is taken from article 2 common to the four 1949 Geneva Conventions.]

(b) In the event of an armed conflict not of an international character.

231. For example, use of the term "attacks" as found in article 3, the definition of "civilian population" contained in article 4, and the definition of "military objective" contained in article 7 will be discussed in conjunction with the analysis of articles 49(1), 50, and 52, respectively.

civilian purposes.[232] Second, it recognized that members of the civilian population assume a certain risk of injury incidental to combat operations when they place themselves within, or adjacent to, a military objective.

Article 10 was expressly written to prohibit target area bombing as practiced during World War II, providing: "It is forbidden to attack without distinction, as a single objective, an area including several military objectives at a distance from one another where elements of the civilian population, or dwellings, are situated in between the said military objectives." The provision is a manifestation of the ICRC desire to preclude a repetition of area bombing as it was practiced during World War II. While commendable on first impression, it fails to take into consideration steps that may be taken by a defender, such as dispersal of supplies into populated areas, that may lead to such actions by a belligerent engaged in legitimate, offensive operations. To its credit, however, the ICRC had recognized this imbalance, and incorporated the following passive precautions into article 11:

> The Parties to the conflict shall, so far as possible, take all necessary steps to protect the civilian population subject to their authority from the dangers to which they would be exposed in an attack—in particular by removing them from the vicinity of military objectives and from threatened areas.
>
> Similarly, the Parties to the conflict shall, so far as possible, avoid the permanent presence of armed forces, military materiel, mobile military establishments or installations, in towns or other places with a large civilian population.

The danger of these companion articles lay in the fact that they had begun the shift of responsibility for collateral civilian casualties from the traditional shared responsibility to placing it predominantly on the belligerent engaged in offensive operations—and with the least control over the civilian population. Thus the language concerning area bombardment was absolutely prohibitive, whereas the language regarding movement of the civilian population from the area surrounding a target was hortatory, not mandatory.

Article 13 of the Draft Rules strengthened the language contained in article 28, Geneva Convention, by providing: "Parties to the conflict are prohibited from placing or keeping members of the civilian population subject to their authority in or near military objectives, with the idea of inducing the enemy to refrain from attacking those objectives." Although this article established a clear duty, it failed to specify responsibility for collateral casualties where the duty is violated. It established a duty without a remedy, while shifting the responsibility for collateral casualties to the party engaged in offensive operations.

At this point in time, however, the issue became moot. The ICRC introduced the rules at the XIXth Red Cross Conference held in New Delhi, India, in 1957, where they were greeted by a response from governments that can be described (at best) as no reaction or (at worst) as one that was extremely negative. There were several reasons for this. First, the rules were proposed in the midst of the Cold War, when perceptions and policies between the two superpowers was markedly different from the era of *Glasnost* and *Perestroika*; the first of the postwar arms control agreements had not even seen the light of day at that time.[233]

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232. Such as power plants, refineries, and lines of communication.

233. The first postwar arms control agreement was The Antarctic Treaty (12 U.S.T. 794, T.I.A.S. 4780, 402 U.N.T.S. 71), signed by the United States on December 2, 1959, with ratification advised by the Senate on August 10, 1960. It entered into force on June 23, 1961. This arms control agreement was made possible because seven nations (Argentina, Australia, Chile, France, New Zealand, Norway,

Second, article 14 specifically condemned weapons "whose harmful effects—resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents—could spread to an unforeseen degree . . . from the control of those who employ them, thus endangering the civilian population." Both the Soviet Union and the United States saw a clear attempt by the ICRC to prohibit or regulate nuclear weapons, which neither was prepared to accept.

The third reason related directly to the second, and that concerned the role of the ICRC in armed conflict. The ICRC is a private Swiss corporation made up entirely of Swiss citizens. It has performed extremely well (given the circumstances) in endeavoring to provide protection for war victims in the hands of a belligerent. But Switzerland is a neutral nation whose citizens have not fought a military engagement since March 5, 1798, and there was a strong and justifiable reluctance to permit private individuals with little or no modern military training or experience to intercede into an area as complex as the conduct of hostilities.[234]

B. Conferences of the 1960s

The ICRC was persistent, and reintroduced its Draft Rules at the XXth International Conference of the Red Cross in Vienna, Austria, in October 1965. That conference adopted a resolution with the following language relating to the law of war:

> solemnly declares that all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:
>
> - that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
> - that it is prohibited to launch attacks against the civilian population as such;
> - that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible; [and]
> - that the general principles of the law of war apply to nuclear and similar weapons.[235]

Over the next two years several events were to provide the ICRC with some unexpected, if not highly questionable allies, in large measure because of the U.S. military operations in defense of South Vietnam. Consider the following three examples.

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and the United Kingdom), were making specific claims to the Antarctic region on the basis of discovery, exploration, or geographic proximity. Eight other nations, including the United States and the Soviet Union, had engaged in exploration but had put forward no specific claims. Neither the Soviet Union nor the United States recognized the claims of other nations; hence there was a mutual interest in reaching agreement to demilitarize the continent. United States Arms Control and Disarmament Agency, ARMS CONTROL AND DISARMAMENT AGREEMENTS 19–27 (1982).

234. Switzerland is not a member of the United Nations and, accordingly, has substantially less military experience than some other neutrals (such as Sweden), whose military forces have participated in peacekeeping operations. While members of the ICRC have considerable experience carrying out their humanitarian missions in areas of armed conflict, oftentimes at great personal risk, their experience nonetheless remains that of an observer rather than a participant. They have no experience in decision making in the heat of battle or the fog of war. This affects both their ability and credibility to deal with those portions of the law of war relating to the conduct of hostilities, and frequently is manifested in proposals offered by the ICRC.

There also was some petty jealousy, as rules related to the conduct of hostilities traditionally were reserved for negotiation in The Hague, the Netherlands.

235. SCHINDLER & TOMAN, *supra* note 27, at 259–60. Editorial discussion of the resolution in the SCHINDLER & TOMAN text errs, however, in stating that "The resolution was affirmed by the United Nations General Assembly in resolution 2444." While the first three sentences quoted were contained in the General Assembly resolution, the fourth sentence relating to nuclear weapons was deleted.

From January 3–15, 1966, the first Tri-Continental Conference of Asian, African and Latin American Revolutionary Solidarity, sponsored by the Afro-Asian Peoples Solidarity Organization, was held in Havana, Cuba. Delegates to the Communist-dominated conference represented governments, opposition parties and revolutionary guerrilla movements. The major issues discussed at the conference were the Vietnam War, the 1965 U.S. stability operation in the Dominican Republic, and "colonialism and neo-colonialism throughout the world." The language of resolutions adopted by the conference mirrors that adopted by the International Conference on Human Rights at Teheran, Iran, in May 1968, and in United Nations General Assembly Resolutions cited by the ICRC in its support for a Diplomatic Conference updating the law of war.

Socialist World protests against U.S. efforts to assist South Vietnam in its resistance to conquest by North Vietnam, and especially the Socialist World's campaign against the United States bombing of North Vietnam, were carefully couched in law of war terms alleging "indiscriminate" bombing of "non-military objectives," "civilian" casualties, and the use of "illegal" weapons.

The defeat of Arab nations by Israel during the Six-Day War in June 1967, was in large measure because of Israel's effective use of its numerically smaller, but qualitatively superior air force. Resolutions passed by the United Nations Security Council and General Assembly calling upon Israel to adhere to the 1949 Geneva Conventions in the territories it occupied as a result of its victory in the June 1967, Six–Day War suggested that the Arab bloc intended to use the law of war as a diplomatic tool in its continuing conflict with Israel.[236]

It was during this time that the ICRC revisited its proposal to convene a conference to update the law of war, on the assumption that any call for a conference would have strong support in the Third World. On May 19, 1967, only days before the Six-Day War, the ICRC addressed a memorandum to all States Parties to the 1949 Geneva Conventions raising a question regarding further development of the law of war. The memorandum included a list the ICRC had prepared of what it considered to be the written and customary rules that could be considered as still in force. Its timing could not have been more propitious.

The ICRC assumption was confirmed in language adopted by the International Conference on Human Rights at its meeting in Teheran, Iran, on May 12, 1968, where its Resolution XXIII contained the following:

> Considering further that the Red Cross Conventions of 1949 are not sufficiently broad in scope to cover all armed conflicts, . . .
>
> noting also that *minority racist* or *colonial regimes* which refuse to comply with the decisions of the United Nations and the principles of the Universal Declaration of Human Rights frequently resort to executions and inhuman treatment of *those who struggle against such regimes* and considering that such persons should be protected against inhuman or brutal treatment and also that such persons if detained *should be treated as prisoners of war* . . . .
>
> 1. Requests the General Assembly [of the United Nations] to invite the Secretary-General to study:

236. Security Council Resolution 237 Concerning Humanitarian Protection for Civilians and Prisoners of War in the Area of the Middle East Conflict, June 14, 1967. S.C. RES. 237, 22 U.N. SCOR, Resolutions and Decisions of the Security Council 1967, at 5, U.N. DOC. S/INF/22/Rev. 2 (1968). General Assembly Resolution 2252 (ES-V) Concerning Humanitarian Assistance to Civilians and Prisoners of War, July 4, 1967. G.A. RES. 2252 [ES-V], U.N. GAOR, Resolutions adopted by the General Assembly during its Fifth Emergency Special Session June 17, September, 18, 1967, Supp. 1, at 3–4, U.N. DOC. A/6798 (1967).

. . . (b) The need for additional humanitarian international conventions or possible revision of existing Conventions to ensure better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.[237]

Although the resolution did not limit its scope to organizations or individuals fighting against Israel, it was at this point that the effort of the ICRC to develop a new law of war treaty became inextricably intertwined with the Arab war against Israel and of other conflicts supported by the Third World. This resolution not only had an effect on the overall shape of the treaty that was to become the 1977 Protocol I, but also was related directly to the language drafted in those articles that affect aerial bombardment. Qualitatively Israel had been the principal airpower in the Middle East; the Arab nations saw a chance at the 1974–1977 Diplomatic Conference to diminish Israel's capabilities. Those efforts would pay large dividends during the 1982 Israeli incursion into Lebanon, as will be seen. Other Third World nations viewed the proposal as a means to limit external threats to their respective regimes.

Seven months later the United Nations General Assembly adopted Resolution 2444 regarding respect for human rights in armed conflicts. The resolution repeated the first three of the four points contained in the resolution adopted by the XXth International Conference, while deleting the fourth point regarding nuclear weapons.[238]

At the XXIst International Conference of the Red Cross, held in Istanbul, Turkey, in September 1969, the conferees adopted a resolution (drafted by the ICRC) urging the ICRC to convene a conference of government experts representing the principal legal and social systems of the world to review documents and proposals prepared by the ICRC in order to assess those areas of the law of war in which progress might be possible. In short, the ICRC drafted a resolution calling upon itself to convene a conference to review the documents which it had prepared.[239]

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237. SCHINDLER & TOMAN, *supra* note 27, at 261–62 (emphasis added).

238. SCHINDLER & TOMAN, *supra* note 27, at 263–64. The resolution made an unfortunate association of the law of war with human rights. The former are specific rules relating to legal rights and obligations of a nation engaged in war, some of which involve deprivation of the most fundamental human right, the right to life, and for the violation of which individuals can be held criminally responsible. They also are frequently a product of military considerations. In contrast, the latter is largely philosophical and political, with little or no individual criminal responsibility for its breaches; in the words of one author, "even their discussion (not to mention their implementation) is dependent on political bodies and their conjectural majorities." Mario'n Mushkat, *The Development of International Humanitarian Law and the Law of Human Rights*, 21 GERMAN YEARBOOK OF INTERNATIONAL LAW 150–68 at 160 (1978). Mushkat points out that much of the marriage was intended to legitimize the use of violence by the Palestine Liberation Organization (PLO) against Israel while providing international status for the PLO, and for no other reason. This was carried over into the 1977 Protocol I.

239. There was not only a need for an update of the law of war, particularly as it related to aerial bombardment, but also some interest in new negotiations. However, the interest was not overwhelming within governments. At a meeting, such as the Conference of the International Red Cross, it is difficult for delegations to vote against general resolutions calling upon humanitarian ideals, particularly when they have no binding effect upon governments. But such apparently harmless "motherhood and apple pie" resolutions are but one step in the building block process used by the ICRC and some of its more liberal supporters, such as Sweden and Switzerland, to suggest to governments that a conference is necessary. Since the 1974–1977 Diplomatic Conference, the United States and other nations have taken a more cautious approach to resolutions proposed at Red Cross Conferences. At the XXVth Conference of the Red Cross and Red Crescent, held in Geneva in October 1986, for example, the United States and Soviet Union delegations joined with others to defeat a resolution prepared by Sweden and Switzerland condemning directed energy weapons. To illustrate further how forum shopping is used in this building block process, following defeat of this resolution, the Government of Sweden in April 1988, held an informal meeting at its Mission in Geneva to interest selected delegations from the United Nations Committee on Disarmament on the same issue. The Soviets declined to attend, while the author was sent to Geneva for the sole purpose of attending the meeting to repudiate statements made by

That same month the Institute of International Law passed a resolution regarding "The Distinction Between Military Objectives and Nonmilitary Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction."[240] While the resolution takes an extreme view and does not restate customary international law, it is yet another indication of the attention that the law of war was receiving at this time, in no small measure because of the involvement of the United States in the war in Vietnam.[241] Slowly but surely, the stage was being set for a new law of war conference.

C. United Nations Resolutions 2444 and 2675

In a letter dated September 22, 1972, the General Counsel of the Department of Defense responded to a letter from Senator Edward M. Kennedy relating to the United States interpretation of the law of war. The General Counsel's letter specifically rejected the resolution of the Institute of International Law as an accurate statement of the law of war, but stated that it regarded the three points contained in United Nations General Assembly Resolution 2444 (taken from the first three points of the resolution of the XXth Red Cross Conference, quoted above) as declaratory of customary international law. However, the letter elaborated upon the United States interpretation of these broad principles, noting:

a. While armed forces must refrain from making civilians as such the object of armed attack, they are not restrained from attacking lawful targets, even though there is a risk of incidental casualties or damage to civilian objects in the vicinity of the target;

b. The third principle (distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, so that civilians are spared as much as possible) addresses primarily the party exercising control over members of the civilian population. The DOD General Counsel's letter went on to state that:

> This principle recognizes the interdependence of the civilian community with the overall war effort of a modern society. But its application enjoins the party controlling the population to use its best efforts to distinguish or separate its military forces and war-making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives will be minimized as much as possible.

Swedish authorities in their draft papers; this second Swedish attempt failed. This was followed by a Swedish attempt to get the matter on the agenda of the United Nations Special Session on Disarmament, held in New York in June 1986, which also did not meet with success. In February 1989, the author, along with a medical expert and a scientist, each employed by the United States Government, were invited by the ICRC to attend a meeting of "experts" at the ICRC (at ICRC expense) on directed energy warfare that paralleled previous Swedish efforts. All U.S. invitees declined their invitations, as did invitees from the United Kingdom and Canada. The latter nations sent observers to the meeting, which was held in June 1989. It is expected that the ICRC will prepare a report indicating that its "experts" supported the Swedish call for new negotiations. As with some other Swedish initiatives regarding weapons, the primary motive is economic rather than humanitarian or altruistic. Given the ICRC's purported dedication to its own principles of neutrality and independence, its support for a program by an individual nation that is based on that nation's economic and political interests is questionable and inconsistent with criteria (viz., neutrality and independence) for U.S. contributions to the ICRC (The United States is the largest contributor to the ICRC.)

240. SCHINDLER & TOMAN, *supra* note 27, at 265–66.

241. The Vietnam War focused a great deal of attention on the law of war. There were many publications produced during this time that raised an interest in the subject. Three examples are 1–4 THE VIETNAM WAR AND INTERNATIONAL LAW, (1968–1976); WHEN BATTLE RAGES, HOW CAN LAW PROTECT? (John Corey, ed. 1971); and LAW AND THE INDO-CHINA WAR (John Moore, ed. 1972).

The letter warned against "attempts to limit the effects of attacks in an unreasonable manner," expressly referring to the 1923 Hague Rules of Air Warfare as such a failed attempt. The letter closed after repeating its rejection of the resolution of the Institute of International Law.[242] Its importance lies in its statement of the law of war as it was considered to have existed prior to the 1974–1977 Diplomatic Conference.

The following year the United Nations General Assembly (UNGA) adopted Resolution 2675 (XXV) which, after "noting with appreciation" the work of the ICRC "to ensure the better protection of human rights in armed conflicts of all types," set forth the following basic principles:

> - In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in hostilities and civilian populations;
>
> - In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations;
>
> - Civilian populations as such should not be the object of military operations;
>
> - Dwellings and other installations that are used only by civilian populations should not be the object of military operations;
>
> - Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations; and
>
> - Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.[243]

The text of UNGA Resolution 2675 bears examination for several reasons. It correctly states the general requirement regarding discrimination in the application of force, while limiting the attack of civilian objects only to those used *exclusively* for military purposes. However, the requirement that "every effort" must be made to spare civilian populations the effects of war drifts away from the customary standard of reasonable care, while placing responsibility entirely upon military commanders without a concomitant responsibility on the part of the civilian population as such. The prohibition on reprisals exceeded that stated in the law of war at that time, in that the population of the enemy not in the hands of an occupying power remained a legitimate object for reprisals. As with all UNGA resolutions, UNGA Resolution 2675 was not binding; but it also was not authoritative as to the state of the law of war at the time. Its intended effect, however, was cumulative, in that it offered yet another "building block" on the road to the ICRC's goal of a new law of war conference.

D. Conference of Government Experts

Two years later the ICRC convened its Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. That conference had been preceded by a Conference of Red Cross

242. A summary of the letter is contained in Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT'L L. 122–25 (January 1973). The General Counsel's letter was coordinated with The Judge Advocate Generals of the Army, Navy, and Air Force.

243. SCHINDLER & TOMAN, *supra* note 27, at 267–68.

Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in The Hague from March 1–6, 1971, in which the ICRC explained its agenda and drafts to members of national Red Cross Societies.[244]

The first session of the Conference of Government Experts was conducted in Geneva from May 24 to June 11, 1971. Its basic aim was to have attendees review the lengthy set of documents and proposals submitted by the ICRC in order to assess where progress would be possible in the further development of the law of war.[245] Almost 200 "experts" from thirty-nine nations, including the United States, attended the meeting.[246] It was apparent that there was insufficient time to complete the work necessary to produce an agreed draft text, and the conferees agreed to a second session.[247]

The second session of the Conference of Government Experts was held in Geneva from May 3 to June 2, 1972.[248] Because there had been complaints that the Third World had not been adequately represented at the first conference, all states parties to the 1949 Geneva Conventions were invited to send representatives to the second session. The comments of the senior U.S. representative in his June 1, 1972, closing

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244. REPORT ON THE WORK OF THE CONFERENCE OF RED CROSS EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, THE HAGUE, 1–6 MARCH 1971 (Geneva, April 1971). The attendees were the senior officers of national Red Cross Societies, not experts. The United States attendees were from the American National Red Cross and knew little of the law of war. The United States delegation head, the President of the American National Red Cross, acknowledged on many occasions his skepticism regarding the efficacy of the law of war.

245. The reader will note that the ICRC had developed the term "international humanitarian law applicable in armed conflicts" to supplant the traditional *law of war*. The first step actually was taken within the United Nations, where the term "law of armed conflict" had replaced law of war, on the theory that the Charter of the United Nations had outlawed war—notwithstanding the fact that United Nations forces fought in the Korean *War*, and the general public refers to conflicts by the traditional term of *war* (*e.g.*, the 1967 Arab-Israeli War, the 1971 Indo-Pakistani War, the 1973 Yom Kippur War, the Vietnam War, the 1982 Falklands/Malvinas War, *etc.*). Moreover, combatants captured in an "armed conflict" continue to be called "prisoners of *war*" rather than "prisoners of *armed conflict*," the acronym for which (as some pundits have noted) would be the same as that of the Pentagon Officers Athletic Club. Changing *law of war* to *law of armed conflict* was a way of avoiding acknowledgment of the limits of international law. While the U.S. Navy and Air Force changed their programs to use the term "*law of armed conflict*," the overall program of the Department of Defense as well as the programs of the Army and Marine Corps have retained the traditional term *law of war*, as has the author.

The ICRC borrowed a page from the Marxist-Leninist lexicon in adding the term "humanitarian", as it suggests that anyone who opposes adoption of the rules under consideration is anti-humanitarian. The term is singularly inappropriate to those parts of the law of war dealing with combat. The author, who has taken the life of other men in combat at ranges as close as three meters, finds nothing humanitarian about such an action—which is fully condoned by the law of war.

246. Again, there were no criteria for establishing the expertise of the "experts." The majority of attendees were lawyers, not military officers from the combat arms branches. This was the case throughout the Diplomatic Conference and the subsequent Conference on Certain Conventional Weapons.

247. U.S. DEPARTMENT OF STATE, REPORT OF THE U.S. DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, MAY 24–JUNE 11, 1971 (1971); INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, 24 MAY–12 JUNE 1971 (Geneva, August 1971); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 [ICRC COMMENTARY] xxxi (Geneva, 1957).

248. The conference was again preceded by a preparatory meeting of Red Cross national society officials. ICRC, REPORT ON THE WORK OF THE CONFERENCE OF RED CROSS EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, VIENNA, 20–24 MARCH 1972 (Geneva, April 1972). The same "experts" from the American National Red Cross who attended the 1971 Hague meeting attended the Vienna meeting.

statement at the second session of the Conference of Government Experts suggest the change in atmosphere that had occurred:

> Some countries have been led by their experience, geography, industrial development, and other factors to invest in and rely on certain weapons for their military forces, and other countries have been led to invest in and rely on other weapons. Some countries rely more heavily on infantry and ground combat forces, and others rely more on fire power and mobility. A few countries happily have had little, if any, direct involvement in hostilities in recent years; others have been steadily involved. All of these differences, and others, continue to produce profoundly different views of both priorities and possibilities in the development of legal restraints on the means and methods of warfare. [249]

This was particularly true with regard to the development of rules relating to the use of airpower. The developing nations regarded the use of airpower by the developed nations as a remnant of the days of colonialism and as a continuing threat to their independence, the former with some justification. The Royal Air Force had developed and employed with considerable effect a program of air policing within the British colonies in the interwar (1919–1939) years. The comments of one of the participants in those campaigns offer an appropriate description of the divergency of views on the subject:

> The Air Method was often criticized on the score that it was brutal and caused particular resentment on the part of its victims—built up a 'legacy of hate' was a common expression. That meaningless phrase 'indiscriminate bombing' was constantly deployed. . . . The impression was put about that women and children suffered specially from air action; it was considered perfectly legitimate to *shell* a tribal village without warning, but even in an area where troops were in actual contact with a tribal enemy, villages were not allowed by the regulations to be *bombed* without special permission and the usual period of warning. . . . [O]n one occasion during a battle in Waziristan [India] when I, as Air Force Commander, was requested by the Army Commander to bomb a village from which heavy fire was holding up our advance, and had regretfully to refer him to the instructions of the Government of India on this point, I was told, 'Oh, come on, that will be all right, we'll say we shelled it.' That indeed would have been all right and in accordance with the extraordinary rules of the game. [250]

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249. U.S. DEPARTMENT OF STATE, REPORT OF THE U.S. DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, MAY 3–JUNE 2, 1972, 54 (1972). The senior U.S. representative to the Conference of Government Experts was Ambassador George H. Aldrich. Ambassador Aldrich also served as the head of the United States delegation to the Diplomatic Conference and the subsequent United Nations Conference on Certain Conventional Weapons.

250. J. SLESSOR, *supra* note 176, at 66. On the air policing program of the RAF, *see also* A. BOYLE, TRENCHARD 365–79, 382–86, and 388–95 (London, 1962); M. DEAN, THE ROYAL AIR FORCE AND TWO WORLD WARS 35–36 (London, 1979); Beaumont, *A Lease on Empire: Air Policing, 1919–1939*, 26 AEROSPACE HIST. 84–90 (Summer/June 1979); and C. BOWYER, RAF OPERATIONS, 1918–1938, 55–235 (London, 1988). The "legacy of hate" was not directed just at Great Britain, because France and Spain had used airpower for policing purposes in their respective parts of Morocco between the wars (L. KENNETT, *supra* note 38, at 68), as had the United States in the Banana Wars in Latin America. *See* A. MILLETT, *SEMPER FIDELIS*: THE HISTORY OF THE UNITED STATES MARINE CORPS 236–63 (1980). The subsequent desire for limiting airpower expressed by developing nations at the 1974–1977 Diplomatic Conference also may have occurred in part because of the insistence of Great Britain in the course of the Geneva Disarmament Conference (1932–1934) on retaining the right to use airpower for policing purposes throughout its empire. It seemed to suggest that Great Britain was willing to abolish military and naval aircraft that might kill civilians of like culture and race, but that airpower could be employed against individuals of different cultures and races. While there may be some truth to this supposition, there also were economic factors, in that Royal Air Force operations had scaled down substantially the costs of policing the British Empire. In fact the British in 1933 unsuccessfully sought to achieve precisely what the Third World accomplished in 1977: an absence of restriction on the use of airpower for suppression of internal dissent. *See* H. HYDE, *supra* note 135, at 287–89; M. SMITH, *supra* note 135, at 118–19.

Third World nations that had waged anti-colonialism wars since 1945 had much the same experience as their pre-war predecessors in being confronted with the threat of air power. The Vietminh [in 1972 in power in the Democratic Republic of Vietnam (North Vietnam)] admitted that one of the greatest advantages held by the French during their war was airpower,[251] as also was the experience of the Front de Liberation Nationale (FLN) in the 1954–1963 Algerian war for independence from France,[252] and North Vietnam and its proxy, the Viet Cong, in the war against the government of the Republic of Vietnam (South Vietnam). Third World concern regarding airpower was fueled by the Israeli victory in the 1973 Yom Kippur War, which took place between the second session of the Conference of Government Experts and the opening of the Diplomatic Conference in 1974. The comments of the senior U.S. representative to the first session of the Conference of Government Experts were insightful in recognizing the desire of Third World nations to negate the airpower advantage of the developed nations, permitting the labor-intensive Third World nations to fight in terms of manpower rather than firepower: Third World desire to negotiate a new law of war treaty clearly had as much if not more of an arms control angle than a humanitarian interest. The ICRC fully shared the Third World view with respect to airpower.[253]

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251. G. TANHAM, COMMUNIST REVOLUTIONARY WARFARE 104 (1967).

252. *See generally* A. HORNE, *supra* note 222. Third World opposition to the use of airpower by developed nations can be illustrated by one incident from the Algerian War. The guerrillas, called the FLN, were supported financially by the Arab League, and provided sanctuaries from which to conduct their military operations in Morocco and Tunisia, the latter in violation of articles 2–5 of the Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of October 18, 1907. SCHINDLER & TOMAN, *supra* note 27, at 941–49. The FLN copied the practice of the Vietminh of neutralizing French airpower by locating its camps and training bases within villages. *See* G. TANHAM, *supra* note 251, at 108.

In six months preceding February 1958, French patrols had been involved in more than eighty shooting incidents with the FLN on the Tunisia-Algeria border. On January 11, 1958, a FLN battalion ambushed a French force, killing fifteen soldiers before fleeing back into Tunisia. Days later, a French aircraft was shot down by machine-gun fire from the Tunisian village of Sakiet, which appeared to be a fortified FLN camp. After another French plane was damaged by fire from Sakiet on 8 February, French Air Force B–26 bombers attacked Sakiet, killing some eighty people, including women and children. Undoubtedly anticipating a French response, the second FLN attack was carried out on market day, when the town was crowded with civilians. The international uproar that followed emphasized the French bombing, while neglecting the FLN use of the civilian population as a screen from attack. The intent clearly was not just to condemn the French bombing, but to take away the French airpower advantage while preserving the FLN sanctuaries outside Algeria. A. HORNE, *supra*, at 249–50, 265–70.

253. This is not altogether unusual. As Clausewitz noted, while, during war, a nation should focus on trying to achieve the optimum conditions to foster that nation's interests in the ensuing peace, a nation in peace should foster conditions most favorable to the nation's interests in any war that may ensue. Winston S. Churchill described this use of negotiations in a speech to his constituency entitled *A Disarmament Fable* on October 25, 1928:

> Once upon a time all the animals in the zoo decided that they would disarm, and they arranged to have a conference to arrange the matter. So the rhinoceros said when he opened the proceedings that the use of teeth was barbarous and horrible and ought to be strictly prohibited by general consent. Horns, which were mainly defensive weapons, would, of course, have to be allowed. The buffalo, the stag, the porcupine, and even the little hedgehog all said they would vote with the rhino, but the lion and the tiger took a different view. They defended teeth and even claws, which they described as honorable weapons of immemorial antiquity. The panther, the leopard, the puma and the whole tribe of small cats all supported the lion and the tiger. Then the bear spoke. He proposed that both teeth and horns should be banned and never used again for fighting by any animal. It would be quite enough if animals were allowed to give each other a good hug when they quarrelled. No one could object to that. It was so fraternal, and that would be a great step towards peace. However, all the other animals were very offended with the bear, and the turkey fell into a perfect panic. The discussion got so hot and angry, and all those animals began thinking so much about horns and teeth and hugging when they argued about the peaceful intentions that had brought them together that they began to look at one another in a very nasty way. Luckily the keepers were

Although some Western delegations, including the United States, recognized the need for "damage control" in limiting proposals that were unrealistic, their sincere interest in updating the codified law of war tended to obscure their veiw of the potential implications of proposed language. This remained a problem throughout the Diplomatic Conference that followed.

The clear purpose of the second session of the Conference of Government Experts was to develop two draft protocols for consideration by a Diplomatic Conference; the first would address international armed conflict, while the second would endeavor to expand the protection provided the civilian population in internal conflict. While Sweden and the ICRC devoted considerable effort to expansion of the discussion to include certain conventional weapons, this issue was not resolved until the 1978–1980 United Nations Conference on Certain Conventional Weapons, discussed *infra*. Norway pressed very strongly for a single protocol, without success. But the developing nations from the outset of their involvement stood strongly behind the proposition that "wars of national liberation" had to be considered international armed conflicts, and included in Protocol I.

The other major area of work concerned the draft articles prepared by the ICRC for the protection of civilians. Essential to this discussion was the definition of terms such as civilian, civilian population, civilian objects, and military objectives. There was a disparity of views with regard to these definitions and no agreement was reached during the session. After much open debate of the ICRC-drafted articles, the senior American representative advised the conferees that he

> expressed the desire of the United States Government to increase the protection of innocent victims of armed conflict, but emphasized certain concerns. Key among them was the fact that modern warfare includes civilians in the battlefield, and it has become increasingly difficult to prevent the intermingling of military and civilian activities and to separate and protect civilians. Under such conditions, he noted the increasing difficulty of identifying an entity called 'the civilian population.' The best approach, he suggested, was to elaborate basic guidelines, rules general enough to be understood by an ordinary soldier or a commander of regular or irregular forces and fair enough so that they would be thought of as deriving from basic requirements of law and humanity and thus consistently applied. [254]

Taking this approach, the senior U.S. delegate noted, "caused a certain amount of hostility against the U.S. position," particularly by the ICRC. Jean S. Pictet, a senior ICRC representative, turned to another U.S. delegate and declared: "If we cannot outlaw war, we will make it too complex for the commander to fight!"[255] The Conference of Government Experts concluded, still fragmented from confrontations between Western nations and their traditional views of the law of war, and the developing nations with their revolutionary ideas. The ICRC reviewed the texts produced and with an admitted degree of arbitrariness reworded many of the proposals to conform to the desires of the ICRC. A number of procedural steps were taken that would lead to the Government of Switzerland convening The Diplomatic Confer-

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able to calm them down and persuade them to go back quietly to their cages, and they began to feel quite friendly with one another again.

M. GILBERT, V WINSTON S. CHURCHILL, THE PROPHET OF TRUTH, 1922–1939, 305 (London, 1976). The author has no quarrel with this effort by the Third World, but does find it disingenuous for proponents of Protocol I (including the ICRC) to represent that the language of Protocol I was intended to address humanitarian concerns only.

254. U.S. DEPARTMENT OF STATE, REPORT OF THE U.S. DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 247, at 11.

255. Comment attributed to Mr. Pictet by Waldemar A. Solf.

ence on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (the Diplomatic Conference). While, in the words of one ICRC representative, at this point "the texts [of the two draft protocols] passed out of the hands of the Red Cross to enter a new phase in which States would have the power of decision," in truth the ICRC had an active role in the ensuing Diplomatic Conference.[256]

E. The Diplomatic Conference

Background. The Diplomatic Conference took place over the course of four sessions between 1974 and 1977.[257] There were substantial distinctions between the Diplomatic Conference and the Hague Peace Conferences of 1899 and 1907, and the 1949 Diplomatic Conference: the length of the negotiations; the number of delegations, bringing with them cultural and philosophical differences that were substantially greater than they had been previously; and the fundamental political differences between the East and the West that had begun to surface at the 1949 Geneva Diplomatic Conference.[258] Notwithstanding the very clear lesson of the failed 1923 Hague Air Rules against international lawyers exercising the lead in negotiating a treaty in which they lack subject-matter expertise, many delegations—and particularly the Western delegations—were almost exclusively comprised of international lawyers; no delegation had a military officer of the stature of a Mahan, Fisher, or Rodgers.[259] Delegates with combat experience for the most part were veterans of

256. ICRC COMMENTARY, *supra* note 247, at xxxi-xxxii. *See also* INTERNATIONAL COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, 3 MAY–3 JUNE 1972 (Geneva, 1972).

257. Four sessions were held: 20 Feb. to 29 Mar. 1974, 3 Feb. to 18 Apr. 1975, 21 Apr. to 11 June 1976, and 17 Mar. to 10 June 1977. It is not the intention of this article to discuss the Diplomatic Conference in detail. For general reference, *see* NEW RULES FOR VICTIMS OF ARMED CONFLICTS (1982); ICRC COMMENTARY, *supra* note 247; and Parks, *The 1977 Protocols to the Geneva Conventions of 1949*, NAVAL WAR C. REV. 17–27 (Fall 1978).

258. In contrast to the twenty-five nations that attended the 1899 Hague Peace Conference, one hundred twenty-six nations participated in the first session of the Diplomatic Conference. One hundred twenty-one nations attended the second session, one hundred six the third session, and one hundred nine the last session. In addition, eleven national liberation movements were present by invitation, and twenty-four international organizations were represented at the Diplomatic Conference with observer status. There also was a Working Group for the Development of Humanitarian Law comprised of representatives from twenty-seven private organizations. A complete list of attendees is contained in SCHINDLER & TOMAN, *supra* note 27, at 608–13. The official records of the Diplomatic Conference are contained in seventeen volumes. FEDERAL POLITICAL DEPARTMENT, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, 1974–1977 (Bern, 1978). The volumes are not well organized for research purposes. Professor Howard S. Levie's four-volume PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE GENEVA CONVENTIONS (1979–1981) reorganizes the official record of Protocol I into an article-by-article, chronological sequence. For Protocol II, *see* LEVIE, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT (1987). Another useful research tool is INDEX OF INTERNATIONAL LAW (Waldemar A. Solf and J. Ashley Roach, eds. Geneva, 1977).

259. The problem would be the same if a conference were called to promulgate a treaty on international monetary controls, and international lawyers (rather than practicing economists and bankers) made up the delegations. While doubtless there are international lawyers who have worked in the international banking business, at the time of the Diplomatic Conference few international lawyers worked in the law of war field on a day-to-day basis, or possessed knowledge or background in military affairs with regard to matters such as targeting intelligence. The U.S. military took steps to correct this in 1982, when it began an annual Military Operations & Law Symposium, wherein senior operations officers and judge advocates meet to discuss contemporary operational-legal matters. Each of the U.S. military services has developed an operational law program to educate its lawyers in this area, but few of those lawyers would feel qualified to negotiate a law of war treaty without substantial advice and assistance from the military staffs. That did not exist during the Diplomatic Conference.

One member of the U.S. delegation has stated that "The provisions [of the Protocols] were closely scrutinized by the military services and the Joint Chiefs of Staff." Solf, *A Response to Douglas J. Feith's "Law in the Service of Terror: The Strange Case of the Additional Protocol,"* 20 AKRON L. REV. 261–89, at 265 [Fall 1986]. Similarly, Ambassador George H. Aldrich, the head of the U.S. delegation to the Diplomatic Conference, has said "The Office of the Secretary of Defense and the Joint Chiefs of Staff approved our position papers for each session." Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L. 693–70, at 695 (Spring 1986). Both statements are highly misleading with regard to the process by which JCS approval of documents related to the Diplomatic Conference was obtained.

The delegation members prepared their position papers with little or no consultation with the military service staffs, the Office of the Secretary of Defense, or the JCS, and then submitted their position papers to the JCS for approval. The position papers seldom were written in absolute terms, instead leaving the maximum amount of latitude for the delegation in which to maneuver in the course of the negotiations. Moreover, the system for military review of delegation position papers did not lend itself to *close* scrutiny. The JCS decision-making system is a deliberative process normally used for papers no more than two or three pages in length. The delegation position papers were substantially in excess of one hundred single-spaced, typewritten legal-size pages in length, and were always submitted to the JCS for worldwide distribution (to the theater commanders and service staffs), examination, comment, and approval on very short notice.

An example of how the delegation prepared—and negotiated—issues illustrates the lack of military cognizance over the actions of the U.S. delegations. Prior to the Diplomatic Conference, a soldier caught by the enemy while wearing an enemy uniform could be tried and executed as a spy; the U.S. Army in fact executed eighteen German soldiers apprehended in U.S. uniforms during the December 1944 Battle of the Bulge. *See* C. MACDONALD, A TIME FOR TRUMPETS 32, 69, 87–89, 119, 224–27, and 451–53 (1984). [Hitler had ordered his soldiers to wear U.S. Army uniforms after being impressed with the success of American soldiers seconded (assigned) to the Office of Strategic Services (OSS) in infiltrating Aachen in September 1944.] But if a soldier wearing an enemy uniform accomplishes his mission and returns to his own lines, he has committed no war crime and would not be subject to any form of punishment if subsequently captured while wearing his own uniform. A question before the Diplomatic Conference was whether the wearing of an enemy uniform should be made a war crime; the ICRC was urging a prohibition on the wearing of enemy uniforms.

The U.S. delegate responsible for negotiating this issue unilaterally (that is, without consultation with the special operations community or the military service staffs) made the decision to accept the language contained in article 39, paragraph 2 of Protocol I making the wearing of an enemy uniform a war crime. On his return, he incorporated the prohibition into a service regulation on deception—prior to U.S. signature of the Protocols.

Subsequently, Ambassador Aldrich defended the decision on the basis that "Modern forces rarely use such tactics." Aldrich, *supra*, at 712, n. 70. This assertion is not historically sound. There exists a very long history of the wearing of enemy uniforms, as indicated by the following examples assembled from unclassified sources by the author:

WHERE	WHEN	WHO
Northeast Europe	1940	Germany
Soviet Union	1941–1943	Germany
Soviet Union, Germany	1942–1945	Soviet Union
North Africa	1942	Great Britain
France	1942–1944	Great Britain
Germany	October 1944	United States
Belgium	December 1944	Germany
Algeria	1958–1962	France
South Vietnam	1968	North Vietnam
Southeast Asia	1965–1972	United States
Southeast Asia	1971–1972	Soviet Union
Middle East	1967,1973	Israel
Zambia, Mozambique	1970s	Rhodesia
Uganda	1976	Israel
South Africa	1978	Mozambique
South Korea	June 1983	North Korea
Peru	1984	Shining Path
Libya	1985	Chad
Salvador	1985–1988	Farabundo Marti National Liberation Front
Nicaragua	1986	Sandinista government

The military review conducted subsequent to U.S. signature of the 1977 Protocols also identified a discrepancy that placed American prisoners of war at greater risk. Article 93, GPW, permits the

World War II, which had concluded twenty-nine years before the commencement of the Diplomatic Conference. In the interim there had been quantum leaps in technology, particularly in the areas of aerial bombardment and air defense, about which the delegates knew little, if anything.[260] While some military lawyers possessed some expertise in the law of war, that expertise did not extend to hostilities issues as they related to the employment of airpower; in fact, there was no delegate at the Diplomatic Conference who had dropped a bomb in anger in the quarter century preceding the conference.[261]

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wearing of civilian clothing or enemy uniforms for the purpose of facilitating escape from a prisoner of war camp; this authority apparently was annulled by articles 39(2) [enemy uniforms] and 44(7) [civilian clothing] of Protocol I. The records of the U.S. delegation reveal that they overlooked this discrepancy during the course of the negotiations. The major commentary prepared by a member of the U.S. delegation mentions the discrepancy with regard to the use of enemy uniforms, but fails to recognize the effect on the wearing of civilian attire by escaping prisoners of war. *See* NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 214, listing the wearing of enemy uniforms by escaping prisoners of war as "*probable* unprohibited ruses," at 257.

In defense of the unilateral decision of the United States delegation, Ambassador Aldrich has illustrated the danger of delegates negotiating "by the seat of their pants." Ambassador Aldrich states: "It might be true that the provision has little value, although American soldiers who had to contend with German infiltrators wearing American uniforms during the Battle of the Bulge in 1944 might disagree, but it seems equally true that nothing significant is lost by accepting the provision." Aldrich, *supra*, at 712. Ambassador Aldrich's reference is to Operation Grief, in which members of SS-Standartenfuehrer Otto Skorzeny's 150th Panzer Brigade created chaos behind allied lines. Wearing U.S. uniforms, this 250-man unit created panic and confusion all out of proportion to its numbers. This not only suggests the military value of the tactic, but the fallacy of diplomats at a law of war conference outlawing it.

When properly employed, special operations forces are a strategic (rather than a tactical) asset. The decision by the U.S. delegation to acquiesce in the prohibition has several implications:

(1) It is generally accepted within the NATO special operations community that the Soviet Union is prepared to devote one division to hunting down each NATO special operations team (four to thirteen men) deployed within the Soviet Union. Although NATO special operations plans are highly classified, one can see that the language of article 39(2) makes Soviet security problems easier, and the survival of NATO special operations teams more problematical.

(2) Making a decision to vote for something because it caused some United States personnel a few nights without sleep in 1944 reflects a certain lack of experience and maturity. Using the same standard, a delegation member could acquiesce in a ban on artillery because he was once subjected to an artillery barrage, or decide to go along with a prohibition on intermediate-range nuclear forces because he believes they are not needed. A delegation's authority to make such decisions must be based upon authority granted after full consultation rather than personal feelings.

(3) Soviet intentions for wearing NATO country uniforms are well known. *See* M. WELHAM & B. QUARRIE, OPERATION SPETSNAZ: THE ARMS, TACTICS AND TECHNIQUES OF SOVIET SPECIAL FORCES 40 (London, 1989). *See also* V. SUVAROV, SPETSNAZ (London, 1987) and J. COLLINS, GREEN BERETS, SEALS & SPETSNAZ: U.S. AND SOVIET SPECIAL MILITARY OPERATIONS (1987). (*Spetsnaz* is the abbreviation for *Voyska Specialnoye Nazachenia*. While it stands for "special designation troops," it has become associated with Soviet special operations forces.) The prohibition contained in article 39(2) would not keep the Soviet Union and the Warsaw Pact from employing such forces, but limits NATO options.

(4) The problem within NATO may be put this way. A special operations team from a NATO nation deploys deep into the Soviet Union wearing Soviet uniforms. The team completes its mission and begins its exfiltration. It enters NATO lines through the territory of a nation party to Protocol I. Under the terms of articles 86 and 87, the host nation has an obligation to arrest the men and prosecute them for a violation of the law of war. Alternatively, a NATO staff member representing a nation that is party to Protocol I, upon hearing of the plan, would be obliged to stop the operation. The difficulties of the provision have been discussed extensively within NATO over the past decade.

The principal purpose for this lengthy discussion was to illustrate that the U.S. delegation made numerous decisions regarding provisions in Protocols I and II without an appreciation of their potential implications, and without consultation with the military services over the more than four years in which the Protocols were negotiated.

260. As suggested in the example regarding electronic warfare contained in footnote 77.

261. The United States had one of the more qualified delegations, but even it lacked experience and expertise related to aerial bombardment. For example, Major General George S. Prugh, The Judge Advocate General of the Army, was a member of the U.S. delegation for the first two sessions. An

Even had there been greater experience or expertise, it is unlikely that it would have been able to stem the tide of Third World domination of the Diplomatic Conference. The developing nations came to the conference with a very clear agenda: (a) gain international recognition for certain national liberation movements—specifically the Palestine Liberation Organization, the African National Congress, and the two principal liberation groups fighting the Portuguese government in Angola, the Angola National Liberation Front (FNLA) and People's Movement for the Liberation of Angola (MPLA);[262] (b) limit the use of military force, and particularly airpower, by another nation against them;[263] and (c) avoid restrictions that might limit their use of force to suppress internal threats. They were successful in accomplishing each.[264]

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artillery battery commander in the Pacific during World War II, General Prugh also served as the Staff Judge Advocate, United States Military Assistance Command, Vietnam, from November 1964 to mid-1966; his law of war expertise lay in prisoner of war matters as they related to an insurgent environment. Then-Brigadier General Walter D. Reed, USAF (subsequently, The Judge Advocate General of the Air Force, 1977–1980), had been trained as a B–29 navigator in the last year of World War II, but did not see combat service; his subsequent international law work contained limited exposure to the law of war. Waldemar A. Solf, the civilian Chief of the International Law Branch of the International Affairs Division in the Office of The Judge Advocate General of the Army, had served in Europe as an artillery officer during World War II. Perhaps the most highly experienced international lawyer on the U.S. delegation, Mr. Solf had no background in matters related to aerial bombardment and did not work on the provisions in Protocol I related to that subject.

262. One example of this specific interest is that the People's Movement for the Liberation of Angola (MPLA) and Angola National Liberation Front (FNLA) were invited to, and attended, the first two sessions of the Diplomatic Conference. Once Portugal granted Angola its independence on November 11, 1975, neither organization returned to the conference. Representatives of the African National Congress attended the first three sessions but, feeling its interests had been served, did not attend the 1977 session. The Palestine Liberation Organization attended all four sessions.

Another illustration of the North-South split that overshadowed the Diplomatic Conference is United Nations General Assembly Resolution 3103 (XXVIII) of December 12, 1973, entitled *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*, contained in SCHINDLER & TOMAN, *supra* note 27, at 601–03. The language contained therein raises armed conflicts in which particular national liberation movements are fighting to the level of international armed conflicts; provides prisoner of war protection for members of national liberation movements; and condemns the use of mercenaries *against* national liberation movements. Eighty-three nations voted in favor of the resolution, including the nations of Africa (except South Africa), the Middle East (except Israel), and the Socialist bloc. Thirteen voted against it, including the United States, while nineteen abstained. The same bloc of nations were able to incorporate each of these provisions into Protocol I.

263. There is evidence that members of the ICRC actively enlisted the support of a number of Third World nations in their campaign against aerial bombardment by promising support for those provisions in which the Third World had expressed interest. While this may be true, it is doubtful that the Third World nations required ICRC assistance in achieving their political goals at the Diplomatic Conference.

264. Many of the Third World delegates were diplomats stationed at their missions to the United Nations in Geneva, and veterans of work in the United Nations General Assembly in New York. They were intimately familiar with methods for fighting within a United Nations-type of conference with the developed nations. *See* B. NOSSITER, THE GLOBAL STRUGGLE FOR MORE: THIRD WORLD CONFLICTS WITH RICH NATIONS (1987). Western nations were at a disadvantage, in that they seldom presented a unified front, and were constantly concerned that they could be singled out for criticism as anti-humanitarian if they threatened to break consensus. The U.S. delegation was particularly sensitive to this during the 1977 session, given the Carter Administration emphasis on human rights. The developing nations comprised more than 60% of the delegations present, and could conceal their individual opposition behind the anonymity of group opposition. Most of them also were considerably less concerned with the possible impact of their being characterized as anti-humanitarian than were the Western democracies, and used the threat of walking out as leverage throughout the four sessions of the Diplomatic Conference. Some developing nations lost interest in the negotiations once recognition had been gained for the Palestine Liberation Organization and the African National Congress. Most continued to attend as members of the Group of 77, the so-called neutral, nonaligned nations. This group included Sweden and Switzerland which, with the ICRC, directed the efforts to incorporate constraints on airpower into Protocol I.

While the Diplomatic Conference was predominantly a North-South and Arab-Israeli struggle, there was considerable Soviet influence in that many of the leaders were Soviet trained, if not Soviet proxies.

Some additional perspective can be gained from the words of Ambassador George H. Aldrich, the head of the U.S. delegation to the Diplomatic Conference. Writing in his final report on the conference, Ambassador Aldrich stated:

> We agreed in Istanbul in 1969 to the ICRC effort that laid the foundation for this Conference, but we did so with considerable misgivings. As a country that relies for its military effectiveness more on technology, modern equipment, and firepower than on massed manpower, the United States had to approach this Conference with caution and concern. Moreover, we had seen in other contexts the risk that conferences of one hundred or more countries would be dominated by a majority of developing countries, a majority of which all too often seems to be led by radical States bearing grudges against the wealthy countries and against the United States in particular. These concerns were, in fact, justified . . . .
>
> Consistent with these concerns, we approached the Conference as more of a hazard than an opportunity . . . .[265]

The interests of the United States in the Diplomatic Conference fell into four specific areas:

a. The improvement of implementation of the existing law of war conventions, including improved procedures for the designation of a Protecting Power and for the performance of the Protecting Power's tasks by the ICRC;

b. Better procedures for dealing with the missing and dead and their effects at the end of the war;

c. Better procedures for quick battlefield evacuation of the wounded, particularly by aircraft; and

d. Increased protection for the civilian population in internal conflicts.

These interests clearly reflected the experience of the United States during the Vietnam War. As will be seen, the success of the U.S. delegation in pursuing these interests was limited, and a failure with regard to the last. Beyond this, the United States delegation had a general interest in improvement of the law of war, but recognized that important issues were at stake in connection with the protection of the civilian population, the regulation of means and methods of warfare, and the

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See B. PORTER, THE USSR IN THIRD WORLD CONFLICTS: SOVIET ARMS AND DIPLOMACY IN LOCAL WARS, 1945–1980 (London, 1984), although the book principally addresses overt participation *vis-à-vis* covert training and support.

Some perspective can be gained from the United Nations General Assembly voting, which consistently has been anti-United States and pro-Soviet. In the 1987 United Nations General Assembly, for example, member states agreed with the United States 18% of the time, while voting with the Soviet Union 80% of the time. Ken Adelman, *One-way Fare to Geneva*, Wash. Times, December 12, 1988, at D1. The percentage ratio was worse during the years of the Diplomatic Conference. The overall problem of cultural and political differences of view between the Western nations and the Socialist bloc, including many of the developing nations, is analyzed in G. DORSEY, BEYOND THE UNITED NATIONS: CHANGING DISCOURSE IN INTERNATIONAL POLITICS & LAW (1986). Professor Dorsey illustrates the fundamental disagreement that exists among the Western nations, the Socialist bloc, and the developing nations with regard to the protection of human rights. His book provides valuable insight into the reasons for the failure of the ICRC and the Western nations to improve protection for war victims in internal conflict in Protocol II.

265. U.S. DEPARTMENT OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, FOURTH SESSION 28–29 (1977).

prohibition of weapons. Hence it was determined to exercise great caution in developing the law in these areas.[266]

In addition to the friction that existed between the United States and the developing nations, there was disagreement within the Western nations, particularly in the area related to the conduct of hostilities. Some of this disagreement has been alluded to in review of the role of the ICRC in attempting to assert a leadership role in the development of rules related to hostilities, and particularly to restrict aerial bombardment; but there is more.

Interest of Other Nations. During the two decades preceding the Diplomatic Conference, the ICRC and its supporters, neutral, nonaligned nations such as Switzerland, Finland, Austria and Sweden, had become so impressed by modern firepower that they began to advocate unconditional protection for individual civilians and the civilian population as such, unrealistic interpretations of the Just War *principle* of proportionality (expressed by these advocates as the *rule* of proportionality), and strict liability standards for the consequences of command decisions made in the heat of battle.

In addition to altruistic purposes, three other motives influenced their advocacy:

a. Inferior military powers in the isolated role of a neutral or nonaligned nation regarded the "humanitarian" law movement as another vehicle for the conventional disarmament of the superpowers. Their ends could be achieved by appealing to the less-developed nations to embrace the law of war as a method for neutralizing the advantages of technologically-advanced nations. By creating new restrictions and prohibitions on the use of modern weapons or the conduct of modern tactical operations, advocates could achieve their conventional disarmament goals through the back door, a tactic similar to that attempted by some smaller nations at the First Hague Peace Conference. Rather than confront the superpowers in overt disarmament negotiations, these advocates pursued their objective through less-publicized negotiations updating the law of war.

b. The same nations, and to some extent some members of the North Atlantic Treaty Organization (NATO), believed (and continue to believe) that a key influence for compliance with the law of war is the construction of a well-publicized regime of law that will serve as a means for bringing international public opinion to bear in time of war, which, in turn, will cause a belligerent to refrain from certain tactical options, even where they are lawful. Sweden had used this technique with great effect in limiting U.S. bombing operations against North Vietnam, and believed it could work against totalitarian nations as it did with a democracy if a proper framework were developed. That framework was to be Protocol I. Sweden was successful in enlisting the support of many of the NATO nations (who saw themselves as the battleground for any future Warsaw Pact-NATO confrontation), or in enlisting peace groups in those nations who at least could pressure the Government to support Swedish and ICRC initiatives.

c. Correlative to these two arguments was an economic interest in the continued minimization of the national defense budget in order to permit greater expenditures

266. U.S. DEPARTMENT OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, FIRST SESSION 25–26 (1974).

on more popular domestic social programs; hence, that which could be accomplished to limit the actions of any potential threat was "money in the bank."

Each of these factors had considerable bearing in developing the rules for aerial bombardment. These nations did not see themselves as nations involved in the projection of military power, but strictly in terms of nations that might be attacked. In this regard they saw airpower solely as an offensive tool that could be employed against them and sought protection from that threat. They shared this view with the developing nations.[267]

Conference Committees and Consensus Voting. Negotiation of the two protocols was divided among three main committees. Committee I was responsible for the general provisions of Protocols I and II; Committee II was responsible for those provisions relating to the wounded, sick, shipwrecked, civil defense, and relief; and Committee III dealt with those articles addressing the protection of the civilian population, means and methods of combat, and a proposed new category of prisoners of war. There also was a Drafting Committee and a Credentials Committee, each of which met infrequently. An *ad hoc* committee on certain conventional weapons was created and held two separate meetings in the course of the Diplomatic Conference, which will be discussed *infra*.

Voting was by consensus. This voting technique has led to a certain degree of confusion, as some authors have represented that the delegations "unanimously approved" each part of each article of the two Protocols, and some international lawyers have suggested that consensus voting equals unanimous assent by all nations, thereby creating "instant customary law."[268] This is an incorrect understanding of

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267. This view of aerial bombardment is not new. The Geneva Disarmament Conference of 1932–1934 devoted much time and effort to the question of bomber aircraft and bombing because of Japanese air attacks on China. On March 19, 1932, Sir John Simon, the British Foreign Minister, circulated a paper among his colleagues proposing "the complete prohibition and outlawry in all circumstances of the dropping of bombs from any aircraft on the territory or shipping of another sovereign state." The paper was prepared by Alexander Leeper, an Australian member of the British Foreign Office, who argued that the bomber was "the most effective weapon of the aggressor," without considering its potential use in national self-defense or to support defensive operations. His proposal gained only momentary attention. H. HYDE, *supra* note 135, at 279–80.

There are other historical similarities. Much of the effort at disarmament and/or regulation of aerial bombardment in the era between World Wars I and II was driven by economic considerations of the participating nations; this was particularly true with regard to the Geneva Disarmament Conference, which coincided with the Great Depression.

Similarly, for domestic economic and political reasons the Government of Sweden in 1972 issued Defense Decision FB72, which brought a radical cut in the Swedish defense budget. A downward trend in Swedish spending for national defense continued throughout the period during which the 1977 Protocols were negotiated, with only a slight increase occurring in reaction to the 1981 incident in which a Soviet *Whiskey*-class submarine was discovered aground in Swedish internal waters, with subsequent evidence of Soviet *Spetsnaz* activity in Sweden. The very strong effort the Swedish delegation made within the Group of 77 for limitations on actions by an attacker was tied less to humanitarian concerns than to their desire to compensate for any increased vulnerability Sweden might face from the Soviet Union as the result of its unilateral disarmament. *See* Ries, *Sweden's Defense at the Crossroads*, 22, INT'L DEF. REV. 1617–21 (December 1989); *see also* M. LEITENBERG, SOVIET SUBMARINE OPERATIONS IN SWEDISH WATERS, 1980–1986 (1987).

268. *See* Veuthey, *Guerrilla Warfare and Humanitarian Law*, 234 INT'L REV. OF THE RED CROSS 115–38 (May–June 1983), where he states that, "Nearly all the articles of Protocol I were adopted by consensus; even where a consensus was not achieved, the number of negative votes was negligible; the fundamental rules embodied in the First Protocol accordingly reflect the universal *opinion juris* as to the rules of positive law which govern all international armed conflicts." This statement is factually incorrect with regard to the application of the rule of consensus as applied during the Diplomatic Conference, as explained in the text; it also is legally incorrect. *See* Sohn, *The Law of the Sea: Customary International Law Developments*, 34 THE AM. U. L. REV. 271–80 (1985), which at page 278, citing the North Sea Continental Shelf Cases, Federal Republic of Germany v. Denmark and Netherlands, 1969 I.C.J. 3, 39, 41, states that:

the consensus process at the Diplomatic Conference, as well as the authority of delegations at that conference.

A consensus vote meant that a delegation had no *substantive* objection to a particular article or provision to the degree that that delegation was willing to break consensus; it did not mean that the delegation agreed entirely with the provision under consideration, or that delegations agreed on how the provision should be interpreted. This avoided bringing a provision or article to a vote, and permitted delegations to pressure other delegations to accept an article, however imperfect it may have been, rather than break consensus. In the process, of course, the language had to be made purposely vague in order to accommodate the objections of a possible consensus breaker while not raising the possibility that other delegations would break consensus because of the changes that were made. This encouraged general, rather than specific, language in texts; it did not necessarily mean that there was agreement. The delegations agreed as to the incorporation of each article into a draft treaty for consideration by governments; however, there was no agreement that any particular article codified customary international law, or otherwise constituted an acceptable codification of a principle of international law. At the Diplomatic Conference, there was frequent, fundamental disagreement as to the interpretation of texts adopted by consensus.

The record of the Diplomatic Conference is rife with statements by delegations that "had a vote been taken, this delegation would have voted against or abstained" with regard to a particular article, or by a delegation clarifying its vote through an explanation.[269] An example will illustrate this point.

The [International Court of Justice] is thus willing to pay attention not only to a text that has codified preexisting principles of customary international law, but also to one that has crystallized an "emergent rule of customary law." It seems, therefore, that once a consensus is reached at an international conference, a rule of customary international law can emerge without having to wait for the signature of the convention.

Professor Sohn's argument can be distinguished from the standpoint of the Diplomatic Conference and the authority granted it by the states. As noted in the text of footnote 236, provision was made in article 92 of Protocol I for a six-month delay in signature of the Protocols so that nations could review the two draft treaties and determine if they desired to sign and/or ratify them. The Diplomatic Conference delegates were well aware that they lacked the authority to promulgate rules that would bind their respective nations.

A distinction also exists between a treaty adopted by consensus that has as its purpose the codification of customary international law and one that develops principles that are contrary to customary international law. Protocol I is more of the latter than the former, particularly with regard to those rules that relate to aerial bombardment. In the dozen years that have passed since the Diplomatic Conference, the author has participated in several conferences of international lawyers that have endeavored to reach agreement on identification of the articles in Protocol I that codify customary international law. Each conference has arrived at a different list of articles or provisions.

The important point is one that Professor Sohn has stated on other occasions: that "international law has only one source—the common will of states." Sohn, *Thoughts on Customary International Law*, 1,2 RUSK CENTER NEWSLETTER 2–3 (University of Georgia School of Law, January 1984). Because of the consensus voting procedure that existed at the Diplomatic Conference, nations were merely agreeing not to disagree rather than to agree. Given the degree to which it was necessary to employ a practice of purposeful ambiguity in order to reach *consensus*, there was no manifestation of a common will.

269. For example, at the Plenary Meeting of the Diplomatic Conference that took place on May 27, 1977, the delegate from France stated that:

Article [55] concerning the protection of the natural environment lays down rules for the conduct of war. As such, it has direct implications for the organization and management of a country's military defense against invasion. The French delegation . . . did not oppose the consensus on the adoption of the article, but wishes it be known that had there been a vote, it would have been abstained.

H. LEVIE, III PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS, 276 (1980).

Article 44, paragraph 3 of Protocol I provides that an irregular combatant (such as a guerrilla or partisan) may retain his status as a lawful combatant if he carries his arms openly "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."

The developing nations, and particularly those who supported the actions of the Palestine Liberation Organization and the African National Congress, argued that it was not possible for a guerrilla to display his weapon until a "split second" before his attack. The Western nations, including the United States, argued that if the article were to be in keeping with the general principle that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants,"[270] guerrillas or partisans must display their arms openly upon any movement toward the place of attack.[271] The article was accepted by consensus, with a number of delegations stating that had the matter been brought to a vote, they would have abstained.[272] Western nations have been explaining or qualifying their vote ever since. In this particular instance, the negotiators were miles apart in their interpretation of the article; a consensus vote accomplished nothing.

Second, delegation *acceptance* of a provision always is *ad referendum*, that is, with the understanding that its vote for particular language in a treaty represents agreement among the delegations present, while reserving to governments the decision as to acceptability for purposes of ratification or accession. With respect to the 1977 Protocols, formal signature of the two Protocols by national representatives commenced six months after conclusion of the Diplomatic Conference; this break was designed to give time for nations "to consult, in cabinets and parliaments, and decide whether they were willing to adopt the Protocols and the obligations contained therein."[273]

It is not possible here to devote the space to negotiations at the Diplomatic Conference as was done with the two Hague Peace Conferences and the 1922–1923 Hague conference that drafted the air rules. Nor is there any intent to enter into the debate that has arisen over the degree to which Protocol I has politicized the law of war, or to join the discussion of those articles not related to aerial bombardment, except where it is necessary to do so for perspective or illustrative purposes. The debate to date has been lively, but has been concerned primarily with the political reasons for the U.S. decision against ratification of Protocol I, and does not bear repetition.[274]

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270. Article 48, Protocol I, contained in DEPARTMENT OF THE ARMY PAMPHLET 27–1–1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 34–35 (1979).

271. For example, at the time of its signature of the two Protocols, December 12, 1977, the United Kingdom stated that "the Government of the United Kingdom will interpret the word 'deployment' in paragraph 3(b) of [article 44] as meaning 'any movement towards a place from which an attack is to be launched.' " The same or similar language was used by Belgium, Italy, Republic of Korea, and the Netherlands upon the ratification of Protocol I by each of those nations. SCHINDLER & TOMAN, *supra* note 27, at 717, 707, 712, 713 and 714. Some nations have added language that movement would include that which can be seen with sight-enhancement equipment (such as binoculars, night-vision goggles, or thermal-imaging devices) rather than just the naked eye, though no such phrase has appeared as yet as part of any interpretive statement on ratification.

272. H. LEVIE, *supra* note 269.

273. NEW RULES FOR VICTIMS OF ARMED CONFLICT, *supra* note 257, at 551; ICRC COMMENTARY, *supra* note at 247 at 1068–69.

274. Nor does the author intend to critique the performance of the members of the U.S. delegation on the manner in which they carried out their duties. International negotiations are complex and difficult, and it is inappropriate for one who was not there to second-guess decisions made in the midst of negotiations. A negotiator is entitled to the same standard as a battlefield commander for his decisions made in the heat of battle. However, just as a commander may be found by historians or

strategists studying a war or battle to have made a wrong decision in battle (for which he may be criticized, but should not be held criminally accountable) so may the products of the decisions of negotiations be subject to critical scrutiny.

For a general discussion of the Protocols, *see* Green, *The New Law of Armed Conflict*, ESSAYS ON THE MODERN LAW OF WAR 1–26 (1985).

For specific criticism of the political effects of Protocol I, *see* Feith, *Law in the Service of Terror: The Strange Case of the Additional Protocol*, THE NATIONAL INTEREST 36–47 (Fall 1985); Feith, *International Responses*, U. RA'ANAN, HYDRA OF CARNAGE: INTERNATIONAL LINKAGES OF TERRORISM 265–85 (1986); Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 AKRON L. REV. 531–35 (Spring 1986). In response to Mr. Feith's criticisms, *see* Solf, *supra* note 259.

The other principal articles are Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109–70 (Fall 1985); Aldrich, *supra* note 259; Gasser, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT'L L. 910–25 (October 1987); and Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)*, 82 AM. J. INT'L L. 784–87 (October 1988).

A difficulty with the Solf, Aldrich, and Gasser articles is that each provides "perfect" legal solutions to problems that are fundamentally political. An example of this form of argument (not from any of the articles) follows:

> At the time North Vietnam became a party to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW), it entered the following reservation:
>
> > The Democratic Republic of Vietnam declares that prisoners of war *tried and convicted* of war crimes or crimes against humanity . . . shall not benefit from the provisions of the present Convention, as specified in Article 85. [Emphasis added]
>
> Article 2 common to the four 1949 Geneva Conventions provides in part:
>
> > [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

At the time the United States became a party to the GPW, it made the following declaration: "Rejecting the reservations which States have made with respect to the [GPW], the [U.S.] accepts treaty relations with all Parties to that Convention, except as to the changes proposed by such reservations."

In the course of the Vietnam War, North Vietnam never tried or convicted any U.S. military personnel in its hands. The "perfect" legal solution was fully recognized by all concerned—and simultaneously ignored by the Socialist World. As the principal scholar on POWs has concluded:

> [T]he American pilots are entitled prima facie to prisoner-of-war status under the 1907 Hague Regulations, the 1929 Geneva Prisoner-of-War Convention, and the 1949 Geneva Prisoner-of-War Convention. *In fact, it would be difficult to imagine a more clear-cut case of entitlement to such status.* [Emphasis added]

Levie, *Maltreatment of Prisoners of War in Vietnam*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 361–415, at 383–84 (Richard A. Falk, ed. 1969). But the "perfect" legal solution does not address the political fact that North Vietnam denied POW status to captured U.S. military personnel for the entire course of the Vietnam War. *See* R. RISNER, THE PASSING OF THE NIGHT (1973); J. DENTON, JR., WHEN HELL WAS IN SESSION (1976); J. HUBBELL, *supra* note 210 and J. STOCKDALE & S. STOCKDALE, IN LOVE AND WAR (1984).

In the course of the Vietnam War the ICRC made seventy-two requests to the Hanoi Government for permission to visit American POWs in its hands. The North Vietnamese refused each, stating that the captured U.S. military personnel were not entitled to POW treatment. For the texts of the reservations to article 85 of the Socialist nations, *see* SCHINDLER & TOMAN, *supra* note 27, at 563–92. For objections to those reservations by Australia, New Zealand, the United Kingdom and the United States, *see Id.* at 565, 580, 589, 590, and 591.

As previously noted, an objective of the United States at the Diplomatic Conference was to "neutralize" the reservation of the Socialist nations to article 85, GPW, in order to prevent recurrence of the Vietnam experience. The United States effort was an attempt at yet another "perfect" legal solution to what was (and remains) a political problem; the American solution (in the words of Ambassador George H. Aldrich) "specifically outlaws a tactic used by our enemies in attempts to justify their inhumane treatment of thousands of American prisoners of war in Korea and Southeast Asia" thereby creating somewhat of a "double crime" by prohibiting something that already was clearly a breach of the 1949 Geneva Prisoner of War Convention. Aldrich, *supra* note 259, at 698. It also was unsuccessful, as will be discussed.

The Diplomatic Conference concluded on June 10, 1977, and the Protocols were open for signature in Berne, Switzerland, on December 12, 1977. The United States was present and signed the Protocols on that date. In light of the subsequent decision by the U.S. Senate not to ratify Protocol I, some light needs to be shed on the circumstances surrounding the American decision to sign as well as the steps leading the Senate to decide against ratification of Protocol I. The latter included a comprehensive military review; those articles that affected aerial bombardment will be examined.

Signing of 1977 Protocols. Upon its return to the United States, selected members of the American delegation began work on the necessary documents for a decision as to United States participation in the signature ceremony that was to occur six months later.[275] Ambassador Aldrich and the remaining members of the delegation assumed that the United States would sign and ratify both Protocols and wrote their supporting documents accordingly. This assumption was reached without consultation with any agency or official of the U.S. Government. The assumption at first blush may appear appropriate, given the record of the United States as a leader in respect for and implementation of the law of war. However, history suggests that the assumption may have been inappropriate. Although the United States ratified the 1949 Geneva Conventions, it declined to become a party to the 1923 Hague Rules of Aerial Warfare and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and did not ratify the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare until 1975. Thus while the United States has found acceptable law of war treaties relating to the protection of war victims, it has been considerably more cautious in its acceptance of treaties relating to the employment of arms.

Given the vast scope of Protocol I, the decision by the delegation in favor of signature and ratification certainly was premature if not presumptuous. The delegation's decision colored the review prepared for senior American officials with regard to U.S. signature. Potential interpretation problems were played down or ignored; in many cases, the interpretation the American delegation had of a provision was the only interpretation discussed, even though it was known that others were expressed in the course of the negotiations that differed substantially from that of the U.S. delegation.

For example, article 35, paragraph 3, and article 55, paragraph 1, of Protocol 1 prohibit attacks on the natural environment that will result in "widespread, long-term and severe damage." It was clear throughout the course of the Diplomatic Conference that the language was specifically directed at certain U.S. operations during the Vietnam War, and particularly the use of herbicides.[276] The terms

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275. With some notable exceptions. Brigadier General Reed was promoted to Major General and became The Judge Advocate General of the Air Force in October 1977. His participation upon return from Geneva was limited thereafter. Similarly, Captain Richard L. Fruchterman, JAGC, USN, the Chief of the International Law Division of the Office of the Judge Advocate General of the Navy until September 1976, served on the U.S. delegation as its naval representative; upon completion of the 1977 session, he ceased his active involvement with the Protocols. The author became Head of the Law of War Branch in the International Law Division of Navy JAG in October 1977, and attended all meetings of the Department of the Defense Law of War Working Group as the naval representative during the balance of the period leading up to the U.S. decision regarding signature of the Protocols.

276. *See* ICRC COMMENTARY, *supra* note 247 at 662, n. 2; H. LEVIE, *supra* note 269, at 259–77, and particularly the statements of Hungary (*id.* at 259–60) and North Vietnam (*id.* at 260). *See also* J. NEILANDS, *Harvest of Death: Chemical Warfare in Vietnam and Cambodia*, STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, ECOLOGICAL CONSEQUENCES OF THE SECOND INDOCHINA WAR (Stockholm, 1976); W. THOMAS, LEGAL AND SCIENTIFIC UNCERTAINTIES OF WEATHER MODIFICATION

"widespread," "long-term" and "severe damage" are approximately the same as the terms used in the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD),[277] except that the terms are stated in the conjunctive (and) in Protocol I but in the disjunctive (or) in the ENMOD Treaty. The terms are defined in the ENMOD Treaty,[278] but there was no agreement as to definition of the terms in Protocol I, with some delegations arguing that "long-term" could be as brief as a single season.

However, in the U.S. review prior to signature, former delegation members concluded their analysis of this provision by stating that "This article is expected to have negligible impact on U.S. military operations," inasmuch as the report of Committee III of the Diplomatic Conference stated that "long term" "was considered by *some* to be measured in *decades*, with reference made to twenty to thirty years as a minimum, and it *appeared* to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision."[279]

In fact, the matter was not agreed upon in the course of the Diplomatic Conference. That there was a potential for substantial divergence in interpretation of these terms is indicated by the *ICRC Commentary*, which states:

> In times of armed conflict . . . the Protocol [I] and the [ENMOD] Convention, taken together, prohibit:

(1977); and WARFARE IN A FRAGILE WORLD: MILITARY IMPACT ON THE HUMAN ENVIRONMENT (Arthur H. Westing, ed. 1980), and ENVIRONMENTAL WARFARE: A TECHNICAL, LEGAL & POLICY APPRAISAL (London, 1984). For a discussion of the U.S. employment of herbicides in Southeast Asia, *see* W. BUCKINGHAM, JR., OPERATION RANCH HAND: THE AIR FORCE AND HERBICIDES IN SOUTHEAST ASIA, 1961–1971 (1982); and P. CECIL, HERBICIDAL WARFARE: THE RANCH HAND PROJECT IN VIETNAM (1986).

277. SCHINDLER & TOMAN, *supra* note 27, at 163–75. The ENMOD uses the terms "widespread," "long-lasting" and "severe," while Protocol I uses "widespread," "long-term," and "severe damage."

278. The following understanding was incorporated into the negotiating record of the ENMOD Treaty and included in the report transmitted by the Conference of the Committee on Disarmament to the United Nations General Assembly in September 1976:

> It is the understanding of the Committee that, for the purposes of this Convention, the terms "widespread," "long-lasting" and "severe" shall be interpreted as follows:
>
> (a) "widespread:" encompassing an area on the scale of several hundred square kilometers;
>
> (b) "long-lasting:" lasting for a period of *months, or approximately a season* [emphasis added];
>
> (c) "severe:" involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

The Conference on Disarmament made special note that "it is further understood that the interpretation set forth above is intended exclusively for this Convention [ENMOD] and is not intended to prejudice the interpretation of the same or similar terms if used in connection with any other international agreement." SCHINDLER & TOMAN, *supra* note 27, at 168. Note, however, that this does not preclude another treaty from using the same definitions.

279. U.S. DEPARTMENT OF DEFENSE, LAW OF WAR WORKING GROUP REVIEW AND ANALYSIS OF PROTOCOLS I & II ADOPTED BY THE DIPLOMATIC CONFERENCE ON INTERNATIONAL HUMANITARIAN LAW I–35–2, 4 (Nov. 1977) (emphasis added). The author attended the meeting at which this (and other) discrepancies were raised. The decision was made that controversial matters would not be discussed in the review document, as that might preclude American participation in the signing ceremony scheduled for 12 December 1977. While there seemed to be agreement that the Protocols had to be analyzed "warts and all" in any review prior to the U.S. decision as to ratification, it was the author's experience that members of the American delegation to the Diplomatic Conference thereafter continued to avoid raising any issue that was potentially adverse to a favorable U.S. decision. They had lost their objectivity and had become advocates for U.S. ratification, whatever the cost.

(a) Any direct action on natural phenomena of which the effects would last more than *three months or a season*

(b) Any direct action on natural phenomena of which effects would be widespread or severe (for the interpretation of these terms . . . see [ENMOD Convention definitions]), *regardless of the duration*, affecting one or other of the Parties to the Convention, even if it is not a Party to the conflict.[280]

The document prepared by former members of the American delegation to the Diplomatic Conference, while lengthy, was not a review of the Protocols; it was a brief for U.S. signature.

The Joint Chiefs of Staff (JCS) met in executive session on November 2, 1977, five weeks before the date of the scheduled signing ceremony. In attendance were the Chairman of the JCS; the Chief of Staff of the Air Force; the Chief of Naval Operations; the Commandant of the Marine Corps; and, substituting for the Chief of Staff of the Army, the Vice Chief of Staff. Also present were the Director of the Joint Staff and the Chairman's Executive Assistant. Before each rested a single JCS decision memorandum. Attached to it was a typewritten document, single-spaced on legal-size paper, almost three inches thick. The JCS, the service staffs, and the worldwide theater commanders had been provided less than two weeks in which to review a complex law of war document that required six years to negotiate. Realizing that the task was impossible, another general officer was present. This was General Alexander M. Haig, USA, theater commander for U.S. forces in Europe. Accompanying him was his deputy. General Haig advised the Chairman and the service chiefs that the JCS should vote in favor of U.S. signature, because "signing doesn't mean anything and has no binding effect" on the United States. General Haig had intervened in the JCS decision at the request of his old friend, Ambassador George H. Aldrich, who feared that any hesitation on the part of the JCS would preclude U.S. participation in the signing ceremony the following month. Based upon his assurance, the JCS voted in favor of U.S. signature—on the condition that the JCS would be permitted a full military review prior to any decision as to ratification of the Protocols by the United States. That condition was accepted by the Secretaries of Defense and State. Ambassador Aldrich and the United States Ambassador to Switzerland were present at the signing ceremony and signed on behalf of the United States.[281]

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280. ICRC COMMENTARY, *supra* note 247, at 416 (emphasis added).

281. General Haig's statement is simultaneously correct and incorrect. Under the terms of Protocol I (articles 92–94), signature alone does not bind a nation; the nation does not become a party until it deposits its instrument of ratification or accession. However, under the terms of article 18 of the Vienna Convention on the Law of Treaties, a nation is obligated once it has signed the treaty to refrain from acts which will defeat the object and purpose of the treaty, until it has made its intention clear that it does not intend to become a party to the treaty. This the Reagan Administration did in forwarding Protocol II only to the Senate for its advice and consent to ratification on January 29, 1987.

A representative of the ICRC has stated that "Washington's decision to sign the two Protocols, especially Protocol I, is of great significance. It reflected *the U.S. delegation's* positive assessment of the Diplomatic Conference." Gasser, *supra* note 274, at 916 (emphasis added). Similarly, Ambassador Aldrich has stated that "None of the defects in the Protocol [I discovered by the subsequent military and political review] should deter the United States from ratification, as they are curable by means of understandings or reservations, as both the State and Defense Departments recognized prior to the Reagan Administration." Aldrich, *supra* note 259, at 719. The former statement is closer to the truth than the latter. Neither the Secretary of State nor the Secretary of Defense was prepared to make a decision with regard to U.S. ratification until the military review promised the JCS as a condition for signature was completed and considered by the Departments of Defense, State and Justice. At the time of U.S. signature there were major differences between the military services and Ambassador Aldrich with regard to certain provisions contained in Protocol I, such as the prohibition on reprisals contained in article 51; they had not been addressed at the department level.

F. Background of Military Review of 1977 Protocols

As part of the Diplomatic Conference that negotiated the 1977 Protocols, an *ad hoc* committee considered restrictions or prohibitions on certain conventional weapons. While no treaty provisions resulted from the work of this committee, the Diplomatic Conference adopted a resolution recommending that the United Nations sponsor a separate conference on certain conventional weapons. The United Nations accepted the recommendation. Preparatory conferences were held in Geneva in August 1978, and March–April 1979, followed by formal negotiating sessions in the fall of 1979 and 1980. These sessions led to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (UNCWC),[282] previously discussed. While some work on the 1977 Protocols took place between 1978 and 1980, preparation for and negotiation of what became the UNCWC demanded most of the time.

Between 1978 and 1980 former members of the U.S. delegation to the Diplomatic Conference prepared various drafts for submission of the two Protocols by the President to the Senate for its advice and consent to ratification. The author's review in June of 1980 of the draft commentaries prepared up to that time revealed that none had as their purpose the review promised the JCS at the time of their consent to U.S. signature. The earlier review and analysis essentially was a legislative history prepared for the limited purpose of approval of the signature decision. As previously noted, that review and analysis was cursory, and criticism of language contained in the various articles was mooted if not avoided altogether. There was no analysis of the overall impact of the Protocols on the broad spectrum of potential combat operations in which United States military forces might be involved.[283]

Moreover, the two statements suggest the basis for the American decision to sign the two Protocols and its effect. The U.S. delegation unilaterally made the decision to sign and ratify, and prepared documents supporting its decision. The U.S. signature in turn conveyed to others a misimpression of American intentions. Some allies have informed the United States that they would have been more cautious in approaching the decision to ratify the Protocols had they known in 1977 that the United States might not become a party to Protocol I. But that was not the impression conveyed to them by members of the American delegation.

282. The Canadian delegation took a portion of the title to create the acronym CUSHIE, for *C*auses *U*nnecessary *S*uffering [or] *H*as *I*ndiscriminate *E*ffects. The acronym never quite caught on, resulting in the unpronounceable acronym UNCWC for *U*nited *N*ations *C*onventional *W*eapons *C*onference.

283. A NATO Military Committee review of the 1977 Protocols during this period did consider the overall impact question, and concluded that the 1977 Protocols would have no adverse impact on alliance operations. This report was prepared by individuals who participated in the negotiation of the Protocols, and suffers from the same problems that hampered the U.S. review prior to signature. Subsequent studies by the United States and several of its Allies, as well as a decade of NATO Military Committee discussions of the Protocols, has cast doubt on the credibility of the original study.

The Strategic Studies Institute of the U.S. Army War College conducted an evaluation of the Protocols in 1978–79. The study was precipitated by concerns expressed by a senior Army judge advocate with regard to the practicality of the warfighting provisions of Protocol I (articles 48–58). The ultimate recommendation of the study was that the "Army position should be that the JCS recommend ratification of Protocols I and II," subject to two dozen recommended reservations and statements of understanding. STRATEGIC STUDIES INSTITUTE, U.S. ARMY WAR COLLEGE 25 (Carlisle Barracks, Pa. 20 March 1979).

One recommendation in the Army War College Study revealed the chameleon-like approach to interpretation of the Protocols by its proponents. In 1976 an opinion had been prepared by the principal U.S. negotiator of the provisions relating to medical aircraft (articles 24–30, Protocol I) that the language contained in article 28, paragraph 2, prohibited the use of cryptological equipment on medical aircraft (DAJA-IA 1976/1080). The same position is reflected in the document prepared by former delegation members prior to U.S. signature. Accordingly, the Army War College Study recommended:

> a. The U.S. Senate be advised of the adverse nature of the prohibition of carrying encryption equipment on board medical aircraft;

Similarly, draft commentaries prepared between 1978 and 1980 were not intended to be a critical analysis of the Protocols, but rather a compilation of statements of U.S. interpretation of the articles of the Protocols for consideration by the President and the Senate. As such, the draft commentaries did not constitute a military assessment of the Protocols; they presented them in their most favorable light only. They did not inform the service chiefs of the myriad interpretations possible of the language contained in the Protocols, some of which clearly were contrary to the American interpretation.

An argument can be made that it might have been preferable for the U.S. Senate to have ratified Protocol I as quickly as possible with appropriate reservations and statements of understanding in the hope of influencing future interpretation of its many ambiguous provisions. But advancement of such a point of view could have been made only after critical review of the treaty rather than in lieu of such a careful analysis. The approach taken prior to 1980 colored the tenor of the review and analysis prior to U.S. signature and the subsequent draft commentaries. Many potentially controversial provisions were given less than adequate analysis, if not ignored completely; other issues discovered by the subsequent military review had been papered over with highly legalistic arguments to become "non-problems."

On June 19, 1980, the author submitted a memorandum to the members of the Ad Hoc Law of War Working Group advising that the work accomplished to date was not regarded as constituting the military review of the 1977 Protocols promised the JCS,[284] suggesting that such a review be undertaken. On September 12, 1980, The

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b. An understanding be provided the U.S. Senate prior to ratification which establishes two points:

(1) that the United States does not intend to use medical aircraft for the collection or transmission of intelligence data;

(2) that the United States intends to carry secure voice equipment and encryption materials on board medical aircraft for the purpose of protecting communications made in support of purely medical operations.

The Army War College recommendation was made for two reasons. Because of the adverse experience of the Army in Vietnam (in loss of the element of surprise because of enemy interception of U.S. transmissions), a national policy decision had been made in 1971 that all future communications would be encrypted. Moreover, medical evacuation helicopter crews employ an abbreviated format message system for reporting the number and type of casualties on board the aircraft to facilitate immediate casualty care upon arrival at a treatment facility which, if intercepted, would appear to be an encrypted message. Because of the language contained in article 28(2), either could place the medical aircraft at risk, and could subject the crew to charges of violation of the law of war if captured. Despite the fact that the U.S. delegation was the principal sponsor of the provisions related to medical aircraft, these issues had been neglected in the course of the six years of negotiations. It also serves further to illustrate the degree to which the delegation worked in a vacuum in preparing the U.S. position.

The Army War College recommendation led to an immediate reversal of the previous U.S. interpretation of article 28(2). A new opinion was prepared (DAJA–IA 1979/26), reversing the previous opinion, concluding that the article did not prohibit the use of cryptological equipment on medical helicopters. This rapid reversal of opinion was a key factor in the decision to demand a separate military review by individuals who had not been members of the U.S. delegation to the Diplomatic Conference.

The foregoing should not be read as questioning the integrity of any member of the U.S. delegation to the Diplomatic Conference. But some had been through six years of intense negotiations (beginning with the Conference of Government Experts) and had lost their objectivity with regard to the Protocols. In similar circumstances in a domestic law matter, it would have been appropriate for them to have recused themselves.

284. DAJA–IA 1980/6084. The Ad Hoc Law of War Working Group, which had been formed at the start of the 1971 Conference of Government Experts, consisted of representatives from the Office of the Legal Adviser, Department of State; the Office of the General Counsel, Department of Defense; the Office of the Joint Chiefs of Staff; the international law divisions of the Offices of The Judge Advocate Generals of the Army, Navy, and Air Force; the Office of the Director, Judge Advocate Division, Headquarters, U.S. Marine Corps; and nonlawyers from service staffs and other agencies, when required.

Judge Advocate General of the Army wrote a memorandum to the Deputy Chief of Staff of the Army for Operations and Plans recommending that final approval of the 1977 Protocols be deferred until the Chief of Staff of the Army was satisfied that he could testify before any Senate committee considering the 1977 Protocols that their ratification was in the national security interest. The memorandum recommended a critical review and analysis.[285] The Deputy Chief of Staff for Operations and Plans concurred with the recommendation of The Judge Advocate General in a memorandum dated December 8, 1980. It was not until January 1981, that a military review of the 1977 Protocols actually was begun.

As occurred in negotiation of the 1977 Protocols, much of the nuts and bolts work of the military review fell to members of the Department of Defense Ad Hoc Law of War Working Group. No assumptions were made for or against ratification of the Protocols. Where one member began to drift one way or another, either in the preparation of an analysis of a particular provision or as to the overall aspect of ratification, the inherent combativeness of the members of the group produced a counterargument by another member of the working group to offset any potential bias that might creep into any evaluation. The prevailing attitude was to provide an analysis that set forth in adequate detail the positive *and negative* aspects of a particular provision *vis-à-vis* the existing law so that decision makers at appropriate levels could make informed decisions with regard to particular articles and, ultimately, the overall decision as to U.S. ratification.

This process entailed considerable research and led to a number of questions. What did the article say in plain language? What had been said at the Diplomatic Conference, and by whom? What had the United States or other nations previously said on a particular subject? What had recognized international lawyers written on the subject? Could a practice of nations on the point in question be established? (In this regard, it was important to avoid the frequent temptation of an anecdotal view of history as necessarily being tantamount to the practice of nations. Similarly, the fact that nations had not engaged in a particular tactic or kind of operation since World War II did not necessarily mean that this former practice was now regarded by nations to be illegal.)[286] How does one establish intent absent evidence of specific acquiescence, or restraint? Did the post-World War II war crimes trials offer any assistance in defining or clarifying a provision? What impact would a proposed rule have in light of technological advances on the battlefield? What was the prospect for a particular rule gaining universal respect? Was a particular rule consistent with U.S. doctrine and tactics? At what level should a particular rule be applied? Was a particular provision susceptible to more than one interpretation? If so, what would be the interpretation of the United States? Of its allies? Of its potential adversaries? Did a particular provision in fact advance protection for the civilian population?

These and other questions were asked repeatedly through the review process.

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285. DAJA–IA 1980/6122 (prepared by the author). The author has included this chronology because of the misimpression under which some have labored, that concerns regarding Protocol I did not arise until the Reagan Administration. *See* the discussion in *supra* note 275. The insistence upon the military review promised the JCS at the time of the U.S. signature was initiated by the author in the fall of 1980, during the term of President Carter, and would have been made earlier but for the concentration of the author and others on the negotiation of the United Nations Conventional Weapons Convention.

286. Thus, prior to the sinking of the Argentine cruiser *Belgrano* during the 1982 Falklands/Malvinas War, some international lawyers suggested that submarine warfare had become illegal because no nation had engaged in such warfare since 1945. The same suggestion has been made with regard to nuclear weapons. Were one to follow this line of reasoning, it would mean that a nuclear power would have to employ one nuclear device in each conflict in order legally to preserve its options for future conflicts.

When examining national practice in a particular conflict, an effort was made to distinguish policy decisions made by national leaders to limit the level of violence through strategic or tactical restraint from a decision based on a belief that greater or different levels of violence were legally impermissible. This distinction was not always maintained during the Diplomatic Conference.[287]

In contrast to the previous practice of sending one large document around for consideration by the military services, individual issue papers were prepared. With a single exception, these papers generally did not exceed more than five pages. Each identified the issue, analyzed it, identified possible alternative interpretations, provided options as to decisions that could be made [accept without reservation or understanding, accept with understanding (with recommended language), or reserve], and requested a decision. In the drafting phase, the draft was carefully coordinated with particular commands and those offices on the staffs of the military services with the knowledge and expertise essential to a complete examination of the issue.[288] There was considerable reliance on all-source intelligence with regard to the practice and/or intentions of other nations.[289] Not until a draft had been thoroughly examined was the paper submitted to the JCS review process, at which time it was circulated worldwide for consideration.

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287. For example, members of the American delegation to the Diplomatic Conference frequently were questioned by the individuals preparing the military review as to why the United States accepted a provision in Protocol I. More times than not, the response was "because that's the way we did it in Vietnam." Although this rationale constitutes a misunderstanding of history, it served as the basis for many of the decisions related to the language contained in articles 48 to 58 of Protocol I, the specific point of reference being the U.S. air campaigns against North Vietnam *as they had been reported in the press*. Yet actions by senior American officials imposed severe operational restrictions on U.S. forces operating over North Vietnam, which the North Vietnamese openly exploited. These policy restrictions served as a considerable detriment to U.S. forces, were imposed without any consideration of the law of war, and forced U.S. units to operate well within legally permissible boundaries. *See* Parks, *supra* note 109, and Parks, *supra* note 208. (Each of these articles was prepared in large measure from classified Air Force studies available in Washington, but to which the American delegates did not avail themselves in the course of the four years of negotiations of the Protocols.)

288. For example, article 10, paragraph 1 of Protocol I states that "All the wounded, sick and shipwrecked . . . shall be respected and protected." Article 8(a) defines "wounded" and "sick" as "persons, whether military *or civilian*." The 1949 Geneva Conventions obligate the military to treat wounded and sick members of military forces only; *see, e.g.*, article 12, GWS. The review of this provision by the American delegation prior to U.S. signature stated that article 10 of Protocol I creates no new obligation, except to obligate a party to care for wounded and sick civilians "*if* [civilian] *medical resources are inadequate for that purpose*." The same statement is contained in NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 107–08. The language of article 10 does not limit the obligation to provide civilians medical care to those cases when civilian medical resources are inadequate. Using the plain language of article 10, an ICRC publication, Alma Baccino-Astrada, MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS 39–40 [Geneva, 1982] and the ICRC COMMENTARY, *supra* note 247, at 145–148, published subsequent to the completion of the U.S. military review state the obligation as unequivocal; neither is the assertion made in the U.S. delegation's review prior to signature supported by the negotiating record. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS, 241–311 (article 8), 333–352 (article 10) (1979). An issue paper was prepared in coordination with the Offices of the Surgeons General of the Army, Air Force and Navy, inquiring whether the United States military could assume this additional obligation; the same issue was raised in NATO meetings with alliance members. In both cases the response was resoundingly negative. Military medical facilities would be overwhelmed if obligated to treat wounded and sick civilians. All agreed that if a wounded or sick civilian were taken in by a military medical facility, that person would be entitled to equal care on the basis of medical priority. But none were prepared to assume the new obligation the ICRC claims article 10 creates.

289. Intelligence inquiries were not limited to doctrine and tactics of potential enemies. Those nations that rushed to become parties to Protocol I during the first five years it was available for ratification or accession were scrutinized to determine what steps, if any, were taken to implement that convention. With the exception of Denmark, Finland, Norway, Sweden and Switzerland, all other nations party to Protocol I had taken no steps to implement Protocol I, and had done nothing to implement their obligations under the Geneva Conventions of 1949—to which most had been parties for some years.

A detailed review in the U.S. military was possible for several reasons. There was a breadth of combat experience available within the services. In addition to the fact that officers involved in the military review had experience in World War II, Korea, Vietnam, and Grenada, they also had access to detailed analyses of the Middle East conflicts of 1967, 1973, and 1982, the 1982 Falklands/Malvinas War, the Iran-Iraq War, and Soviet military operations in Afghanistan. The later campaigns were particularly important in placing certain provisions of Protocol I in perspective on the modern battlefield, where electronic warfare has significant influence. While it is necessary to view each individual's combat service as somewhat unique to a particular war, mission, battle, or even a certain piece of terrain, combat experience is invaluable in relating the esoteric details of a law of war treaty to the practical realities of the battlefield.

A thorough military review was possible because of the degree of knowledge of international law and the law of war within the U.S. military. The Law of War Working Group established during the negotiation of the Protocols continues in operation today. The comprehensive dissemination programs established by each of the four U.S. military services in the post-Vietnam era has led not only to an increased overall awareness within the military, but to a significant cadre of military judge advocates with advanced degrees in international law and extensive experience in its teaching and practice. This practice—formalized in 1979 in part because of the requirement contained in article 82 of Protocol I[290]—has led to military lawyers providing law of war advice on a daily basis on operational matters at virtually every level of command as they review doctrine, operations plans, contingency plans, and rules of engagement; review new weapons; participate in field exercises and war games; and serve in operations centers during periods of crisis management. Military lawyers at the service level and in specified and unified commands were deeply involved in the preparation of the 1981 Worldwide Peacetime Rules of Engagement for Seaborne Forces and the subsequent Worldwide Peacetime Rules of Engagement, approved by the Secretary of Defense on June 26, 1986. Military lawyers at a variety of levels were active participants in the planning and execution of the 1983 Grenada rescue operation, the 1981 and 1986 freedom-of-navigation exercises to challenge Libya's illegal claim to the Gulf of Sidra, the subsequent air strike against terrorist-related targets in Libya, and the 1989-1990 military operations in Panama. In 1982, The Judge Advocate General of the Army established the previously-described annual Worldwide Military Operations and Law Symposium. In short, judge advocate participation in operational matters had taken a quantum leap since 1979. This improvement provided a strong system for a responsible military review of the 1977 Protocols.

The U.S. military traditionally has been consulted independent of the political leadership with regard to the acceptability of treaties relating to national security matters. There is a strength to this, for if a treaty cannot withstand critical scrutiny prior to ratification, its chances for implementation and respect are substantially diminished. Given the military commander's responsibility for accomplishment of his mission in a lawful manner, a military review of Protocols I and II was appropriate. It also was important to review these draft treaties in light of certain technological advantages enjoyed by the United States rather than in the generic sense in which they had been examined previously. Military advice is not always negative; in many

290. SCHINDLER & TOMAN, *supra* note 27, at 670. For discussion of this provision, *see* Parks, *The Law of War Adviser*, XVIII REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE 359–417 (1979); and 31 JAG JOURNAL 1–52 (Summer 1980).

cases detailed military review of a treaty tends to offset visceral reaction to a treaty by political fringe groups.

G. Analysis of Impact of 1977 Protocols

The military review examined each of the Protocols from several standpoints.

Ensuring Respect for the Law of War. The United States is a party to the four Geneva Conventions of August 12, 1949. Article 1 common to those conventions states that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."[291] The U.S. military review examined the language contained in Protocols I and II to determine whether each contributed to the continued credibility of the law of war. While Protocol II made a minor advance in the protection of innocent civilians in internal conflicts, it was concluded that Protocol I diminished rather than advanced the law of war. Although there were several reasons for this conclusion, two principal issues will be discussed to illustrate this point.

Article 51, paragraph 6, and article 52, paragraph 1, of Protocol I prohibit reprisals against the civilian population or civilian objects of an enemy nation, respectively. These provisions are not a codification of customary international law, but, in fact, a reversal of that law. The military review considered whether surrender of these rights would advance the law of war, or threaten the continued respect for the rule of law in war. It was concluded that removal of this legal right placed any further respect for the rule of law by certain nations in jeopardy.

Reprisals historically have existed in a state of confusion. The term "reprisal" has been used by national leaders to justify actions that might be better characterized as retaliation, revenge, or legitimate acts of self-defense.[292] The term has been misused by historians,[293] resulting a doubt expressed by some regarding the effec-

291. SCHINDLER & TOMAN, *supra* note 27, at 375 in GWS.

292. Within the U.S. military, the confusion may have been caused in part by the fact that the law of war manuals of each of the services contained similar, but different, definitions for the term and criteria for the execution of a reprisal. *Cf.* the language contained in UNITED STATES ARMY FIELD MANUAL 27–10, *The Law of Land Warfare* para. 497 (1956); NAVAL WARFARE INSTRUCTIONAL PAMPHLET 10–2, *The Law of Naval Warfare* sec. 310 (1955); and AIR FORCE PAMPHLET 110–31, *International Law—The Conduct of Armed Conflict and Air Operations* para. 10–7 (1976). The military review standardized the definition of *reprisal* and the conditions for its execution. *See* NAVAL WARFARE PUBLICATION 9, *The Commander's Handbook on the Law of Naval Operations* para. 6.2.3 (1987). For a general examination of reprisals and the discussions at the Diplomatic Conference, *see* ICRC COMMENTARY, *supra* note 247, at 982–87, and NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 311–15.

293. For example, Professor D. P. O'Connell characterized the United States Navy's employment of unrestricted submarine warfare in World War II as a reprisal for the Japanese attack on Pearl Harbor. D. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 44 (London, 1975). Naval historian Samuel Eliot Morison regarded the Japanese attack on Pearl Harbor as a basis for abrogation of article 22 of the 1930 London Treaty for the Limitation and Reduction of Naval Armaments. SCHINDLER & TOMAN, *supra* note 27, at 881–82; *Coral Sea, Midway, and Submarine Operations* IV HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II, 190 (1949). Another historian has interpreted the United States action as a renunciation of article 22. C. BLAIR, SILENT VICTORY 106 (1975). In fact, an American campaign of unrestricted submarine warfare against Japan was planned and approved prior to the Pearl Harbor attack. *See* Talbott, *Weapons Development, War Planning and Policy: The U.S. Navy and the Submarine, 1917–1941*, 37 NAVAL WAR C. REV. 53–71 (May–June 1984). As noted by the first historian to discover this:

> The motives which impelled the United States . . . to resort to unrestricted submarine warfare . . . were the same which had activated Germany to the same tactic. They were cooly, studiously strategic: to cut off the enemy's vital overseas trade and thereby weaken his capacity to fight and win a long war. Submarines were the only American naval instrument which could reach across the Pacific at the beginning of the conflict, and they were promptly put to this prearranged task.

tiveness of reprisals.[294] The 1949 Geneva Conventions prohibit reprisals against persons protected by those conventions, in large measure because of the abuse of reprisals during World War II.[295]

Because a reprisal involves an illegal act—accomplished for the limited purpose of forcing an enemy to cease certain illegal acts—it is politically sensitive, particularly in a democracy with a history of respect for the rule of law. But reprisals or the threat thereof have proved necessary and effective in preventing violations of the law of war, and the U.S. Government was opposed to a broadening of restrictions on reprisals at the Diplomatic Conference. The American delegation was unwilling to break consensus on this matter, however, resulting in a number of provisions in Protocols I and II narrowing the objects against which a reprisal may not be taken.[296] At the time of U.S. signature of the two Protocols, a major difference existed between the U.S. Departments of State and Defense as to whether these provisions were acceptable.[297]

In the course of the military review, the provisions limiting reprisals were considered from the standpoint of ensuring respect for the law of war. The United States has threatened the use of reprisals on several occasions to prevent violation of the law of war by others, to good effect. Thus a threat by President Franklin D. Roosevelt to resort to the use of chemical weapons deterred their use by Nazi Germany during World War II.[298]

A more recent example emphasized the concerns of the Department of Defense. In the course of the Vietnam War, the Government of North Vietnam threatened "war crimes" trials of American military personnel in its hands.[299] When the Johnson Administration warned of reprisals against North Vietnam if such illegal trials were conducted, the North Vietnamese Government quickly decided to permit socialist Bertrand Russell to conduct "trials" of the United States in general rather

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Samuel F. Bemis, *Submarine Warfare in the Strategy of American Defense and Diplomacy, 1915–1945* at 36 (unpublished paper delivered at the Naval War College, Newport, Rhode Island, November 1, 1961). Using the criteria for a reprisal contained in any one of the law of war manuals cited *supra* note 292, the U.S. employment of unrestricted submarine warfare against Japan could not be characterized as a reprisal.

294. Thus the document prepared by the American delegation in support of U.S. signature of the two Protocols stated that "[Reprisals] are not particularly efficient militarily to the extent that vital resources are diverted away from attacks against military objectives. Another problem with reprisals is the substantial existing requirements of law which regulate their execution." United States Department of Defense, Department of Defense Law of War Working Group Review and Analysis of Protocols I and II Adopted By the Diplomatic Conference on International Humanitarian Law I–51–9 (1987) [hereinafter Law of War Working Group].

295. Article 46, GWS; article 47, GWS (Sea); article 13, GPW; and article 33, GC.

296. Articles 20 (civilian medical personnel), 51(6) (civilian population in enemy hands), 52(1) (civilian objects), 53 (cultural objects), 54(4) (objects indispensable to the survival of the population), 55(2) (the natural environment), and 56(4) (works and installations containing dangerous instruments), Protocol I.

297. By way of illustration, the language quoted in footnote 294 is followed by a statement that:

> It would appear unlikely that the U.S. would have to resort to reprisals against civilian populations, as such, except in situations involving nuclear weapons . . . . On the other hand, it is possible that the U.S. might want to preserve the right of reprisal in some types of widespread conventional warfare.

The first sentence was authored by Ambassador Aldrich; the second, by Defense Department members of the U.S. delegation. Law of War Working Group, *supra* note 294, at I–51–9.

298. U.S. DEPARTMENT OF STATE BULLETIN, VII *Statement by President Roosevelt on the Use of Poison Gas*, 507 (8 June 1943).

299. The matter is discussed in Levie, *supra* note 274, at 382–90. *See also* J. HUBBELL, *supra* note 210, at 181, 223, 267, and 274–75.

than prisoners of war in North Vietnamese hands—and far away from North Vietnam.[300] In another instance, although officially characterized as an act of self-defense against a continuing threat, the 1986 United States attack of terrorist-related targets in Libya was a reprisal that has successfully deterred Libya from acts of terrorism against American citizens for almost four years—clear evidence that reprisals can be effective.[301]

The review prepared by former members of the American delegation to the Diplomatic Conference prior to U.S. signature recommended that the United States make a statement at time of signature to the effect that

> [the United States] reserves the right, in the event of massive and continuing attacks against the civilian population, to take reprisals against the civilian population of the State perpetrating these illegal attacks for the sole purpose and only to the extent necessary to bring the illegal attacks to an end.

This statement paralleled one made by Ambassador Aldrich in explanation of the American Delegation's participation in the consensus adoption of Protocol I. However, because the disagreement between the Departments of State and Defense could not be resolved prior to the signing ceremony on December 12, 1977, no statement was made at the time of U.S. signature.[302]

The American military review recognized that the statement made by Ambassador Aldrich failed to take into consideration the abuses of U.S. prisoners of war that were widespread in the course of the wars in Korea and Vietnam.[303] It seemed highly probable that the greatest area for violation of the law of war in future conflicts was in prisoner of war abuse by Communist nations.

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300. *See generally* AGAINST THE CRIMES OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL (1968). The inaugural session of the Bertrand Russell "war crimes" trial was held in London in November 1966 to establish the major areas of concern and inquiry. The next session was held in Stockholm, 2 to 10 May 1967; and the final session in Roskilde, Denmark, 20 November to 1 December 1967. The United Kingdom and France refused to permit the "trials" to take place within their territory. *See also* B. RUSSELL, WAR CRIMES IN VIETNAM (1967). Russell invited international personalities such as Jean-Paul Sartre and Simone de Beauvoir to serve as judges along with representatives from Yugoslavia, Germany, Turkey, Italy, the United States, and Cuba. Sartre was elected executive chairman and, although a leftist, endeavored to keep an open mind during the proceedings. Sartre and de Beauvoir did not believe the United States could be charged with genocide, as Russell proposed. As de Beauvoir's biographers describe subsequent events, "The Cuban delegate, 'a lovely woman,' . . . for whom this was a political affair, found their scruples superfluous. Sartre, who always fell for a beautiful woman, let himself be convinced by the beautiful Cuban delegate. In his capacity as executive chairman, it fell to him to write the preamble to the tribunal's verdict. His text, composed in the early-morning hours, was adopted unanimously. . . . The International Russell Tribunal on U.S. War Crimes in Vietnam condemned the United States for genocide." C. FRANCIS & F. CONTIER, SIMONE DE BEAUVOIR: A LIFE, A LOVE STORY 321–23 (1985). For a critical analysis of the trials, *see* G. LEWY, AMERICA IN VIETNAM 311–13 (1978).

301. Because the United States has joined in a number of United Nations resolutions cautioning against reprisals in peacetime, the American attack was characterized as an act of self-defense against a continuing threat. One need only examine the criteria for a reprisal and the steps taken by the United States prior to and in the course of the attack to see that American actions fit both the definition of a reprisal and its criteria. *See* Parks, *supra* note 86.

302. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 314, contains Ambassador Aldrich's statement in explanation of the U.S. participation in the consensus adoption of Protocol I. The difference of opinion between the Departments of State and Defense, and the decision against its resolution prior to the 12 December 1977 signing ceremony are based on the author's participation in the meetings that took place during the time between officials of the two departments.

303. Examples of POW abuse during the Vietnam War have been provided in previous pages of this article. For the Korean War, *see* U.S. SENATE, 83d Cong., 1st Sess., KOREAN WAR ATROCITIES (1954); and UNITED KINGDOM, MINISTRY OF DEFENCE, TREATMENT OF BRITISH PRISONERS OF WAR IN KOREA (London, 1955); T. FEHRENBACH, THIS KIND OF WAR 178, 209–10 (1963); and Levie, *Prisoners of War in International Armed Conflict*, 59 U.S. NAVAL WAR C. INT'L L. Studies 349–50 (1978).

The matter was raised in the course of several meetings with NATO allies, without resolution. Those nations that saw their territory as a potential battleground continued to express the desire they had voiced during the Diplomatic Conference to close the door entirely on any form of reprisal, regardless of the risk of violation by a potential enemy.[304] The delegate of one NATO ally suggested that a threat to carry out a reprisal was not prohibited by Protocol I—merely the act itself.[305] Another delegate stated that if the United States were to ratify Protocol I and reserve some right of reprisal, since his nation found it politically infeasible to reserve this right, he expected his nation would ask the United States to carry out a reprisal in its behalf and as its agent if its military personnel in the hands of an enemy were abused. This illustrates the political sensitivity of the issue.

Nonetheless, the American military review recognized the historic pattern for abuse of U.S. and allied prisoners of war by their enemies, and concluded that a broad reservation to the prohibition on reprisals contained in articles 51 and 52 of Protocol I was essential as a legitimate enforcement mechanism in order to ensure respect for the law of war.

A second concern with regard to the need to ensure respect for the law of war was the major change made in the law of war by the language contained in article 44, paragraph 3, of Protocol I, previously discussed.[306] Historically an individual who is not a member of regular armed forces is not entitled to combatant (and prisoner of war) status unless he is a member of an organization: (1) commanded by a person responsible for his subordinates; (2) that has a fixed distinctive emblem recognizable at a distance; (3) the personnel of which carry their arms openly; *and* (4) conduct their operations in accordance with the laws and customs of war.[307]

There was a specific humanitarian purpose for this provision: if a militia or similar organization wanted to attain legitimate combatant status for itself and its members, it had to meet the same standards as nations. Article 44, paragraph 3, of Protocol I discontinued the obligation to adhere to the law of war for selected organizations (such as the Palestine Liberation Organization and the African National Congress) while continuing to require adherence to it of nations.

The purpose for this amendment of customary international law, it was argued, is that by "providing an incentive for the irregular combatant to comply with the law, . . . [it thereby increased] the protection of both civilians and regular soldiers."[308] The alternative was prosecution of individual combatants for individual offenses.[309] Considering that the ICRC Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War had described the previous requirement for organization adherence to the law of war as an "essential provision" for respect for the law

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304. *See* NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 312, n.37.

305. The same argument was raised in the course of the Diplomatic Conference. *See* F. KALSHOVEN, THE LAW OF LAND WARFARE 65 (Leyden, Netherlands, 1973). As a treatise correctly indicates,

> The fallacy in Professor Kalshoven's argument is that a threatened reprisal will be regarded as a bluff if made by a Party which usually complies with the law of armed conflict. The credibility of such a threat is enhanced only if there is a general cynical attitude about the effectiveness of conventional restraints on the use of force.

NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 315.

306. *See* text at *supra* note 271.

307. Article 1 of the Annex to Hague Convention IV of 1907, contained in SCHINDLER & TOMAN, *supra* note 27, at 75; and article 4A(2) of the Geneva Convention Relative to the Treatment of Prisoners of War of 1949, contained in *id.* at 430–31.

308. Aldrich, *supra* note 259, at 704.

309. Solf, *supra* note 259, at 273; and Gasser, *supra* note 274, at 921.

of war,[310] it was necessary to ascertain whether the change brought about in article 44(3) or Protocol I ensured or diminished respect for the law of war.

It took little examination to realize that article 44(3) did not enhance respect for the law of war. Previously an organization had to adhere to the law of war to gain legitimacy for the organization and its members; in addition, its members could be prosecuted for violations. As noted, article 44(3) removed the first requirement.

The theory behind this change was that guerrilla organizations generally start as undisciplined groups facing difficulties of command and control, and that it was unfair to deny prisoner of war status to the individual guerrilla who wanted to comply with the law of war; that automatically to deny combatant status to a guerrilla served as a disincentive to that individual to comply with the law of war.[311] Strangely, the Diplomatic Conference delegates took the exact opposite approach in article 47 in denying prisoner of war protection to mercenaries.

The theory behind the change contained in article 44(3) is entirely inconsistent with the doctrine and practice of Communist revolutionary warfare. Communist guerrilla units are extremely well organized and disciplined; violence against the civilian population is selective and intentional, and is regarded as essential to the survival of the insurgent movement. The record of the use of intentional violence against the civilian population by Communist revolutionary organizations is long and well-established.[312] Communist revolutionary warfare employs violence against

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310. J. PICTET, COMMENTARY OF THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 61 (Geneva, 1960).

311. This argument was voiced in the report of the U.S. Delegation to the first session of the Diplomatic Conference. FIRST SESSION, *supra* note 266, at 8.

312. The Vietnam War brought a wealth of information on Communist revolutionary warfare techniques. On the systematic, deliberate use of violence against civilians, *see* G. TANHAM, *supra* note 251, at 121–23; D. PIKE, VIET CONG (1966), chapter 13, and specifically 246–48; B. FALL, THE TWO VIETNAMS, *supra* note 224, at 359, 360, 361; W. DAVISON, SOME OBSERVATIONS OF VIET CONG OPERATIONS IN VILLAGES, RAND RM-5267/2-ISA/ARPA at vi, 28–29, 30–34 (Santa Monica, May 1968), U.S. MISSION IN VIETNAM, VIET CONG USE OF TERROR, 16–38 (rev. ed. Saigon, Mar. 1967) which contain a detailed listing of acts of terror directed at local elected officials, schoolteachers, and other prominent civilians; R. PEARCE, THE INSURGENT ENVIRONMENT, RAND RM-5533-1-ARPA 36–50, 53–54, 87–88 (May 1969); S. HOSMER, VIET CONG REPRESSION AND ITS IMPLICATIONS FOR THE FUTURE, RAND R-475/1-ARPA v–vi (May 1970); J. RACE, WAR COMES TO LONG AN: REVOLUTIONARY CONFLICT IN A VIETNAMESE PROVINCE 82–94 (1971); W. ANDREWS, THE VILLAGE WAR: VIETNAMESE COMMUNIST REVOLUTIONARY ACTIVITIES IN DINH TUONG PROVINCE, 1960–1964 51–71, 115–16 (1973); and G. LEWY, *supra* note 300, at 272–77, and table 8–1, appendix II, at 454, in which Lewy concludes that terrorism was methodical (*id.* at 272) and that "the use of these terror tactics constituted an integral part of communist strategy" (*id.* at 277). Lewy also correctly notes that the use of violence against the civilian population was not merely an opening phase of the conflict; it was a technique carried out throughout the Vietnam War. For example, "Statistics for the years 1968–1972 indicate that about 80% of the terrorist victims were ordinary civilians and only about 20% were government officials, policemen, members of self-defense forces or pacification cadres. . . . Capital punishment occasionally was carried out by disembowelment with the villagers forced to be in attendance" (*id* at 273). Further:

> A VC/NVA force of about 12,000 men seized Hue during the night of 20 January 1968 and held the old imperial city for 26 days. During this time some 6,800 civilians were killed or abducted. . . . In the first phase of the purge local communist cadres, following prepared blacklists, rounded up key civil servants, officers, educators and religious figures—the leaders of the community—and executed them. A captured VC document with the classification "Absolute Secret" states that during the occupation of Hue the Communists "eliminated 1,892 administrative personnel, 38 policemen, 790 tyrants", and an assortment of other enemies of the party.

Id. at 274.

These citations from the Vietnam War are typical of Communist Revolutionary Warfare rather than being unique to that war. Similar examples can be found in every conflict. For example, for the Algerian War and the activities of the FLN, *see* A. HORNE, *supra* note 222, at 118–19, 120–23, 134–35, 144, 184–88, 352, 425, 479, and especially chapter nine, 183–207; and J. TALBOTT, *supra* note 222, at 79–82. Other examples can be found daily in local press clippings:

the individual civilian and the civilian population as such by choice rather than as a result of indiscipline, as was misperceived by the ICRC in its effort to change the law. One of the strongest U.S. proponents for ratification of Protocol I has conceded that the relaxation of the standard contained in Hague Convention IV of 1907 and the 1949 Geneva Prisoner of War Convention was a primary goal of the Socialist World.[313] In that, they were successful.

Proponents of the change that occurred in article 44(3) have suggested that the right to prosecute the individual combatant for a violation of the law of war is sufficient to ensure respect for the law of war. That argument is historically incorrect and pragmatically unsupportable.[314] Heretofore an organization and its members

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(1) In November 1986, the Peruvian Maoist group Shining Path killed a woman who was a candidate for the Huancayo Town Council, the day before national elections. *Peruvian Candidate Slain on Eve of Election*, N.Y. Times, Nov. 9, 1986, at 9.

(2) In 1987, a former member of the African National Congress confirmed that organization's policy of executing local elected black officials, because they are regarded as collaborators with the white-minority South African government. Morrison, *ANC Killer Recalls Haunting Existence*, Wash. Times, October 27, 1987, at A8. *See also* Jensen and Deigh, *An Insurgency with Methods Reminiscent of the Vietcong's*, 2, 10 INSIGHT 28–31 (Mar. 10, 1986).

(3) In June, 1988, Shining Path executed a United States agricultural advisor and his Peruvian colleague in their war against the Government of Peru. *U.S. Agronomist Killed in Andes by Guerrillas*, Wash. Post, June 16, 1988, at A33.

(4) In November, 1988, El Salvador's Marxist Farabundo Marti National Liberation Front (FMLN) embarked on a campaign to force civilians to take sides in the war by assassinating local elected civilian leaders. Farah, *Salvadoran Rebels Step Up the War*, Wash. Post, Nov. 26, 1988, at 1.

(5) In December, 1988, it was disclosed that the FMLN had murdered eight mayors since March 1988, and was planning on killing justices of the peace in a campaign to demonstrate their power in the face of declining international support. Gruson, *Salvador Rebels Step Up Terrorism*, N.Y. Times, Dec. 16, 1988, at A10.

(6) In December, 1988, members of the Marxist People's Liberation Front and the Patriotic People's Movement in Sri Lanka blockaded roads and entered communities, where they killed 23 civilians in an effort to prevent national elections. Crossette, *23 Killed at Hands of Sri Lanka Left*, N.Y. Times, Dec. 19, 1988, at A7.

(7) As rebels in Sri Lanka agreed to a cease-fire, it was revealed that members of the Sinhalese People's Liberation Front had killed more than 3,500 government officials and governing party members in the preceding two years. *Sri Lanka and Tamil Rebels Agree to a Cease-Fire*, N.Y. Times, June 29, 1989, at A5.

As is true of the citations to the practice of Vietnamese communists during the Vietnam War, the foregoing are considered representative of Communist Revolutionary Warfare, not isolated incidents. Supporters of organizations that rely upon terrorism to accomplish their objectives argue that "one man's terrorist is another man's freedom fighter," or note that "George Washington was called a terrorist by the British." In response to these claims, an expert on terrorism had the following comments in a recent speech:

> We see here the peculiar depravity of people who can make no distinction between confronting the regular constituted forces of a powerful nation—as George Washington did—and throwing burning gasoline on a young mother and her three infant children as happened last month in Israel. George Washington never did that.
>
> Or attacking a nursery school in Ma'alot in 1974 and killing 22 children, three older people, and wounding 66. George Washington never did that, either. . . . [Or] the hijacking of an Air France commercial liner to Entebbe in 1976 and a Lufthansa commercial liner to Mogadishu in 1977. . . . Or the murder of a cripple in a wheelchair in a botched hijacking master-minded by the Palestine Liberation Front's Abu al-Abbas, one of [Yasser] Arafat's underlings in the PLO.

Noel Koch, as quoted in *For the Record*, Wash. Post, Dec. 9, 1988, at A26.

313. Solf, *supra* note 259, at 268, where Mr. Solf states that "It is readily understandable that the relaxation of the standards for qualifications of privileged combatants was a high priority goal of those governments and authorities who employ guerrilla warfare in furtherance of political objectives."

314. As previously noted in the text supporting *supra* note 92, an attempt to hold war crimes trials following World War I was unsuccessful. War crimes trials took place after World War II because there

the allies achieved total victory over the Axis powers. *See generally* E. DAVIDSON, THE TRIAL OF THE GERMANS (1966); P. PICCAGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE FAR EAST, 1945–1951 (1979); B. SMITH, REACHING JUDGMENT AT NUREMBERG (1979); B. SMITH, THE ROAD TO NUREMBERG (1981); R. CONOT, JUSTICE AT NUREMBERG (1983); and A. & J. TUSA, THE NUREMBERG TRIAL (1984).

The difficulty of trials of individuals accused of war crimes during hostilities can be illustrated by one American case from World War II. On March 12, 1944, a German POW was found murdered at the United States POW camp at Papago Park, Arizona, apparently killed by fellow prisoners of war who (correctly) believed he was a turncoat. A criminal investigation identified seven suspects. In accordance with article 60 of the 1919 Geneva Convention Relative to the Treatment of Prisoners of War (SCHINDLER & TOMAN, *supra* note 27, at 339–64, at 354), United States authorities notified Germany through the Swiss Government of its intention to prosecute the seven suspects for murder. Germany then notified the United States that, quite by coincidence, it intended to prosecute an equal number of American military personnel on the same charge. United States authorities elected to proceed with the trial. The seven were convicted, and sentenced to death. In accordance with articles 65 and 66 of the 1929 GPW, this information was conveyed to Germany through the Swiss Government. A response was received that, again by coincidence, the seven Americans also had been found guilty and had received the same sentence. United States authorities deferred execution of the sentences until the end of hostilities and the repatriation of all American POWs, and on August 25, 1945, the seven German POWs were hanged at Fort Leavenworth, Kansas. *See* R. WHITTINGHAM, MARTIAL JUSTICE (1971).

In the course of the Korean War, North Korea infiltrated personnel into South Korea to be "captured" and placed in United Nations POW camps, because it had been revealed that a number of North Korean and Chinese POWs were not anxious to be repatriated once hostilities were concluded. On May 7, 1952, the infiltrated POWs staged a major riot within compound 76 on Koje Island, killing a number of fellow POWs. The United States commander was prepared to bring those responsible to trial, but was prohibited from doing so by the United States Department of State because of concern for United States and United Nations military personnel in the hands of Communist forces. H. VETTER, MUTINY AT KOJE ISLAND (1965), and W. HERMES, TRUCE TENT AND FIGHTING FRONT, UNITED STATES ARMY IN THE KOREAN WAR 233–62 (1966).

The ICRC Commentary on the Protocols, in discussing the change in article 44(3), states that "the obligation for all combatants to comply with the rules of international law applicable in armed conflict remains in its entirety, for such combatants can be punished in case of breach." ICRC COMMENTARY, *supra* note 247, at 526. In support of this position, an ICRC spokesman has cited the American experience in Vietnam, where

> members of Vietcong guerrilla units who were captured while actually engaging in combat ("carrying arms openly") were *treated* by the U.S. Military Assistance Command as prisoners of war (but not granted formal POW status), whereas a Vietcong who had committed an act of terrorism did not receive that treatment.

Gasser, *supra* note 274, at 921, citing Solf, *supra* note 259, at 273.

The statements of Gasser and Solf are incorrect and misleading in that they fail to state *why* the United States began to treat Vietcong as POWs. The history of the basis for this policy decision is described in Levie, *supra* note 274, at 391–92:

> On April 9, 1965, a Vietcong terrorist was tried, convicted and sentenced to death by a South Vietnamese court. At that time the Vietcong announced that if the sentence of execution was carried out, Gustav C. Hertz, a kidnapped civilian American [Agency for International Development] officer, would be shot. The terrorist was apparently not executed.
>
> On June 22, 1965, another Vietcong terrorist was executed by a South Vietnamese firing squad after he had been tried, convicted and sentenced for acts of terrorism by a South Vietnamese special military court. Three days later both Radio Hanoi and the Liberation Radio announced that an American soldier held as a prisoner of war (Sergeant Harold G. Bennett) had been executed in reprisal for the execution of the Vietcong terrorist.
>
> On September 22, 1965, three more Vietcong terrorists were executed in Da Nang after a trial, conviction and death sentence by a South Vietnamese court. Four days later, on September 26, the Liberation Radio announced that the Vietcong had retaliated by the executions of two American prisoners of war, Captain Humbert R. Versage [Versace] and Sergeant Kenneth M. Roraback. Once again the United States labeled these reprisal executions as "murder" and as violations of the [GPW]. It filed a protest with the ICRC which was transmitted to and rejected by the [National Liberation Front].

Thereafter, as Gasser and Solf have stated, American authorities provided POW protection (but not status) to Viet Cong captured in the field. Although Viet Cong reliance on terrorism (as documented in

could not claim combatant status until and unless the organization adhered to the law of war. Article 44(3) removed that requirement, permitting an organization to assert a claim as a legitimate belligerent while ignoring its law of war obligations. This was the precise objective of the Palestine Liberation Organization, the African National Congress, and those nations supporting their claims. This substantially diminished the likelihood of respect for the law of war.

Protection of U.S. Military Personnel. Arguments proffered thus far by proponents of U.S. ratification of Protocol I have been phrased entirely along lines of concern for the further development of the law of war. But the American military review had two other purposes, one of which was concern for U.S. military personnel taken prisoner of war by an enemy. Given threats of war crimes trials for captured U.S. military personnel during the Korean and Vietnam Wars, this was not an idle concern.

The American delegation to the Diplomatic Conference was keenly aware of this threat, and took one approach to the problem that was described previously.[315] Even if that approach were effective, however, it would merely guarantee a U.S. prisoner of war certain procedural rights were he charged with a "war crime." In that respect the approach taken by the American delegation was inadequate.

Diplomacy, it may be said, is the art of achieving agreement. It follows that in order to achieve agreement, a resort to purposeful vagueness may be necessary on occasion. Indeed, arms control agreements and other treaties are replete with language that permit more than one interpretation. The recent dispute within the U.S. Government over interpretation of the Anti-Ballistic Missile Systems Treaty[316] is

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supra note 312) did not abate, United States and South Vietnamese prosecution of Viet Cong for acts of terrorism came to a complete halt. Reprisals against captured United States personnel—specifically prohibited by article 13 of the GPW—stopped enforcement of the law of war through the prosecution of individuals responsible for war crimes. When Viet Cong were tried in civil courts and incarcerated in civilian jails, it was for minor offenses.

The United States military procedure for determining the status of a suspected guerrilla is described by Fred K. Green in *The Concept of 'War' and the Concept of 'Combatant' in Modern Conflicts*, 10 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE 267–309 (1971). In fact, reliance on judicial hearings for determination of the status of captured personnel was limited. When used, the captured Viet Cong frequently would endeavor to characterize their actions as criminal rather than belligerent for a particular reason. While the United States had invested a great deal of money in the construction and maintenance of POW camps, little improvement had been made in the civilian jails of South Vietnam. Hence the latter generally applied a "first in, first out" rule, releasing convicted individuals on that basis regardless of the seriousness of their offense. In contrast, individuals provided POW protection could be held in a POW camp for the duration of the hostilities. Hence captured Viet Cong saw an advantage in being denied POW protection and convicted of a civil offense, as it generally meant that they could return to their guerrilla duties within six months.

In a similar instance, in June 1985 a radical Shiite Moslem group known as the Party of God hijacked a Trans World Airlines flight enroute from Athens to Rome. In the course of the hijacking a United States passenger, Robert Stethem, was murdered. One of the terrorists involved in the kidnapping, Mohammed Ali Hamadi, was apprehended with explosives in his possession at the Frankfurt, West Germany, airport in January 1988. United States authorities immediately requested his extradition. But members of the Party of God kidnapped three West Germans in Beirut in retaliation for Hamadi's arrest, threatening their execution if Hamadi was not released. West German authorities declined to extradite Hamadi, and were reluctant to bring him to trial for fear for the safety of the West German hostages. It was not until the United States established conclusively that Hamadi not only was a principal but was in fact the leader of the 1985 TWA hijacking that Bonn authorities agreed to try Hamadi, as they were legally obligated to do under the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (22 U.S.T. 1641, T.I.A.S. 7192). Subsequently Hamadi was found guilty of murder, hijacking, assault, and explosives importation, and sentenced to life imprisonment.

315. *See* discussion of the negotiation of article 75, Protocol I, contained in *supra* note 274.

316. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Systems, May 26, 1972, 23 U.S.T. 3435, T.I.A.S. 7503, contained in U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 139–47 (1982).

illustrative not only of the degree to which reliance is made upon ambiguity, but of the problem that can occur as a result.[317]

Extensive reliance was made on ambiguity in the course of the Diplomatic Conference, and agreement could not have been reached were it not for purposeful ambiguity.[318] Yet a clear distinction exists between international agreements in general and law of war treaties. Although international agreements frequently permit amendment, renunciation, or abrogation in the event the agreement in question proves unsatisfactory, law of war treaties such as Protocol I provide for specific penal sanctions against military commanders who violate their provisions.[319] These sanctions necessitate specific language in such treaties. Specificity is especially critical in that potential adversaries have a long record of denying prisoner of war protection and threatening war crimes trials against U.S. and allied military and civilian personnel who fall into enemy hands.[320] In this regard, the resort to purposeful ambiguity in Protocol I is a great disservice to battlefield commanders operating in the fog of war.

The members of the military review began to examine the language of the 1977 Protocols as a lawyer viewing a contract on behalf of his client. Given the purposeful ambiguity built into the Protocols by their negotiators, the picture was not favorable.

The American delegation to the Diplomatic Conference (along with others) took the approach of obtaining language that permitted the United States certain legal rights with respect to what it could do in hostilities. In the course of the negotiations, however, in order to achieve consensus, the language of many provisions was made intentionally vague, permitting interpretations of treaty provisions that were contradictory to Western interpretations. The United States and other Western delegations did not necessarily concern themselves with any interpretation except their own. Examples previously have been provided with regard to articles 44(3) and 55; other examples will be offered in the discussion of those articles that affect aerial bombardment.

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317. *See e.g.*, Nunn, *The ABM Reinterpretation Issue*, 10 THE WASH. Q. 45–58 (Autumn 1987); and Sofaer, *The ABM Treaty: Legal Analysis in the Political Cauldron*, 10 THE WASH. CAULDRON 59–75 (Autumn 1987).

318. Much credit for agreement is due Ambassador Aldrich, whose negotiating skills were essential to the degree of success achieved in reaching agreement in the Protocols. Ambassador Aldrich is a protege of former Secretary of State and National Security Adviser Henry Kissinger, who placed great reliance upon purposeful ambiguity in order to reach agreement. For example, in describing the 1973 agreement between the United States and North Vietnam ending the war in Southeast Asia, one historian has noted:

> At his 24 January [1973] news conference, Kissinger voiced approval of the agreement. "It is clear," he said, "there is *no legal way* by which North Vietnam can use military force against South Vietnam." The National Security Adviser then added: "Now, whether that is due to the fact that there are two zones temporarily divided by a provisional demarcation line or because North Vietnam is a foreign country with relation to South Vietnam—*that is an issue we have avoided making explicit in the agreement, and in which ambiguity has its merits.*"

M. CLODFELTER, *supra* note 224, at 199, citing *Agreement on Ending the War and Restoring Peace in Vietnam: New Conference, 24 January 1973*, 9 Weekly Compilation of Presidential Documents 71 (29 January 1973) (emphasis added). The 1975 conquest of South Vietnam by North Vietnam reveals the fallacy of such diplomacy or, collaterally, an overreliance on written agreements with nations that have no regard for the rule of law.

319. Article 85, Protocol I.

320. Proponents of ratification of Protocol I argue that any ambiguities can be corrected through statements of understanding. Such statements would be of value if an American soldier, sailor, airman, or marine were to be brought to trial in a United States court, or before an impartial international tribunal; they are of dubious value in a captor's less-than-impartial court, particularly when the captor is allowed a contradictory interpretation because of vagueness introduced into the provision in question at the time of its negotiation.

The military review again identified yet another problem that poses a direct threat to the safety of U.S. military and civilian personnel who fall into enemy hands. Article 102 of Protocol I establishes that the Arabic, Chinese, English, French, Russian, and Spanish texts are equally authentic. A cursory comparison in 1985 identified discrepancies between the English and Russian texts; no independent comparison has been made of the other texts.[321] Yet ratification of Protocol I would constitute acceptance of the Protocol in each of its official languages, notwithstanding any discrepancies.[322]

In this case, the client was the American fighting man. No lawyer in good faith could advise a client to accept a contract which contained myriad major ambiguities subject to multiple interpretations by the parties (some of whom have a long record of disregard for the concept of *pacta sunt servanda*), prepared in six different languages with potential discrepancies between the texts, but by which the client would not only be legally bound but could be found criminally and civilly liable.[323]

Protection of National Security Interests. Notwithstanding attempts by some to characterize Protocol I as a humanitarian agreement, those articles that affect the conduct of hostilities are as much an arms control agreement as they are law of war provisions. A primary objective of the ICRC as early as 1953 was to force the conduct of hostilities, and particularly the employment of airpower, back onto the immediate battlefield or, stated another way, to prohibit the use of airpower beyond the immediate battlefield.[324] The ICRC clearly sought to breathe new life into the 1923 Hague Air Rules.[325] While its initial efforts took a relatively pragmatic view, it was caught up in the momentum of Third World and Western European nations' use

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321. The term "re-identified" has been used because the author's predecessor, Waldemar A. Solf, first raised this concern in 1977 prior to U.S. signature of the Protocols. He was advised by Department of State officials not to worry about it. An official Soviet text was not available until more than a year after the Protocols were open for signature. While the ICRC has published and distributed texts of the Protocols in French, Spanish, English, and Arabic, the Russian and Chinese texts have never been made available. Nor has there been an independent corroboration of the texts.

322. Article 33, paragraph 1 of the Vienna Convention on the Law of Treaties provides that "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language." While paragraph 3 provides that "The terms of a treaty are presumed to have the same meaning in each authentic text," this presupposes that the text has been confirmed as the same, which has not been accomplished with regard to the texts of Protocols I and II. No such comparison has been undertaken by the Department of State, which has the responsibility for such action. Again, however, the point would be rather moot, for example, if a United States airman in an enemy POW camp were threatened with a war crimes trial for violation of a text that not only is ambiguous but potentially could have an entirely different meaning in the captor's language.

323. In addition to the penal sanctions contained in article 85, article 91 provides for damages (not reparations) for violations of Protocol I. Considering just the disagreement with regard to article 10 of Protocol I concerning admission of the civilian population into military medical facilities, the potential for civil litigation is considerable.

324. Claud Pilloud, a senior lawyer with the ICRC during the course of the negotiation of the Protocols, admitted this to the author during a drive from San Remo, Italy, to Geneva in 1978.

325. Thus in introducing its earlier draft rules an ICRC representative stated that, "The 1922/23 [Hague Air Rules] project would have required combatants to abstain from bombing when it might affect the civilian population, but a good text was useless if it went unsigned, unratified and unimplemented." NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 310, n.32. ICRC texts consistently give a perjorative connotation to airpower, while tending to ignore acts of terrorism carried out by guerrillas. *See Guerrilla Warfare and Its Legal Implications*, 87 ICRC BULLETIN 4 (April 6, 1983) in which it is stated: "Some chiefs of staff are inclined to regard the 'realistic' military counter to . . . [guerrilla] tactics as a strategy of aerial bombing, summary executions, if not torture and 'disappearances.' " Thus the ICRC equates aerial bombardment, which is no less lawful than artillery bombardment or other employment of arms, with three patently illegal actions—summary executions, torture, and "disappearances"—to suggest its illegality *per se*. This is representative of the ICRC fixation against the employment of airpower, and illustrates its intent closely to regulate (if not prohibit) the use of airpower beyond the immediate battlefield, and the ICRC's fundamental ignorance of modern warfare.

of the Diplomatic Conference as a means for limiting external threats posed by nations with significant airpower capabilities.

From the standpoint of the United States, there were several concerns. First, as Ambassador Aldrich acknowledged early in the negotiations of the Protocols, the United States historically has relied on its technological superiority to enhance its warfighting skills. Not the least of these is the *discriminate, accurate* employment of firepower, including airpower. The military review had to address the fundamental issue that Protocol I sought to constrain one means of warfare—airpower—while simultaneously enhancing another—guerrilla warfare—not only at increased risk to the civilian population but also to U.S. and allied combatants.

Second, the United States is a superpower with global obligations. It is not limited to fighting in a single theater; it has mutual defense commitments around the world. It must be prepared to employ military force at all levels of conflict, ranging from "peacetime" incidents such as the 1986 airstrike against terrorist-related targets in Libya to total war. The requirements of Protocol I had to be viewed in that light.

Pragmatic Standpoint. Finally, the Protocols had to be viewed from a pragmatic standpoint. War, according to a recent Marine Corps manual,

> is among the greatest horrors known to mankind; it should never be romanticized. The means of war is force, applied in the form of organized violence . . . that we compel our enemy to do our will . . . . Violence is an essential element of war, and its immediate result is bloodshed, destruction, and suffering. While the magnitude of violence may vary with the object and means of war, the violent essence of war will never change.[326]

In a word, war is something that cannot be trifled with by individuals who do not understand it. It is complex and lacking in order,[327] not given to simple rules that govern in all circumstances at all levels of conflict. The military review cast a

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326. HEADQUARTERS, U.S. MARINE CORPS, FMFM–1, *Warfighting* 11 (1989) (FMFM–1). Or, as Clausewitz said,

> Kindhearted people might, of course, think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst.
>
> This is how the matter must be seen. It would be futile—even wrong—to try to shut one's eyes to what war really is from sheer distress at its brutality.

ON WAR 75–76 (M. Howard & P. Paret, eds. 1984).

327. FMFM–1 comments on this point:

> In an environment of friction, uncertainty, and fluidity, war gravitates toward disorder. Like the other attributes of the environment of war, disorder is an integral characteristic of war; we can never eliminate it. In the heat of battle, plans will go awry, instructions and information will be unclear and misinterpreted, communications will fail, and mistakes and unforeseen events will be commonplace.

FMFM–1, *supra* note 326, at 8–9. What most concerned the author and other members of the military review group who had personal experience in combat was the degree to which the rules contained in Protocol I, and particularly articles 48–58, assumed that a combat commander has a greater grasp of his environment than is generally the case. This prompted one reviewer to recall the statement of John Galsworthy that "Idealism increases in direct proportion to one's distance from the problem."

Members of the military review were particularly concerned with the provision contained in article 81 of Protocol I that grants to the ICRC "all facilities within [the power of the Parties to the conflict] so as to enable the [ICRC] to carry out the humanitarian functions assigned to it by the [1949] Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts." This provision has been interpreted by the ICRC as blanket authority to move about the battlefield as some sort of referee, deciding when and where a commander had applied too much firepower, or the wrong kind of firepower.

The danger of the provision was manifested in the 1982 Israeli incursion into Lebanon. In its opening

critical eye at the rules contained in Protocol I with two basic questions: (a) Is United States military practice consistent with the requirements contained in Protocol I?, and (b) Is there a likelihood of universal respect for the provisions of Protocol I by all parties to a conflict, at all levels of conflict? The military review determined that positive gains claimed for Protocol I by Ambassador Aldrich in fact achieved little, if any, improvement over existing law.

One of the advances alleged was the language contained in articles 32 through 34 relating to missing and dead persons on the battlefield.[328] Given national concern for the unrecovered dead and missing in action from the Vietnam War, the guidance to the American delegation placed great emphasis on creation of an international obligation that went beyond existing law of war requirements. Comparison to articles 15 to 17 of the 1949 GWS determined that the Protocol I gain is more one of form than substance.[329] The United States forces on Grenada searched for and recovered enemy

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phases a representative of the ICRC informed a press conference that Israeli Defense Forces (IDF) had killed more than 10,000 civilians since crossing into Lebanon. The information should have been verified before its release, inasmuch as it was received from PLO Chairman Yasser Arafat's brother. The information subsequently was found to be false, and the ICRC delegate was recalled. But the ICRC nonetheless released a statement calling upon Israel to cease the "indiscriminate" attack of civilians, ignoring the PLO's use of civilians and civilian objects such as hospitals and churches as shields from attack.

Several days later an ICRC representative called the author, asking how the United States had "permitted" the IDF to employ an American "tank" bearing the Magen David Adom, the Israeli equivalent to the Red Cross and Red Crescent. On investigation, it was determined that the "tank" was a M113 armored personnel carrier being used exclusively as a medical vehicle. The United States Army employs M113s in the same role, and numerous other nations also employ armored personnel carriers in this role. The ICRC representative lacked fundamental training in the identification of military vehicles, even though he had served in the Swiss military.

These actions revealed several weaknesses of the ICRC. First was the ignorance of ICRC delegates of military matters that they now feel prepared to judge. Second was a certain bias or inability to speak impartially. Previous statements of the ICRC historically had been generic statements calling upon all parties to a conflict to take protection for the civilian population into consideration in their operations. The 1982 announcement was disturbing because it singled out only one party to the conflict, suggesting that it was the only party that might not be in compliance with the law of war. (An official investigation by the author in 1983 revealed that the IDF had taken extraordinary steps to protect the Lebanese civilian population in the course of the IDF incursion into Lebanon.) ICRC actions also raised some questions about the ICRC looking solely at the effect rather than the cause of damage.

A senior ICRC official subsequently acknowledged that the ICRC has different "methods" (standards) for dealing with democratic nations *vis-à-vis* totalitarian states or terrorist organizations. While it chooses to emphasize "quiet diplomacy" with the latter, the ICRC will not hesitate to rely on international public pressure to address what it perceives to be infractions of the law of war by a democracy. Hence the ICRC made no public statements about the denial of its seventy-two requests to visit U.S. POWs in North Vietnam, or of Soviet violations of the law of war in Afghanistan, or of recent military operations by Syria and Iraqi-backed forces in Beirut (which have resulted in substantially greater damage and loss of civilian life than actions by Israel in 1982). But it has been very quick to criticize any action by Israel. The author recently learned that the ICRC threatened (but did not employ) critical public statements about U.S. POW camps in South Vietnam, even though privately its delegates praised American efforts. The issue is not whether such criticism is warranted, but rather the double standard the ICRC has adopted. Such an attitude is an abandonment of the ICRC's requirement for neutrality, and furnishes fuel for propaganda to totalitarian regimes. For these reasons, the language contained in article 81 is unacceptable outside the ICRC's traditional focus on respect for war victims contained in the four 1949 Geneva Conventions.

328. Aldrich, *supra* note 259, at 693.

329. Article 33, paragraph 1 of Protocol I provides that: "As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing." In contrast, article 15 of the 1949 GWS provides that: "At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for . . . the dead and prevent their being despoiled."

Thus, whereas the 1949 GWS requires that a party to the conflict search for the dead (including the missing in action) at all times, and particularly following an engagement, the language of Protocol I obligates a party to the conflict to carry out such a search only at the end of a war. (The term "active hostilities" has been interpreted to mean the end of war, not the end of a particular engagement. ICRC COMMENTARY, *supra* note 247, at 353.)

dead following the end of that operation, for example, without any reference to the language of Protocol I.[330] Comparison to the language contained in the 1973 Agreement Between the United States and Vietnam revealed the language of article 33 of Protocol I to be *weaker* than that of the agreement between the United States and Vietnam.[331] The failure of the latter in the years following the end of the Vietnam War suggests how enhancement will evolve in practical rather than legal terms; as with the GWS provisions, implementation remains dependent upon good faith of the party in question. Article 33 of Protocol I essentially is a legal solution to a problem that seldom if ever is resolved in legal terms. It constitutes no advancement over exisiting law.

Another purported enhancement is the language of articles 24 to 30 for the increased protection of medical aircraft.[332] The language is an improvement in that it provides a regime in which parties to a conflict *may* establish procedures for the safe operation of medical aircraft. But as with its predecessor language in article 36 of the GWS, such safe operation largely remains dependent upon express agreement between the parties to the conflict.[333] The medical aircraft provisions of Protocol I were unnecessary to achieve such special agreement: For example, the famous Red Cross Box in which medical aircraft of Great Britain and Argentina were allowed to operate during the 1982 Falklands-Malvinas War was achieved despite the fact that neither belligerent was a party to the 1977 Protocols at the time of the conflict.[334]

The American military analysis revealed that communication (much less agreement) between the parties to the conflict on the modern battlefield was, at best, extremely

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330. In contrast, Libya—a party of Protocol I since 1978—recovered the bodies of the F–111F aircrew lost during the 1986 United States airstrike, but refused to return them to the United States. One body was returned in January 1989, when questions were being raised in the international arena about Libya's construction of a chemical weapons facility. The second remains in Libyan hands, *Libya Says It Plans to Return Body*, Philadelphia Inquirer, Dec. 25, 1988, at 20; and *Libya Offers to Accept Controls on Suspect Plant*, Wash. Post, Dec. 25, 1988, at A48. Only the most perverse would suggest that Libya's failure can be attributed to the fact that the United States is not a party to Protocol I. The ICRC has remained silent regarding Libya's conduct.

331. Article 8B of that agreement provides that:

> The parties shall help each other to get information about these military personnel and foreign civilians of the parties missing in action, to determine the location and take care of the graves of the dead so as to facilitate the exhumation and repatriation of the remains and to take such other measures as may be required to get information about those still considered missing in action.

Agreement on Ending the War and Restoring the Peace in Vietnam Between the Government of the Democratic Republic of Vietnam and the Government of the United States of America, Jan. 27, 1973 24 U.S.T. 1, T.I.A.S. 7542. *Cf.* Richburg, *Vietnam Stalls on MIAs*, Wash. Post, Mar. 20, 1987, at A30.

332. For discussion of these provisions, *see* Solf, *supra* note 77.

333. For example, article 26 of Protocol I states that "protection for medical aircraft can be fully effective only by prior agreement between the competent military parties to the conflict" when medical aircraft are operating in and over those parts of the contact zone which are either physically controlled by friendly forces or the physical control of which is not clearly established. Article 27 provides that "medical aircraft of a Party to the conflict shall continue to be protected while flying over . . . areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party." Only when medical aircraft are flying over their own territory is their operation not dependent upon agreement with the adverse Party. Even then article 25 provides that "For greater safety, . . . a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, . . . in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party."

In contrast, article 36 of the GWS provides that: "Medical aircraft . . . shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned."

334. Argentina became a party to the 1977 Protocols on 26 November 1986. Great Britain had not reached a decision as to ratification at the time this article was prepared.

unlikely due to communication security, operational security, the impact of electronic warfare, and the incompatibility of communication equipment.[335] This was particularly true for the frequency of medical evacuation sorties that are flown on a day-to-day basis. The ambiguities in article 28 relating to use of cryptological equipment placed U.S. medical aircraft and aircrews at greater risk than previously, and were totally incompatible with established U.S. policy and medical evacuation communication procedures.[336]

The articles of Protocol I were negotiated to respond to problems found in Vietnam relating to the use of medical evacuation helicopters. The American military review concluded that even if the provisions of Protocol I had been in effect during the Vietnam War, for tactical, ideological and technological reasons they would have been of no value.[337] Nor would they be of value on a modern, high-intensity

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335. Incompatibility between U.S. and, *e.g.*, Warsaw Pact communications equipment is a fundamental problem that precludes the arrangement of the agreements contemplated by articles 25 through 29 of Protocol I. Readers familiar with the 1983 American rescue operation in Grenada will recall that communication equipment incompatibility among the forces participating in the mission precluded vital communications during that operation. Even greater communications compatibility problems arise when considering *e.g.*, NATO alliance operations, and those are compounded when *e.g.*, Warsaw Pact communications equipment is considered. In a word, the parties cannot communicate with one another. The heavy emphasis placed upon jamming of all enemy communications within the theater of operations exacerbates the matter.

Caution should be exercised to distinguish an ability to listen (*i.e.*, intercept) an enemy's transmissions *vis-à-vis* communicate with an enemy; they are not the same, and seldom, if ever, will an enemy reveal his ability to accomplish the former. Allied abilities to intercept German ULTRA transmissions remained highly classified for more than three decades following World War II, for example.

During the Vietnam War, North Vietnamese and Viet Cong forces frequently intercepted U.S. and Allied transmissions, including requests for medical evacuation aircraft, to exploit them to their military advantage. This included the attack of medical evacuation aircraft. Frequently this was accomplished through the use of captured American radios. Had the medical aircraft provisions of Protocol I been in effect during the Vietnam War, they would have been of no benefit, because the enemy would not have wanted to reveal the degree to which he could listen in on American transmissions for fear that U.S. forces would encrypt their communications (which were broadcast in the clear, or unencrypted, for most of the war). As a result of a study conducted by the United States Army after the Vietnam War into the effect on operational security of enemy intercept of American tactical communications, a formal policy decision was made in 1971 that all U.S. tactical communications thereafter would be encrypted. The provisions contained in articles 25–28 of Protocol I were negotiated by the United States delegation without knowledge of this policy change.

336. As discussed *supra* note 283.

337. As discussed *supra* note 335, the medical aircraft provisions of Protocol I would not have worked in Vietnam because of a fundamental incompatibility of radio equipment between U.S. forces and the North Vietnamese and its Viet Cong proxies. Even if there had been a method for communication, North Vietnamese forces (including the Viet Cong) would have had little incentive for communication or agreement. The former would facilitate American location and attack of enemy units through electronic intelligence, while enemy refusal to permit medical evacuation not only would have an effect on the morale of United States forces, but in certain circumstances might force a United States unit to break off contact in order to provide for its wounded.

A frequent misconception regarding the medical aircraft provisions of Protocol I is that they provide increased protection for medical aircraft; they do not. They provide that medical aircraft are protected from intentional attack upon agreement with competent authority for their operation in a particular area at a particular time for a particular mission, *i.e.*, the same data required by article 36, GWS. Blanket authorization to fly medical aircraft in the area of active operations is highly improbable, particularly given the dependency of nations on helicopter mobility for movement of light infantry forces and/or reliance upon helicopter gunships. The United States military review ascertained that the likelihood of such agreement at the battlefield level was virtually nonexistent. Local arrangements for removal of the wounded and sick from the battlefield (by the means to which the parties agree) already exist in article 15, GWS.

In this regard it is important to understand that the medical aircraft provisions of Protocol I provide no greater rights for protection than exist within the GWS. Article 24 of Protocol I provides that "Medical aircraft shall be respected and protected, subject to the provisions of this Part," *i.e.*, subject to agreement between the belligerents. Thus, if a besieged unit wishes to evacuate its wounded by medical aircraft without the permission of the besieging force, the besieging force commander has the right to fire upon those aircraft to defeat their mission. Nothing in Protocol I changes this.

conflict battlefield. The danger to medical aircraft on the latter is such that the U.S. Army does not intend to operate its medical aircraft any further forward than the division rear, an area akin to that specified in article 25 of Protocol I, in which protection for medical aircraft is not dependent on any agreement with an adverse party.[338] The Marine Corps operates no dedicated medical aircraft, while Navy and Air Force C–9 medical aircraft will operate much further to the rear. The conclusion of the American military review was that the provisions of Protocol I regarding protection of medical aircraft do not constitute any advancement over the language contained in article 36, GWS, and in fact would be totally unworkable on a modern battlefield.

The military review did find some advances, though none that could be considered major. One improvement sought by the United States is the language in article 42, paragraph 1, that "No person parachuting from an aircraft in distress shall be made the object of attack during his descent."[339] This article is intended to resolve the long-standing debate as to whether aircrew members descending by parachute from a disabled aircraft should be regarded as noncombatants until they reach the ground, at which time they are subject to capture or, in the event of their resistance or attempted evasion, attack.[340] The history behind the debate is long, and has been amply discussed elsewhere.[341]

While the decision as to whether to attack, for example, a pilot who had bailed out of his aircraft, often turned on the self-interest of the attacker,[342] a legitimate mili-

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338. Chapter III of Annex I to Protocol I establishes elaborate communication procedures for medical units and transports, including medical aircraft. The military review found these procedures to be of little value because of the electronic warfare environment that exists on the modern battlefield that will virtually preclude receipt of the medical signals by any party to a conflict. The greatest danger to medical aircraft operating in the contact zones (as set forth in article 26 of Protocol I) is the risk of so-called "friendly fire" from shoulder-fired surface-to-air missiles such as the United States Stinger or the Soviet SA–7 Grail, which lack means for reception of electronic "medical" signals but which can operate at ranges that preclude recognition of the distinctive emblem. This is one of the principal reasons for the United States Army decision to operate its medical aircraft only in the area behind the division rear. Enemy medical aircraft operating without express permission of an opponent (as provided for in article 36, GWS) would be at the same risk of attack as a result of misidentification.

339. This article relates only to aircrew and noncombatant passengers, paragraph 3 expressly providing that "Airborne troops are not protected by this Article."

340. But only so long as they land in hostile territory, where they are subject to capture. Paragraph 2 of article 42 states specifically that descending airmen only remain protected until "reaching the ground in territory controlled by an adverse Party." A member of an aircrew descending over friendly territory would be subject to attack immediately upon making his contact with the ground. The potential for factual disputes as to whether a descending airman landing in friendly territory had touched the ground before being shot is readily apparent.

341. *See* J. SPAIGHT, *supra* note 137, at 152–63. *See also* P. MEIJERING, SIGNED WITH THEIR HONOR: AIR CHIVALRY DURING THE TWO WORLD WARS 49–59 (1988). Article 20 of the ill-fated 1923 Hague Air Rules provided that "When an aircraft has been disabled, the occupants when endeavoring to escape by means of a parachute must not be attacked in the course of their descent." SCHINDLER & TOMAN, *supra* note 27, at 210.

342. There was some genuine belief by a few in the chivalry of the matter. For example, in the course of a meeting with Reichmarschall Herman Goering during the Battle of Britain, Luftwaffe ace Adolf Galland reported the following exchange:

> Experience had proved, [Goering] told us, that especially with technically highly developed arms such as . . . fighter aircraft, the men who controlled these machines were more important than the machines themselves. The aircraft which we shot down could easily be replaced by the British. Not so the pilots.
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> There was a short pause . . . Goering looked me straight in the eyes and said: "What would you think of an order directing you to shoot down pilots who were bailing out?" "I should regard it as murder . . . ," I replied, "and I should do everything in my power to disobey such an order."

tary issue existed. In most cases, it is more difficult to replace a pilot than an aircraft.[343] Where a parachuting pilot (or aircrew member) could be captured after his descent, he usually was not at risk of intentional attack. Where he was descending in friendly territory, however, an argument could be made that he should be subject to attack. As Air Marshal Hugh Dowding noted during his Battle of Britain tenure as head of the Royal Air Force Fighter Command, "Germans descending over England were prospective prisoners and should be immune [from attack], while British pilots descending over England were still potential combatants. German pilots were perfectly entitled to fire on our decending airmen."[344]

While in most cases RAF pilots declined to attack Luftwaffe pilots notwithstanding this guidance,[345] there are recorded cases of such attacks being carried out by all

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Goering put both his hands on my shoulders and said: "That is just the reply I had expected from you, Galland." In the First World War similar ideas had cropped up, but were equally strongly rejected by the fighter pilots.

[T]he subject was never mentioned again, not even later when aerial warfare became so gruesome.

A. GALLAND, *supra* note 188, at 120–21. Goering's views on this point have been confirmed by others. *See* R. TOLIVER & T. CONSTABLE, THE BLOND KNIGHT OF GERMANY, 169 (rev. ed. 1989); and D. IRVING, GOERING: A BIOGRAPHY 423 (1989).

While the author does not want to dispute this view, and in fact commends it, it is noted that the view was based somewhat upon self-interest, as was true during the original days of chivalry. The term "chivalry" arose during the Middle Ages. Chivalry is derived from *cheval*, (the French word for horse) and originally meant horsemanship. Knights, *chevaliers*, were mounted warriors who fought on horseback. R. DAVIS, THE MEDIEVAL WARHORSE 6 (London, 1989). In its original form, chivalry meant that a knight who had fallen from his horse should not be attacked. In addition to the obvious self-interest of all knights, whose allegiance often was dependent upon financial interests, a knight captured and held for ransom generally was of greater value than a dead knight. But the idea of refusing to attack one who was *hors de combat* did not extend to ordinary foot soldiers or to non-Christian soldiers, mounted or otherwise. As historian Richard Barber has observed,

[B]eneath the high idealism of chivalric honor, war continues much as before, as cruel, atrocious and thoughtless as ever. Knighthood becomes a kind of guild of warriors, who may put the ordinary soldier and the civilian to the sword, but who rarely kill each other intentionally on the battlefield, and who see to it that military enterprises have a suitable financial reward. The occasional feat of arms is a diversion from the more serious business of pillage and destruction, and chivalry owes more to the pen than the sword.

R. BARBER, THE KNIGHT AND CHIVALRY 208 (1970). The distinctions made during the Middle Ages persisted during World War II, and are representative of respect for the law of war in general. While there was general respect for aircrew members in parachutes as between British, American, and German forces, the same cannot be said for combat between German and Russian forces, or for British and American forces in fighting the Japanese, and vice-versa, as will be seen in cites contained *infra* notes 344 and 347. While one author has characterized this as a racial bias in the case of the Pacific war it seems to have been more of a cultural issue on both sides. J. DOWER, WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR (1986). As is true of many aspects of the law of war, the concept of chivalry is based upon Judeo-Christian ideals, and benefits or suffers accordingly. British and American attacks on Japanese pilots in their parachutes differed little from the views of knights in the Middle Ages in providing no quarter for "non-believers," or from British desires in the 1930s to retain bombing for the policing of "savages," as discussed *supra* note 250.

343. For example, during the Battle of Britain, Great Britain was able to replace aircraft losses far more easily than pilot losses. *See* B. COLLIER, *supra* note 1, at 154–55, 162, 198, 200, 246, 250. Likewise, towards the closing months of World War II, the Luftwaffe had a surplus of fighter aircraft, but lacked trained pilots to fly them. *See* A. GALLAND, *supra* note 188, at 261, 264, and 268; R. TOLLIVER & T. CONSTABLE, *supra* note 342, at 146; and W. MURRAY, *supra* note 85, at 285–92, 296.

344. P. TOWNSEND, DUEL OF EAGLES 288 (1970); *see also* L. DEIGHTON, FIGHTER—THE TRUE STORY OF THE BATTLE OF BRITAIN 43 (1978).

345. As Peter Townsend comments "[Sergeant Dickinson] had been shot dead by a Me–109 while coming down by parachute. By the rules of war it was justifiable to kill a pilot who could fight again. But few of us could bring ourselves to shoot a helpless man in cold blood," *supra* note 344, at 378–79.

sides during World War II.[346] The practice of shooting at descending pilots was particularly prevalent in the Pacific, where it appears to have been more the rule than the exception.[347]

Cases are on record of the attack on American airmen in their parachutes as they descended over enemy territory during the Vietnam War,[348] so the United States strongly supported the prohibition on the attack of descending airmen. But the proposal met with substantial resistance, primarily from Arab nations that had the experience of watching Israeli pilots parachute safely into their own territory, only to be thrown back into combat on very short order. The case for attack of descending aircrew under certain circumstances as made by Air Marshal Dowding during the

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In a slightly similar vein, Luftwaffe pilot Erich Rudordorffer, who ended the war with 222 victories, reported:

> Once—I think it was 31 August 1940—I was in a fight with four [RAF] Hurricanes over Dover. I was back over the Channel when I saw another Hurricane coming from Calais, trailing white smoke, obviously in a bad way. I flew alongside him and escorted him all the way to England and then waved goodbye. A few weeks later the same thing happened to me. That would never have happened in Russia—never.

L. DEIGHTON, *supra* note 344, at 211. *See also* J. SPAIGHT, *supra* note 137, at 160–61.

346. For examples, *see* J. SPAIGHT, *supra* note 137, at 159–62, and A. DE ZAYAS, THE WERMACHT WAR CRIMES BUREAU, 1939–1945 148 (London, 1989). Frequently pilots or aircrew members in their parachutes were fired upon by ground force personnel rather than enemy aircraft, often with disastrous consequences as a result of misidentification. For example, during the Battle of Britain RAF Flight Lieutenant James Nicholson and Pilot Officer M. A. King of 249 Squadron were descending over their own territory, their respective aircraft having been disabled during an engagement with Luftwaffe Me–109s. As one historian describes the action:

> An officer of a Royal Artillery detachment ordered his men to take up positions and open fire with their rifles at the two airmen—ostensibly in the belief that they were enemy parachutists. Some Local Defence Volunteers joined in the fusillade. Whether King himself was hit is not known, but some of his parachute strands parted, the canopy collapsed, and the young pilot plunged to his death.

F. MASON, *supra* note 81, at 268, 270; and L. DEIGHTON, *supra* note 344, at 138. Because French civilians often participated in shooting at parachuting airmen, frequently killing British and French as well as Luftwaffe airmen, German headquarters in Abbeville on 15 May 1940, issued instructions to its forces only to shoot at groups of at least three parachutists. DE ZAYAS, *supra*, at 148.

347. *See* T. BLACKBURN, THE JOLLY ROGERS 208 (1989); and R. PORTER, with E. HAMMEL, ACE! 121–23 (1985). In the latter reference, after a Japanese pilot was unsuccessful in his machinegun attack on a U.S. Marine Corps pilot descending by parachute, he made two additional passes, using his propeller to injure or kill the descending pilot, and doubtless would have made more had he not been driven away by the attack of a Royal New Zealand's Air Force P–40. The Marine lost a foot, but survived to fly again.

Attacks on descending airmen sometimes led to tragic results. In late 1944 or early 1945, four U.S. Navy F6F Hellcat fighter aircraft on a combat sweep engaged four Japanese fighters. In the ensuing dogfight, a Navy pilot observed a parachute only seconds after he had seen a Japanese fighter blow up. He opened fire on the parachuting pilot. Following the engagement, the Navy fighters discovered one of their aircraft missing as they returned to their aircraft carrier. During the debrief, the Navy pilot reported that he had machinegunned the parachuting Japanese pilot. The pilot credited with shooting down the Japanese fighter noted that the Japanese pilot was not able to jump from his aircraft before it blew up. Later that day, a screening U.S. destroyer recovered the body of the American Navy pilot who had died of the machinegun wounds received from his squadronmate's erroneous attack. Story related to the author by Barrett Tillman, Managing Editor, TAILHOOK magazine, 14 May 1989.

348. There does not seem to have been an enemy policy of shooting at descending aircrew during the Vietnam War. Indeed, the North Vietnamese were quick to recognize the value of capturing U.S. military personnel and established an award system for their capture. The problem appears to have been somewhat akin to that experienced by the Germans in France in 1940 (A. DE ZAYAS, *supra* note 346), as local citizens, acting unilaterally, frequently fired upon descending aircrew or assaulted them once they reached the ground, but before North Vietnamese military personnel could take them into custody.

Battle of Britain remained a strong argument against article 42(1) for many nations attending the Diplomatic Conference.[349]

H. Overriding Considerations

The preceding paragraphs provide background regarding the political environment in which Additional Protocol I was negotiated. As the earlier analysis of the 1899 and 1907 Hague Peace Conferences, 1923 Hague Air Rules, and 1949 Geneva Conventions conference revealed, politics is no stranger to law of war treaty negotiations. But in the course of negotiation of the 1977 Protocols, the law of war took a backseat to certain overriding considerations:

a. arms control: an effort by Third World nations, some NATO nations, and neutrals (such as Switzerland, Sweden, and Austria) to limit the military superiority of potential adversaries, and particularly the superpowers; and

b. political: an effort by Third World nations to achieve international recognition for selected national liberation movements (specifically, the Palestine Liberation Organization and the African National Congress) while protecting their right to suppress domestic dissent within their respective nations.

The 1977 Protocols do not constitute any advance for the law of war, and in many ways constitute a significant step backwards with respect to protection for war victims. The 1977 Protocols are a reflection of the time in which they were negotiated. Speaking of that era and the Third World domination thereof, a noted columnist observed: "The United Nations' moral authority evaporated in the 1970s when it became dominated by radical Third World regimes. Since then, the inherent, incurable trouble with the United Nations has been glaringly, blaringly apparent."[350]

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349. The arguments are contained in LEVIE, 2 PROTECTION OF WAR VICTIMS, *supra* note 258, at 345–68. Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Mauritania, Morocco, Qatar, Saudi Arabia, Libya, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen offered a qualifying amendment to article 42, paragraph 1, to the effect that a descending aircrew member would not be attacked "unless it is apparent that he will land in territory controlled by the Party to which he belongs or by an ally of that Party." The amendment was defeated by a vote of 47 against, 23 votes in favor, with 26 abstentions, following a heated debate. The debate illustrates the difficulty of balancing so-called humanitarian arguments against the realities of modern warfare, and serves to indicate that despite the codification of article 42, the issue is far from settled. For further discussion, *see* ICRC COMMENTARY, *supra* note 247, at 493–502; and NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257 at 224–31. The latter is a bit quick off the mark in referring to the prohibition contained in article 42(1) as "custom" from the earliest days of aviation. The sources it cites to support its assertion, many of which were referred to in the preceding discussion, make it clear that the prohibition was far from universally accepted, and that there was considerable practice to the contrary. The debate at the Diplomatic Conference and the fact that this rule was not adopted by consensus also argues against any assertion that article 42(1) constitutes a codification of customary international law.

A collateral issue not discussed at the Diplomatic Conference and beyond the scope of this article concerns air-sea rescue of downed aviation personnel. An excellent discussion of this subject is Dunn, *Air-Sea Rescue Operations in Europe During World War II: Historical Perspective on a Footnote in International Law*, 21 A. F. L. REV. 602–19 (1979).

350. Will, . . . *and Terrorists*, Wash. Post, Dec. 1, 1988, at A27; *see also* D. MOYNIHAN, with S. WEAVER, A DANGEROUS PLACE (1978), which chronicles Senator Moynihan's 1975–1976 tenure as United States Ambassador to the United Nations in New York. Senator Moynihan's period of service coincided with the period during which substantial work was done in the negotiation of Protocol I and with the experience of the "tyranny of the majority" that was manifested by the Third World delegations at the Diplomatic Conference.

This environment continues, as evidenced by the ouster of the delegation of the Government of South Africa from the XXVth International Conference of the Red Cross, held in Geneva in October 1986. The author attended as a delegate representing the U.S. Government, and was witness to the proceedings. The ICRC opposed the ouster of South Africa, but was presented with an ultimatum by the Third World: find a way that will permit us to vote for the ouster of South Africa, or all of the Third World

XVI. PROTOCOL I

It was within the same context that Protocol I was negotiated, and it is necessary to keep that context in mind while examining those articles in Protocol I that relate to aerial bombardment. The section of Protocol I most directly relating to combat operations, articles 48 to 58, was the portion with which the U.S. military review found its greatest concern. The rules adopted by the Diplomatic Conference bear no relation to the way warfare has evolved over the past two centuries, and were expressly intended to return to a form of warfighting that has not been seen in this century. Any claim of a "humanitarian gain" is offset by the fact that the provisions contained in Protocol I shift the responsibility for the protection of the civilian population away from the host nation (which has custody over its civilian population, and which traditionally has borne the principal responsibility for the safety of the civilian population) almost exclusively onto an attacker.[351]

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delegations will walk out. The ICRC acquiesced to Third World demands, and South Africa was ousted.

Subsequently the ICRC endeavored to place the incident in the best light. *See* Moreillon, *Suspension of the Government of the Republic of South Africa at the Twenty-fifth International Conference of the Red Cross*, 27,257 INT'L REV. OF THE RED CROSS 133–51 (Mar.–Apr. 1987). This analysis leaves much to be desired, from both a factual and a political standpoint. It was clear to Western observers that the ICRC is prepared to abandon its principles of *impartiality, neutrality,* and *universality* where politically expedient, and that it did so in October 1986. (For an explanation of the Red Cross Principles, *see* INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL RED CROSS HANDBOOK 17 (12th ed. Geneva, 1983).

While the author questions the actions of the ICRC, it is not the author's intent to carry any brief for the South Africa policy of apartheid. The purpose in raising the 1986 incident was to illustrate the Third World's domination of the 1986 conference, which replicated its domination of the Diplomatic Conference that produced the 1977 Protocols. At every turn Diplomatic Conference attendees were faced with a threat of a walkout by the Third World delegations if those representatives did not have their way. This overriding threat took precedence over any advancement of the law of war.

351. There were two reasons for this. The first is the view of many nations that nothing in Protocol I or the law of war can be construed as hindering their conduct of military operations against an invader in exercise of their respective right of self-defense, as contained in article 51 of the Charter of the United Nations. While the ICRC COMMENTARY endeavors to explain away the distinction between the law of war *jus ad bellum* and *jus in bello*, there remains the view in many nations that sovereign rights take precedence over any international legal obligation, that is, nations have a right to place their civilian population at risk if necessary to provide for the national defense, and international law has exhibited an inability to respond to this claim. ICRC COMMENTARY, *supra* note 247, at 615–16. *See* the statement of France contained in the ICRC COMMENTARY discussion of article 48 of Protocol I to the effect that had there been a vote on article 48, the delegation of France would have abstained inasmuch as it considered the article to have "direct implications as regards a State's organization and conduct of defense against an invader." France's view was representative, not isolated. *Id.* at 599.

The option exercised in Protocol I was to shift the entire responsibility to the so-called invader that brings forward the second reason. A power (or powers) on foreign territory or otherwise engaged in offensive operations is perceived by many as an aggressor; hence his combat options should be limited. Such an assumption is historically incorrect. The allies that carried out strategic air operations against Nazi Germany, and ultimately crossed into Nazi Germany, for example, were replying to the acts of that nation, as were the sixteen-nation multinational United Nations forces that marched into North Korea in 1950 in response to that nation's invasion of South Korea. In the same vein, however, a combination of the two reasons brought the conclusion by the ICRC and many Third World nations that as (a) airpower is an offensive weapon, then (b) airpower is the weapon of an aggressor that (c) must be restricted. On this point, the members of the ICRC clearly were reflecting their views as Swiss citizens surrounded by NATO and Warsaw Pact nations. This point has been expressed to the author by a number of different members of the ICRC on numerous occasions, reflecting not only an ignorance of warfare but a bias against air operations.

These matters will be elaborated in the discussion of article 49, paragraph 1, and the use of the term "attacks." *See* text *infra* note 354.

A. Discrimination

Article 48 states the fundamental principle of discrimination, a principle with which there should be no disagreement.[352] Indeed, military efficiency calls for discrimination to the extent that it is reasonably possible, and the United States historically has used its technological superiority to endeavor to gain increased accuracy in order to be as discriminate as possible in placing munitions on target. This has been particularly true with regard to aerial bombardment, where World War II circular error probable (CEP) bombing accuracy standards (measured in hundreds and, in some cases, thousands of meters) have been diminished to today's CEP capabilities (measured in substantially less than 100 feet).[353]

While there is total agreement with the general principle of discrimination, there are several areas of disagreement that follow in elaboration of this principle in subsequent articles: (a) use of the term "attack;" (b) the definition of who is a civilian and who is a combatant; (c) the definition of what is a military objective as opposed to a civilian object; (d) the placing of equal emphasis on the protection of civilian objects as is provided civilians and, commensurately, a diminishment of the value of the lives of one's own combatants; and (e) assignment of responsibility for collateral civilian casualties between attacker and defender. Each will be discussed in the paragraphs that follow.

Attacks. Article 49, paragraph 1, provides that " 'Attacks' means acts of violence against the adversary, whether in offense or defense."[354] The ICRC *Official Commentary* acknowledgment that "It is quite clear that the meaning given here [in article 49] is not exactly the same as the usual meaning of the word" is an

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352. Article 48 provides that "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." SCHINDLER & TOMAN, *supra* note 27, at 650.

353. Circular Error Probable (CEP) is defined by the United States Department of Defense (and the Inter-American Defense Board) as "An indicator of the delivery accuracy of a weapon system, used as a factor in determining probable damage to a target. It is the radius of a circle within which half of a missile's projectiles are expected to fall." The NATO definition is "An indicator of the accuracy of a missile/projectile, used as a factor in determining probable damage to a target. It is the radius of a circle within which half of the missiles/projectiles are expected to fall." U.S. DEPARTMENT OF DEFENSE, JOINT CHIEFS OF STAFF PUBLICATION 1, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (1 June 1987).

For an illustration of the CEP measurement of one World War II bombing mission, *see* Hodges, *The 'Magic' 1000-foot Circle* 1 MIL. J. 6–10 (Sept.–Oct. 1977); MIL. J. 1 15–19 (Nov.–Dec. 1977); and 2 MIL. J. 30–32, 39 (Jan.–Feb. 1978). For illustrative discussion of the effort made to improve bombing accuracy, *see* P. DELEON, THE LASER-GUIDED BOMB: CASE HISTORY OF A DEVELOPMENT, RAND R–1312–1–PR (1974); McKnight, *Tactical PGMs: Implications in Perspective* IX PARAMETERS 32–46 (June 1979); Beaumont, *Rapiers Versus Clubs: the Fitful History of 'Smart Bombs'*, 126 J. ROYAL UNITED SERVICES INST. 45–50 (Sept. 1981); Haering, *How Tactical Air Works*, 108 U.S. NAVAL INST. PROC. (Nov. 1982); and Owens, *Pave Knife: The First Combat Use of the Laser Guided Bomb*, 2 NAVAL AVIATION MUSEUM FOUNDATION 77–84 (Fall 1988). George Haering notes that during the 1972 Linebacker operations, United States tactical aircraft operating over North Vietnam dropped sixty unguided or "dumb" bombs for every "smart" (either laser or electro-optically guided) bomb delivered, with considerably less effect, attesting to the potential value of the United States investment in more accurate munitions. In contrast, many Third World nations have turned to less discriminate surface-to-surface missiles because of their inability to operate modern fixed-wing attack aircraft effectively. Haering, *supra* at 64. *See* Zaloga, *Ballistic Missiles in the Third World: Scud and Beyond*, 11 INT'L DEF. REV 1423–427 (Nov. 1988). The Soviet R–17, better known as the SS-1c Scud B, was used extensively by Iran and Iraq during their 1988 "war of the cities."

354. SCHINDLER & TOMAN, *supra* note 27, at 650. The word "attacks" is used throughout Protocols I and II. In the context of the present discussion, it is considered as it appears in articles 51, 52, and 57. For a complete listing of the articles in which the term is used, the reader is referred to the two Protocols or to INDEX OF INTERNATIONAL LAW, *supra* note 258, at 21–23.

understatement.[355] Use of "attacks" to refer to acts of defense is etymologically inconsistent with its customary use in any of the six official languages of Protocol I. For example, the first edition (1933) of *The Oxford English Dictionary* defines attack as, "The act of falling upon with force or arms, of commencing battle; an offensive operation; an onset, an assault. The common military term; opposed to defense."[356]

The second edition (1989) of *The Oxford English Dictionary* continues the definition contained in the first edition, but also includes, "To fasten or fall upon with force or arms; to in battle with, assail, assault. (The ordinary word used to describe offensive military operations.)"[357] Similarly, the French term "attaque" is defined as "attack, assault, aggression,"[358] while the Spanish term "ataque" means "offensive works."[359]

The term "attacks" was selected by the ICRC, first appearing in its 1956 *Draft Rules*. It met with considerable objection at the 1971 Conference of Government Experts, but was accepted at the 1972 Conference with its changed composition of so-called experts. In introducing it as part of the draft Protocol I, the ICRC explained that,

> The term 'attack' . . . is related to only one specific military operation. . . . Care should be taken not to confuse the author of an attack . . . with an aggressor, that is to say, the Party that starts the armed conflict itself. The author of the attack is he who, whatever his position may be at the outbreak of hostilities, *starts a military operation* involving the use of arms.[360]

The ICRC explanation resolves but part of the difficulty with the use of the word "attacks" in that it merely addresses the issue of the aggressor; it fails to address,

355. ICRC COMMENTARY, *supra* note 247, at 603. What must be appreciated is that the ICRC remained totally in charge of the draft Protocols up until the time the Diplomatic Conference began its work in 1974. The ICRC OFFICIAL COMMENTARY acknowledges that it did not accept all views offered it during the Conferences of Government Experts, stating that "In other cases, when the requirements of the Red Cross so dictated, the ICRC had to take the initiative itself and assume full responsibility" for text preparation. *Id.* at xxxi. Although the ICRC received considerable criticism for its use of the word attacks, it disregarded that criticism because it best suited its agenda to return combat operations exclusively to the immediate battlefield, as well as the Swiss-Swedish goal of limiting offensive operations of an invader. (The close relationship of the ICRC to the Swiss-Swedish foreign policy goals during the negotiation of the 1977 Protocols is discussed *infra* note 361.

While the ICRC COMMENTARY subsequently states that it turned the draft Protocols over to the Diplomatic Conference and the States that participated in those negotiations for their deliberation, that is not entirely true. *Id.* at xxxiii. The ICRC participated in the Diplomatic Conference as more than a casual observer. It protected its agenda throughout the Diplomatic Conference, principally through representatives from Sweden, Switzerland, and the Third World, who were known and who met as the Group of 77 (indicating their number). Those nations held a majority lock on the decision-making process. Any nation that sought to make substantive amendments to any provision, such as to substitute another word or words for attacks, could do so only with the concurrence of this block—which in turn was heavily influenced in many respects by the arguments of Sweden, Switzerland, and the ICRC. With regard to the word attacks, the views of the ICRC and the Group of 77 were identical, that is, to use a word that (notwithstanding any disclaimer in article 49(1) to the contrary) would limit *offensive* operations against those nations. At the same time no Western delegation was willing to break consensus over the point and, indeed, many failed to appreciate the nuance.

The author did not participate in the negotiation of the 1977 Protocols. The record of the Diplomatic Conference provides little information on the corridor negotiations that were necessary to complete the myriad provisions therein. The preceding paragraph, as well as other portions of this text related to the manner in which the 1977 Protocols were negotiated, is based upon discussions over the past twelve years with more than three dozen participants in those negotiations, including six members of the ICRC and several members of delegations within the Group of 77.

356. THE OXFORD ENGLISH DICTIONARY 543 (Oxford, 1933).

357. THE OXFORD ENGLISH DICTIONARY 760 (2d ed. Oxford, 1989).

358. THE NEW CASSELL'S FRENCH DICTIONARY 58 (1973).

359. APPLETON'S NEW CUYAS DICTIONARY, Rev. part II 55 (1972).

360. INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT COMMENTARY 54 (Geneva, 1973), (emphasis added). A similar statement appears in the ICRC COMMENTARY, *supra* note 247, at 603.

and in the italicized portion of its last sentence supports, the traditional use of the term in associating it with offensive operations only.

This was intentional on the part of the ICRC, and was in keeping with its intent of limiting offensive operations, particularly with regard to the use of airpower beyond the immediate battlefield.[361] A participant in the two sessions of Government Experts explains the ICRC purpose in selection of the term "attacks": "The advantage of the attack may be with the attacker, but the advantages of a propagandistic exploitation of the situation lie with the party attacked."[362]

Article 49(1) states clearly that the word "attacks" refers to both offensive and defensive military operations. This use of the word is contrary to its ordinary meaning, and its intentional selection by the ICRC for the purpose of limiting offensive military actions casts serious doubts upon the neutrality of Protocol I. Moreover, it runs afoul of the principle of war of the offensive. Its importance is emphasized in the foundation document for U.S. Air Force doctrine:

> Unless offensive action is initiated, military victory is seldom possible. The principle of offensive is to act rather than react. The offensive enables commanders to select priorities of attack, as well as the time, place, and weaponry necessary to achieve objectives. Aerospace forces possess a capability to seize the offensive and can be employed rapidly and directly against enemy targets. Aerospace forces have the power to penetrate to the heart of an enemy's strength without first defeating defending forces in detail. Therefore, to take full advantage of the capabilities of aerospace power, it is imperative that air commanders seize the offensive at the very outset of hostilities.[363]

Use of the word "attacks" in Protocol I served no humanitarian purpose, but did serve the purposes of certain nations (as well as those of the ICRC) in their desire to

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361. A careful reading of the language contained in articles 48–58 of Protocol I with an understanding of the Swiss and Swedish strategy for defending their respective territories makes it clear that these two nations, working hand in glove with the ICRC, tailored (and maneuvered through the Group of 77) a law of war treaty that establishes the ideal conditions for those nations to defend themselves. As a neutral, neither nation intends to fight outside its borders. Each nation also has elaborate plans for use of its natural and man-made obstacles (the latter including urban areas) in its defense. Hence the desire of the Swiss and the Swedes (expressed by the ICRC) to use the word attacks, because it would have a potential for limiting offensive actions by forces operating against either nation.

Both Switzerland and Sweden have minimal (less than 1% of total strength) regular forces, but large reserves; Switzerland can fully mobilize 650,000 in less than forty-eight hours, for example. A number of reservists hold key military positions, but would be protected from attack until actually mobilized because of the language contained in article 51, paragraph 3 of Protocol I that "Civilians shall enjoy the protection . . . [from attack], unless and for such time as they take a direct part in the hostilities." Each nation uses underground shelters for critical war materials; some shelters are camouflaged as civilian objects, while others are entered through basements below civilian buildings. Use of civilian objects would assist in the protection of military headquarters and supply centers from attack because of the language contained in article 51, paragraph 3 that "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

Using a "humanitarian" guise, the language of Protocol I contained in articles 48–58 was developed to place maximum constraints on a force engaged in offensive military operations regardless of the actions of a defender or, perhaps more appropriately, in spite of a defender's actions. It was tailor-made by Swiss and Swedish authorities working with the ICRC (but, as will be seen, without full coordination with the Swiss military) as yet another phase in the defense planning of those two nations. Switzerland and Sweden persuaded Group of 77 members of the desirability of these rules on the basis that the rules would place effective limits on offensive operations against their respective territories by an invader. The threat of superpower intervention was played upon heavily in Group of 77 discussions. Specific examples of the benefit availed a defender by these new rules will be provided in the analysis of individual articles. For a description of Swiss defense planning, *see* J. MCPHEE, LA PLACE DE LA CONCORDE SUISSE (1984).

362. F. KALSHOVEN, THE LAW OF WAR 62 (Leiden, 1972).

363. HEADQUARTERS, U.S. AIR FORCE, AIR FORCE MANUAL 1–1. BASIC AEROSPACE DOCTRINE OF THE UNITED STATES AIR FORCE 2–6 (1984).

limit enemy military operations within their territory, even if the nation under attack was the initial aggressor. This attempt to use a law of war treaty for the political gain of some nations not only was inconsistent with the humanitarian purposes of the law of war, but served to undermine its continued credibility.

Civilians and Combatants. To determine who is a civilian requires the reading and analysis of no fewer than four different articles of Protocol I, as well as one of the lengthier articles of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.[364] It is not the intention of this article to attempt a detailed analysis of those various provisions.

Determination of an individual's status as a combatant or civilian using the appropriate provisions could be achieved where time is not of the essence. Using the legal standards of the time (which remain in effect for the United States), American forces during the Vietnam War developed an elaborate screening program that was praised by the ICRC for its protection of the rights of prisoners of war and detained civilians.[365] Where time is of the essence, however, as in the heat of battle, this cannot be accomplished. Writing a quarter of a century ago, in a time of slower aircraft and substantially less lethal air defenses, one author summarized the problem as it relates to the employment of aircraft in combat: "The speed of even the slowest fixed-wing aircraft is so great that the pilot has little chance of positively identifying an enemy who is not wearing a distinctive uniform, unless the latter obligingly waves a rifle or shoots at him."[366]

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364. Article 50, paragraph 1 states that "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A(1), (2), (3) and (6) of the Third Convention [GPW] and in Article 43 of this Protocol."

The cited provisions of article 4 of the GPW state that:

> A. Prisoners of war . . . are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. . . .
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The reader must now return to articles 1 (4), 43 and 44 (3) of Protocol I to determine how those articles amend the provisions of article 4A, cited above, of the GPW. The United States and several of its allies regard the provision contained in article 44(3) to apply only to the conflicts contemplated by article 1(4). In the context of the Diplomatic Conference, that provision (in its final form) was intended to apply only to the Palestine Liberation Organization and the African National Congress. However, an ICRC official discussing article 1(4) has stated "That major innovation [article 1(4)] must not be necessarily confined in a limited historical context. . . . The realities of armed conflicts, very soon after the closing of the Diplomatic Conference, showed patently that certain parties intended to extend it to a dimension other than the colonial one." Veuthey, *Guerrilla Warfare and Humanitarian Law*, *supra* note 268, at 121. Indeed, there are indications that the ICRC intends to "determine" that article 1(4) (and hence Protocol I) applies to the Irish Republican Army as soon as Great Britain becomes a party to Protocol I, thereby using a "humanitarian" document for its political purposes.

365. *See* Green, *supra* note 314.

366. B. FALL, THE TWO VIETNAMS, *supra* note 224, at 349, citing J. CROSS, CONFLICT IN THE SHADOWS 98 (1963).

Several problems arise at this point. The first has been identified: the Byzantine definition contained in Protocol I clearly is not suited for battlefield employment, and it would be impossible for any nation to issue implementing instructions to its combat forces that would reduce the formula to a workable battlefield standard. But article 50, paragraph 1, of Protocol I continues: "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."

In the context of ground warfare, and particularly guerrilla warfare, this provision would be extremely difficult to accept; it is impossible in the realm of aerial operations.[367] The problem is exacerbated upon reading portions of article 51:

> 1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
>
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack.
>
> 3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

Violation of these provisions is made a grave breach by article 85, paragraph 3(a) of Protocol I.[368]

In analyzing these provisions, it is important to understand the interpretation by the International Committee of the Red Cross of the phrase "direct part in hostilities." The ICRC has stated that,

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367. The late Secretary of Commerce Malcolm Baldridge once related an experience from his service as an infantry platoon leader during the 1945 U.S. capture of Okinawa that bears directly on the impracticality of this assumption. As dusk fell, an Okinawan woman approached Baldridge's position. A nervous member of Baldridge's unit fired, killing the woman. Search of the body revealed that the "woman" was in fact a male Japanese soldier trying to approach their position so that he could throw hand grenades into it. Had the provision cited from article 50(1) been in effect during the Okinawa campaign, Baldridge and/or several of his soldiers very likely would have been killed. Such a rule not only is impractical, but would do substantial damage to the credibility of the law of war.

This rule was of considerable concern to a number of Western delegations, not the least of which were the United Kingdom and the United States. *See supra* text accompanying notes 6 and 7 concerning the court's decision in the case of Generaloberst Rendulic's "scorched earth" policy in Norway.

Concerned about the difficult position in which soldiers and commanders would be placed by the language contained in the last sentence of article 50(1) (as well as language contained in articles 51 to 58), an effort was made to codify the *Rendulic* rule as part of Protocol I. Neither the ICRC, Third World nations, nor the Socialist bloc were willing to permit such flexibility in Protocol I. At the time of its signature of Protocols I and II, Great Britain made the statement, "military commanders and others responsible for the planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time." SCHINDLER & TOMAN, *supra* note 27, at 717. It is the author's understanding that Great Britain plans a similar statement should it decide upon ratification of Protocol I. Belgium, Italy and Netherlands made similar statements at the time of their ratification. *Id.* at 707, 712, and 714. These statements of understanding are not binding upon other parties to Protocol I, particularly should they desire to charge a prisoner of war from the armed forces of one of these countries with a violation of the "heat-of-battle judgment call" provisions of articles 50 to 58.

368. Coupling the grave breach provision contained in article 85(3)(a) with the presumption contained in article 50(1) reverses normal battlefield procedures. While any civilian death is regrettable, it was the author's experience in Vietnam that close calls in the heat of battle leading to the death of an innocent civilian was not something for which a soldier, sailor, airman or Marine would be prosecuted. There are two practical reasons for this: (1) civilians in a combat area are expected to exercise the common sense to stay out of the way of combat operations while avoiding any action that might be construed as a threatening act by combatants; and (2) no commander can afford to have men looking over their shoulders for his or his lawyer's "blessing" before responding to a life-threatening act. The civilian population of South Vietnam understood this and such deaths were infrequent. The provision in question reverses this by placing the burden upon the combatant, regardless of the actions of the civilian(s).

'direct' participation means acts of war which by their nature or purpose are likely to cause *actual harm* to the personnel or equipment of the enemy armed forces. It is *only during such participation* that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian *regains his right to the protection* under this Section, i.e., against the effects of hostilities, and he may no longer be attacked.[369]

An initial problem with establishment of combatant or civilian status lies in the new revolving door provided for by Protocol I for certain "civilians." Previously a civilian was protected from intentional attack unless he carried out specific combatant-like activities, whether it involved the gathering of intelligence, logistical support for combatant forces, or acts of violence. At that time that person might become either a belligerent (and entitled to prisoner of war protection if captured) or an unprivileged belligerent (and subject to punishment, if captured), but most certainly he became a legitimate target and could not revert to his civilian status. This is a long-standing provision in customary international law from which Protocol I has departed, to the benefit of a very few but to the danger of the ninety-five percent of the civilian population in any nation who do not take part in the hostilities. Writing in 1911, James Maloney Spaight stated:

[I]f [civilian] populations have a war right against armies, armies have as strict a war right against them. The citizen must be a citizen and not a soldier. [T]here is no room in modern war for the resistance of unorganised inhabitants. They have had their chance of joining the armed forces of their country, and if they have not done so, then they must play loyally their part as citizens. [W]ar law has a short shrift for the non-combatant who violates its principles by taking up arms. 'It is manifest,' says Kipling's Unir Singh, Sikh of the Khalsa, trooper of the Gurgaon Rissala, type and spokesman of a breed of fighters, 'that he who fights should be hung if he fights with a gun in one hand and a *purwanna* [a permit given to non-combatants for their protection] in the other.' There is a whole chapter of war law—its history and its principle—epitomized in his words.[370]

The purpose of the rule so eloquently set forth by Spaight is clear: In order to provide protection for the greatest number of civilians, individual civilians are obligated to abstain from participating in the hostilities. Nations are obligated to take steps to keep their private citizens from taking part in hostilities in a manner that could endanger innocent civilians. And in order to protect the civilian population, an individual could not revert to being a civilian once he had crossed the line and committed combatant-like acts. The new rules of Protocol I clearly place the civilian population at greater risk by permitting individual civilians to cross and recross the line dividing the civilian population from combatants. These new provisions not only endeavor to revoke customary international law, but go so far as to make it a

369. ICRC COMMENTARY, *supra* note 247, at 619 (emphasis added). Protocol I thus provides a small group of "civilians" with the ability to have their cake and eat it too: by providing them prisoner of war protection (under article 44, paragraphs 2 and 3) if captured while engaged in hostilities, but immunity from attack (under article 50, paragraph 3) during those times in which they are planning attacks but not actually carrying them out. All of this is at the expense of protection for the majority of the civilian population that is not participating in the hostilities in any way.

370. J. SPAIGHT, *supra* note 161, at 38. *See also* G. LEWY, *supra* note 300, at 232, where he states:

Another source of confusion in judging the matter of civilian casualties was the designation . . . of all villagers as innocent civilians. We know that on occasion in Vietnam women and children placed mines and booby traps, and that villagers of all ages and sexes, willingly or under duress, served as porters, built fortifications, or engaged in other acts helping the communist forces. It is well established that once civilians act as support personnel they cease to be noncombatants and are subject to attack.

war crime to direct an attack at an individual who, seconds before, was carrying out hostile acts but who is beyond capture.

The rule clearly was intended for a guerrilla-war context in which the individual "civilian" is a "farmer by day, guerrilla by night;"[371] and the new rules of Protocol I were written with the view that if a "civilian" has engaged in combatant-like activities, he may be captured and detained. But capture cannot always be accomplished. During Rolling Thunder (the 1965–1968 U.S. bombing campaign against the Democratic Republic of Vietnam) the North Vietnamese Government issued small arms to thousands of private citizens with the instruction that when the air raid sirens went off, they were to seize their weapons, run outside, and fire directly into the air. This small-arms barrage proved deadly and effective against American attack aircraft flying at tree-top level in an effort to avoid equally deadly antiaircraft guns and surface-to-air missiles. ICRC observers witnessing these actions warned the Government of North Vietnam that they were placing their entire civilian population at risk by using segments of their civilian population in this combatant mode; the warning was disregarded by North Vietnamese officials.

Recalling that the attack on a civilian is made a grave breach by article 85 (3) (a) of Protocol I, at what point does a civilian-combatant revert to being a civilian? In the historic scenario cited, suppose a North Vietnamese civilian has fired at a passing American aircraft, seriously damaging it and causing it to crash. Suddenly the civilian rifleman realizes to his horror that the downed pilot's wingman was following in thirty-second trail, witnessed the attack and crash, and is turning to fire on the "civilian" rifleman to protect his leader while he descends by parachute. The "civilian" throws down his weapon; by the ICRC interpretation of article 51 (2), the "civilian" rifleman has ceased to take a "direct part in the hostilities," and is protected from attack. This provision not only places the pilot of the trailing aircraft at risk of trial as a war criminal if he now fires at the "civilian," but makes a

371. The protection for guerrillas who were "farmers by day, and guerrillas by night" was an appeal for Third World support for the ICRC's efforts, as many Third World governments had come into power through the use of guerrilla warfare. Those governments could suppress future guerrilla movements within their countries through a refusal to accept limitations on actions taken against internal challenges, while legitimizing their actions in coming into power. Protection for guerrillas also had appeal for certain European nations, such as Norway and the Netherlands, which had experience with partisan warfare during World War II. Other nations with partisan experience, however, did not share this view.

The ICRC also emphasized protection for guerrillas with the argument that guerrilla warfare was a new phenomenon, though it is not. The term "guerrilla" originated during Napoleon's campaign in Spain, while the word "commando" was a Boer word for guerrilla during the Anglo-Boer War at the turn of the last century. With respect to the former war, *see* D. GATES, THE SPANISH ULCER: A HISTORY OF THE PENINSULA WAR (1986). With regard to the Anglo-Boer War, *see* D. REITZ, COMMANDO: A BOER OF THE BOER WAR (1929); B. FARWELL, THE GREAT ANGLO-BOER WAR (1976); and T. PAKENHAM, THE BOER WAR (1979). The ICRC image of the "farmer by day, guerrilla by night" is itself historically flawed in that cases in which a population has organized and armed itself to overthrow an existing regime are few and far between. For example, most of the so-called guerrillas in the Republic of Vietnam during the United States war in that nation were trained in North Vietnam, then returned to South Vietnam individually or in organized military units. North Vietnam returned regular forces to South Vietnam in civilian attire as a matter of convenience and for the sake of plausible deniability of their role in that conflict, which since has been acknowledged.

The problem of guerrillas and their status *vis-à-vis* protection of the civilian population had been thoroughly considered in the Lieber Code, at the two Hague Peace Conferences of 1899 and 1907, and at the Geneva Conference of 1949. Protection for guerrillas was deemed not to outweigh the principles (a) that only nations have authority to wage war, and (b) that protection for innocent civilians outweighed protection for individuals who preferred to be a "farmer by day, and guerrilla by night." The provisions of Protocol I thus reverse more than a century of precedent, with no gain for the innocent civilian.

mockery of the line that has been so carefully drawn over the years distinguishing civilians from combatants in order to protect the former.

There is no humanitarian gain in the change made by article 51, paragraph 2 of Protocol I. Indeed, in providing protection for that very small percentage of the civilian population that uses the revolving door created by Protocol I, the entire civilian population of a nation could be placed at greater risk because of the distrust this provision will create between the civilian population of that nation and the opposing forces.

Protocol I draws a sharp line between civilians and combatants. Combatants are considered to include both uniformed combatants as well as civilians while they are taking a direct part in the hostilities (as defined by the ICRC, above). But there is a greater problem relating to the classification of combatants and civilians that Protocol I had the opportunity to address, and it is one that was evident three decades before the start of the Diplomatic Conference. Writing in 1944, Sir Hersch Lauterpacht stated that:

> Modern war has raised, and, in some respects, left unsolved the problem of reconciling the fundamental distinction between combatants and noncombatants with the advent of new weapons and with the increase of the numbers of both combatants and noncombatants engaged in work of vital importance for the war effort.[372]

The problem was identified long before World War II. Seven years before the outbreak of that conflict, J.F.C. Fuller wrote:

> In 1918 France had in the field an army of close upon 3,000,000 men, but this army would have been proved utterly useless unless the 1,700,000 workers employed in her war industries remained at work. During 1917 the French armies required 225,000 field gun shells a day. They wanted these shells to kill Germans with. The men and women who made them (and there were 900,000 employed in this work) were as deeply concerned in the problem of killing as the French gunners themselves. . . . In the kingly wars it was barbarous to slaughter the civilian population, because the people stood outside the quarrel. . . . The long and short of the matter is that a 'nation in arsenals' is obviously a legitimate war target; and the oftener a bull's-eye is scored on it the sooner will the war be over.[373]

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372. *The Law of Nations and the Punishment of War Crimes* 21 BRITISH YEARBOOK OF INTERNATIONAL LAW 58–95, at 74–75 (1944). Similarly, international lawyer Clyde Eagleton argued in 1941 that:

> The distinction between combatant and noncombatant has always been of great importance in the law of war; but the basis of that distinction has now been destroyed, on the one hand . . . by the fact that every man, woman, or child, whether in uniform or not, can be and is used in the belligerent effort.

Eagleton, *Of the Illusion That War Does Not Change*, 35 AM. J. INT'L L. 659–62, at 660 (Oct. 1941). Regrettably, the only solution Professor Eagleton offered was to declare war to be illegal, "and to be done with it." *Id.* at 662.

373. WAR AND WESTERN CIVILIZATION, 236–237 (London, 1932). The same question was raised within the British Air Ministry in the months immediately preceding World War II. With regard to the previously-discussed British directives to attack military objectives only, one participant recalled Air Staff considerations:

> [T]he distinction between "military" and "civilian" was growing pretty thin—why, for instance, should Hans Schmidt, a fitter in the German Tank Corps servicing tanks at a base depot outside Dusseldorf, be fair game while his civilian brother Fritz, who was assembling the same tanks *in* Dusseldorf, be protected by law?

J. SLESSOR, *supra* note 176, at 213–14. As the earlier discussion (at *supra* text accompanying notes 175–78) indicates, a decision was made along policy rather than legal lines to apply a conservative, restricted interpretation. Air Marshall Slessor continues:

The ICRC recognized this problem, and sought the advice of its committee of experts at its first session in 1971. One of its original documents identified four categories of civilians, as represented in figure 1, at page 122. Obviously civilians who were not participating in military operations, the military effort, or the war effort—as a rule of thumb more than ninety-five percent of any nation's population—were protected from intentional attack at all times. The three designated categories were defined as:

> War effort: all national activities which by their nature or purpose would contribute to the military defeat of the adversary.
>
> Military effort: all the activities . . . [which] are objectively useful in defense or attack in the military sense, without being the direct cause of damage inflicted, on the military level.
>
> Military operations: movements of attack or defense by the armed forces.[374]

At the Second Conference of Government Experts, however, which involved Third World representation,[375] the ICRC backed away from this issue, and reacted with hostility to a statement by the senior U.S. representative that recognized the problem of civilians on the battlefield and called for "basic guidelines . . . general enough to be understood by an ordinary soldier or a commander of regular or irregular forces and fair enough so that they would be thought of as deriving from basic requirements of law and humanity."[376] In sum, the ICRC turned a blind eye to the issue, arriving at the standard described on the preceding pages.

Change of Role of Civilians. Prior to and during the eighteenth century, a civilian was entitled to protection from intentional attack so long as he refrained from participation in an armed conflict. The distinction between combatant and noncombatant was easily established. But just as war became more complex, so too did the line between combatant and civilian become less distinct. A host of military analysts and historians[377] have acknowledged that war and society underwent several revolutionary changes in the century and a half before 1939.

The democratization of war. Nation-states look to their entire population, rather than the uniformed military alone, to provide for the common defense.[378] Two

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> Eventually we did issue in August 1939 instructions which defined military objectives very narrowly—Hans Schmidt was a military objective and Fritz was not. . . . I regarded it all as a matter not of legality but of expediency. We did what we could at the time . . . to limit air warfare as much as we could. We should no doubt have taken a different line if we had believed that, in the near future and with our existing equipment, we could have achieved anything like decisive results from an unlimited offense. But at the time of Munich we did not believe that.

Id. at 214.

Ultimately, of course, as RAF Bomber Command capabilities increased and the Luftwaffe capability to respond in kind diminished, the policy was amended. The German war industries worker was made a direct target—in part because of the intensity of German defenses, in part because of the inaccuracy of night bombing, but equally because (as previously explained) the line between "civilian" and "combatant" had not been drawn with any clarity in pre-World War II years. Protocol I was the first opportunity for the international community to address this question; it failed.

374. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 294, n.6. The official ICRC COMMENTARY *supra* note 247 makes no mention of consideration of this categorization.

375. *See supra* discussion in text commencing at note 248.

376. Previously quoted and cited in its entirety *supra* text accompanying note 254.

377. *See* T. ROPP, WAR IN THE MODERN WORLD (1959); J. FULLER, THE CONDUCT OF WAR 1789–1961 (London, 1961); B. BRODIE & F. BRODIE, FROM CROSSBOW TO H-BOMB (1972); M. HOWARD, *supra* note 16; W. MILLIS, ARMS AND MEN (1981); M. PEARTON, *supra* note 22; L. ADDINGTON, THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY (1984); M. VAN CREVELD, TECHNOLOGY AND WAR (1989); and R. O'CONNELL, *supra* note 102.

378. The democratization of war preceded the French Revolution; the militia units formed in the British colonies in North America were based upon the same principle. *See* J. GALVIN, *supra* note 23; and W. MILLIS, *supra* note 23, at 13–71.

CIVILIANS IN CONVENTIONAL WAR

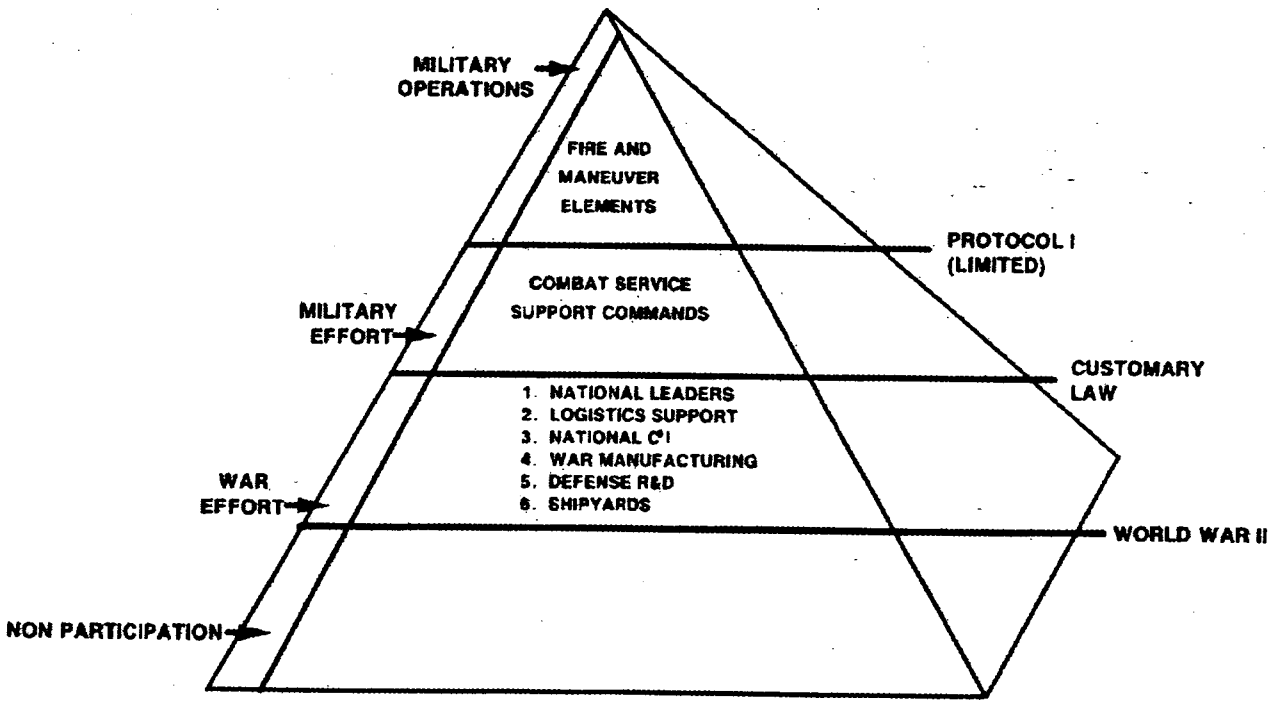

Figure 1.

A foundation for the democratization of war lay in the commencement of conscription as a national duty. Having run short of volunteers during the winter of 1792–1793, the French National Convention first voted the conscription of 300,000 men, then on 23 August 1793 decreed that every Frenchman was permanently required for service in the armies. By the following year 1,169,000 men had registered for national military service, leading to what Theodore Ropp has described as the "first national army in modern European history." T. ROPP, *supra* note 377, at 90. *See also* Strachen, *supra* note 23; M. PEARTON, *supra* note 377, at 30; and R. O'CONNELL, *supra* note 102, at 174, 185. Speaking of the Prussian experience following the defeat of Napoleon, O'Connell notes that "Gone were the Potsdam giants and the Hohenzollern's automata professionals, replaced by a *volks* arms and a centralized military brain." *Id.* at 202. As historian John Keegan has observed:

> [T]he nineteenth-century states' enhanced powers of head-counting and tax-gathering . . . ensured that recruits could be found, fed, paid, housed, equipped, and transported to war. The institution of census-taking—in France in 1801, Belgium in 1829, Germany in 1853, Austria-Hungary in 1857, Italy in 1861—accorded recruiting authorities the data they needed to identify and docket potential recruits; with it died the traditional expedients of haphazard impressment, cajolery, bribery and press-ganging which had raised the *ancien regime* armies from those not fleet enough of thought or foot to escape the recruiting sergeant. Tax lists, electoral registers, and school rolls documented the conscript's whereabouts—the grant of the vote and the introduction of free education for all entailed a limitation as well as enlargement of the individual's liberties. By 1900 every German reservist, for example, was obliged to possess a discharge paper specifying the centre at which he was to report when mobilisation was decreed. . . . Universal conscription in the European armies took all classes willy-nilly—in Prussia from 1814, in Austria from 1867, in France from 1889—and bound them to serve for two or three years.

J. KEEGAN, THE SECOND WORLD WAR 14–15, 20 (1989).

By the time of World War I, only the United States and Great Britain did not rely on conscription for mobilization. L. ADDINGTON, *supra* note 377, at 101. A principle reason for the 1907 Hague Convention III Relative to the Opening of Hostilities lay in the European experience with mobilization during the preceding three decades, in which the very act of mobilization had come to be regarded as tantamount to an act of war. SCHINDLER & TOMAN, *supra* note 27, at 57–59.

A prime example of the mobilization of an entire population for war is Emperor Haile Sellassie's mobilization decree of October 3, 1935, on the invasion of Ethiopia by Italy:

> The hour is grave. Each of you must rise up, take up his arms and speed to the appeal of the country for defense.
>
> Warmen, gather round your chiefs, obey them with a single heart and thrust back the invader.
>
> You shall have lands in Eritrea and Somaliland.
>
> All who ravage the country or steal food from the peasants will be flogged and shot.
>
> Those who cannot for weakness or infirmity take an active part in the holy struggle must aid us with their prayers.
>
> The feeling of the whole world is in revulsion at the aggression aimed against us. God will be with us.
>
> Out into the field. For the Emperor. For the Fatherland.

J. DUGAN & L. LAFORE, *supra* note 188, at 171–72; and T. COFFEY, LION BY THE TAIL: THE STORY OF THE ITALIAN-ETHIOPIAN WAR 161 (London, 1974).

Although the original *levee en masse* in Revolutionary France was the universal conscription, a critical distinction exists between the traditional *levee en masse* and the mobilization of the manpower of a nation in that the former requires that the inhabitants of a nation "spontaneously take up arms without having time to organize themselves." (Article 2, Annex to Hague Convention IV, in SCHINDLER & TOMAN, *supra* note 27, at 75), while in the latter case the civilian population responds to formal mobilization plans.

The effect of the democratization of war is expressed in paragraph 26 of U.S. ARMY FIELD MANUAL 27–10, *The Law of Land Warfare* (1956), which states that "Under the law of the United States, one of the consequences of the existence of war between two States is that every national of the one State becomes an enemy of the other. However, it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively at them." The term "civilian" is not defined.

The language is not new. Rules 20–22 of the Lieber Code of 1863 state:

> 20. Public war is a state of armed hostility between sovereign nations or governments.

examples can be provided from the commencement of World War II. Before the start of World War II, Great Britain had firmly reestablished its Observer Corps, a volunteer civilian organization which during that war was to grow to 32,000, including 4300 women. It had two roles: (a) to detect low-flying enemy aircraft, operating below radar coverage; and (b) report position and direction of enemy aircraft flying over Great Britain, that is, to take over the reporting of air raid tracks once the enemy aircraft had crossed the coast and no longer could be tracked by the British Chain Home radar. These individuals were an integral part of the British air defense system, not part of the civil defense structure; in a word, they were civilian volunteers augmenting the British military.[379]

As the Battle of Britain approached, and fearing a German invasion,

> [T]he Army, with the help of 150,000 civilians full-time and thousands more part-time (including schoolboys. . . .), festooned the beaches and cliffs with barbed wire, dug tank traps, set up concrete 'dragon's teeth' and pill boxes, and arranged for fire to engulf suitable stretches of shore and roadway as the enemy appeared. And behind the Army stood the unpaid Local Defence Volunteers, their number swollen by the end of June [1940] to one-and-a-half million.
>
> From the coastal districts most vulnerable (and in June proclaimed 'protected areas' forbidden to ordinary visitors), a new wave of evacuation now began. . . . Among those required to stay were members of local authorities, lifeboat crews, employees of banks, water, sewage, gas and electricity undertakings and workers on the land. These last had the heavy responsibility of obstructing their larger fields with barbed wire, disused farm machinery, tractors, commandeered old cars—anything that would make landing of airborne troops hazardous.[380]

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21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war.

22. Nevertheless, as civilization has advanced during the last century, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

SCHINDLER & TOMAN, *supra* note 27, at 6–7.

Similarly, Spaight states that "it may be taken as an axiom of modern war that the peaceful inhabitants of an invaded country, whether they are theoretically 'enemies' of the invading army or not, are in practice never treated as such." J. SPAIGHT, *supra* note 161, at 35.

The Lieber Code language and the statement of Spaight remain valid; a civilian who has not been called to serve in the military remains a noncombatant protected from attack, unless he occupies a civilian position that would render him susceptible to attack. Democratization of war alone does not establish a basis for attack of civilians. It was merely the first of several steps that led to a blurring of the relatively clear Eighteenth Century distinction between the small, professional army and the civilian population, and illustrates that the distinction has been in a state of erosion for more than two centuries.

379. *See* B. COLLIER, *supra* note 1, Appendices III and VI; F. Mason, *supra* note 81, at 96–97; and R. HOUGH & D. RICHARDS, THE BATTLE OF BRITAIN 26, 57 (London, 1989). The Observer Corps was established in 1925 for the express purpose of reporting the movements of hostile aircraft across those parts of Great Britain most vulnerable to aerial attack. B. COLLIER, *supra* at 17. As Hough and Richards note "In 1929, the War Office had relinquished control over the observer system, and the observers had become a civilian corps under Air Ministry aegis." R. HOUGH & D. RICHARDS, *supra* at 26. Civilians, though they may have been, were an integral part of the defense system of Great Britain. One official history described the Observer Corps as "the primary source of intelligence for the whole defence system about the movement over Britain of hostile aircraft." T. O'BRIEN, *supra* note 111, at 4. For its work during the Battle of Britain, the name was changed to the Royal Observer Corps in 1941.

380. R. HOUGH & D. RICHARDS, *supra* 379, at 106. Similarly, Russian civilian women are shown digging an anti-tank ditch outside Moscow in the path of the German Army Group Center's advance in October 1941 in J. KEEGAN, *supra* note 378, at 201.

As a part of its emergency measures, on 12 May 1940 British authorities agreed that "any man between the ages of sixteen and sixty-five who had fired a rifle or a shotgun and was 'capable of free movement' should be eligible" to volunteer for service in the unpaid Local Defence Volunteers. B.

The Industrial Revolution. Without the Industrial Revolution nations could not wage modern war, but it also further diminished the previous distinction between civilian objects and military objectives or targets, and between civilians and combatants.[381]

Earlier discussion of the effect of building railroads for national defense purposes is illustrative of the impact of the Industrial Revolution on national defense planning.[382] Railroads were laid along lines to support mobilization against the greatest threat to a nation's security, while Russia purposely built its railroads in a different size to thwart any foreign use of Russian railroads to support an invasion of Russia. Yet railroads were but one of several products of the Industrial Revolution that would aid national defense; others were the telegraph, improvements in weapons (such as the percussion cap, breech-loading mechanisms, magazine-fed small arms, machine-guns, and smokeless powder) and their mass production, and the use of the steam engine in naval vessels.[383]

COLLIER, *supra* note 1, at 106. The Local Defense Volunteers were renamed the Home Guard and were equipped with weapons and uniforms commencing in July 1940. R. HOUGH & D. RICHARDS, *supra* at 106.

381. As Professor Keegan has observed:

> The enormous wealth, energy and population increase released by Europe's industrial revolution in the nineteenth century transformed the world. It had created productive and exploitative industries—foundries, engineering works, textile factories, shipyards, mines—larger by far than any at which the intellectual fathers of the industrial revolution . . . had guessed. It had linked the productive regions of the world with a network of communications—roads, railways, shipping lanes, telegraph and telephone cables—denser than even the most prescient enthusiast of science and technology could have foreseen. . . . It had built the infrastructure . . . of a vibrant, creative and optimistic world civilisation. Above all, and in dramatic and menacing counterpoint to the century's works of hope and promise, it had created *armies*, the largest and potentially most destructive instruments of war the world had ever seen.
>
> The technology that built the railways also furnished the weapons with which the soldiers of the new mass armies would inflict mass casualties on each other.. . . . [T]he reason for the appearance of the fast-firing, longer-range and more accurate weapons that equipped the conscript armies between 1850 and 1900 was the particular conjunction of human ingenuity and industrial capability which made their production feasible.

J. KEEGAN, *supra* note 378, at 12, 16. *See also* P. MATHIAS, THE FIRST INDUSTRIAL NATION, (2d ed. London, 1983); M. VAN CREVELD, *supra* note 22, at 153–216; and R. O'CONNELL, *supra* note 102, at 189–211.

382. At text *supra* accompanying note 22, and the sources cited therein. Professor Keegan notes that "It is evidence of the military importance the German state and army attached to the free use of the railways that the personnel of the *Reichsban* were not allowed to unionise." J. KEEGAN, *supra* note 378, at 16, n.1.

383. *See* M. VAN CREVELD, *supra* note 377, at 170–71; R. O'CONNELL, *supra* note 102, at 190–202; and H. SPROUT & M. SPROUT, THE RISE OF AMERICAN NAVAL POWER, 1776–1918 (1959). Professor Keegan lists four significant factors:

> The first was the spread of steam power, which supplied the energy to manufacture weapons by industrial process. The second was the development of the appropriate process itself, originally called 'American' by reason of its origin in the 1820s in the factories of the Connecticut Valley, which were chronically short of skilled labor. This industrial process resulted in interchangeable parts, machined by a refinement of the ancient pantographic principle, and achieved an enormous surge of output. . . . Advances in metal engineering would have been pointless without improvements in the quality of the metal to be worked; that was assured by the development of processes for smelting steel in quantity—notably by the British engineer Bessemer after 1857. . . . The fourth ingredient of the firepower revolution was supplied shortly afterwards by European chemists, notably the Swede Alfred Nobel, who developed propellants and bursting-charges which drove projectiles to a greater distance and detonated them with more explosive effect than ever before. The effective range of infantry weapons, for example, . . . increased from a hundred to a thousand yards between 1850 and 1900.

J. KEEGAN, *supra* note 378, at 16–17.

The Industrial Revolution brought about a problem of commingling of civilian objects and military objectives; railroads that were used for the national defense also were used on a daily basis, in peace and war, for trade and civilian transportation.[384] This created problems regarding the distinction between civilian objects and military objectives, and the increased risk to the civilian population of collateral injury that will be discussed in conjunction with articles 51, 52 and 57. The immediate problem—maintaining the separation of the civilian from the combatant—also was affected by the Industrial Revolution, as the design and manufacturing of the modern weapons of war required skilled labor. While the democratization of war had brought about national conscription, the need for skilled labor necessitated a system whereby individuals or trades whose work was critical to national security could be exempted from conscription. By World War II, virtually every nation party to that conflict had enacted domestic legislation or policies that provided an exemption from military service for industrial workers, engineers, scientists, or persons possessing similar critical skills where an individual's skills were considered to be of greater value to that nation's war effort than would be his service in the military.[385] Technological

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384. *See* A. MIERZEHEWSKI, *supra* note 20, for an excellent discussion of this point.

385. The problem actually began to surface during World War I. Sir Solly Zuckerman notes that:

> [T]he mobilization of scientists as scientists was anything but complete in the First World War. Some of the most brilliant young men of the day were among those who died in battle. When the young atomic physicist Moseley was killed in action in the Dardenelles, Rutherford wrote:
>
> It is a national tragedy that our military organization at the start of the war was so inelastic as to be unable, with a few exceptions, to utilize the offers of services of our scientific men as combatants in the firing line. Our regret for the untimely end of Moseley is all the more poignant that we cannot but recognize that his services would have been far more useful to his country in one of the numerous fields of scientific inquiry rendered necessary by the war than by exposure to the chances of a Turkish bullet.

S. ZUCKERMAN, SCIENTISTS AND WAR 13 (1966) citing Rutherford, *Obituary of Henry Gwyn Jeffreys Moseley*, 96 NATURE 33 (1915).

Both the Axis Powers and the Allies established programs at the national level for screening and employment of scientists in civilian defense-related positions rather than as soldiers during World War II, as each also endeavored to do with regard to its skilled labor. *See* R. OVERY, *supra* note 85, at 147; and G. HARTCUP, THE CHALLENGE OF WAR: BRITISH SCIENTIFIC AND ENGINEERING CONTRIBUTIONS TO WORLD WAR TWO 222–24 (1970), where the author notes that:

> The first step taken was the compilation during 1937 and 1938 of a schedule of reserved occupations to provide against the mistake made in the First World War of enlisting into the forces skilled men essential for war production. Secondly, a central register of volunteers for war service with technical, professional and higher administrative qualifications was drawn up with the aid of the Royal Society, the universities and the principal technical and professional institutions. . . . By July 1939 the scientific section of the central register contained the names of 5,000 scientists.
>
> At the outbreak of war Sir Maurice Hankey was summoned by the Prime Minister to become Minister without Portfolio in the War Cabinet, one of his tasks being, as he later said, "to put science on the war map," and as a by-product of that exciting field of activity I had to assume important responsibilities in connection with higher technical and scientific manpower. . . . Eventually, over 50,000 men and women were selected for basic scientific instruction and passed to the services, research and industry. . . . Another 40,000 were engaged by the Admiralty.

See also S. ROSKILL, III HANKEY: MAN OF SECRETS 1931–1963 427–28 (London, 1974). Similarly,

> The 1942 [British] crisis in radio production was ascribed primarily to shortage of skilled labour. . . . What added to the difficulty of labour supply was the great need of the [military] Services for young radio technicians and the continuous losses which the industry consequently suffered from labour call-ups. Various attempts to deal with the problem were made. . . . The skilled labour employed by the industry—some 8,000 men and women—were "frozen," i.e., retained in the industry irrespective of age and irrespective of alternative claims on their services.

developments also led to the need for highly-trained civilian technical representatives to accompany military, naval and air forces into theaters of operations in order to maintain and repair the increasingly more sophisticated engines of war.[386]

The Scientific Revolution. Large numbers of civilian scientists have made contributions to their respective nation's war efforts that far exceeded their value in any potential uniformed military service. The scientific revolution commenced prior to World War I, but reached its first peak during that conflict.[387] Scientific research grew steadily between the wars, increased substantially during World War II, and has never looked back. It was a force multiplier; one witness illustrated this point by noting that:

M. POSTON, BRITISH WAR PRODUCTION 368–69 (London, 1952).
Similarly, on 21 June 1940 the National Resources Mobilization Act became law in Canada,

> authorizing the Governor in Council to make orders or regulations requiring persons to place themselves, their services and their property at the disposal of His Majesty in the right of Canada, as may be deemed necessary or expedient for *securing the public safety, the defence of Canada, the maintenance of public order, or the efficient prosecution of the war, or for maintaining supplies or services essential to the life of the community.* [emphasis added]

C. STACEY, ARMS, MEN AND GOVERNMENTS: THE WAR POLICIES OF CANADA 1939–1945 33 (Ottawa, 1970), On 19 August 1940, Canadian national registration began of "all persons resident in Canada over sixteen years of age, both male and female, providing sufficient basic information not only to serve as a guide for a system of compulsory service but also to use in the direction and control of labor." C. STACEY, *supra* at 123–24. Eventually, conscription was extended to age 30. *Id.* at 404. However, Stacey notes in detail the problems the Canadian government experienced in addressing the army manpower problem while protecting skilled labor. *Id.* at 403. The Committee on Labour Coordination set up a Labour Supply Investigation Committee to gain all the facts on the problem. This committee submitted a report in October 1941 that concluded in part:

> The Committee was deeply impressed by the widespread failure to regard the manpower problem as a single problem. This country is engaged in a life and death struggle in which its entire resources, *including its man-power*, must be allocated to their most effective uses. . . . [T]here is competition between the armed forces and industry, between war and non-war industries, and among the industrial concerns generally. The Committee doubts that this situation results in the most effective use of the nation's man-power.

Id. at 403 [emphasis added]. While both the Axis Powers and the Allies exempted from conscription scientists and engineers whose skills were of greater importance to their respective war efforts than service in the military, it was the British and American exploitation and employment of science and scientists that provided the critical difference between victory and defeat.

386. For example, in June 1942 No. 604 Squadron (County of Middlesex) of the Royal Air Force was equipped with Mark VII air-intercept (AI) radars for its Beaufighter night interceptor aircraft. Servicing of this new radar would have been virtually impossible but for the assignment of a civilian Scientific Officer from the RAF's Telecommunications Research Establishment to the squadron. C. RAWNSLEY & R. WRIGHT, NIGHT FIGHTER 153–55 (London, 1957). Because 604 Squadron was engaged in nightly interception of Luftwaffe intruder aircraft over Great Britain, this civilian's work was critical to the squadron's operational success. This unit was not unique in this respect; civilian technical and scientific representatives served with air, naval and ground units throughout World War II, and continue to do so today.

The importance of this civilian Scientific Officer to 604 Squadron's mission can be illustrated with a very simple scenario. If a German sniper had been able to land in England and after carrying out attacks elsewhere find his way to the 604 Squadron perimeter with only one bullet remaining, but with complete intelligence on the men and women in or supporting the unit, there is little doubt that the sniper would conclude that the most valuable target would be the civilian Scientific Officer maintaining the Mark VII AI radars. Without his expertise, the aircraft could continue to fly, but could not perform their critical nighttime interception duties. There seems to be little question that, through common sense or under the law of war standards of either World War II or today, this civilian Scientific Officer would be a legitimate target. Article 51, paragraph 3, of Protocol I would protect him from attack, and would make it a war crime [under article 85, paragraph 3 (a)] for the German sniper to attack him.

387. *See* G. HARTCUP, THE WAR OF INVENTION: SCIENTIFIC DEVELOPMENTS, 1914–1918 (London, 1988); and Pattison, *Scientists, Government and Invention: The Experience of the Inventions Boards, 1915–1918*, in HOME FIRES & FOREIGN FIELDS: BRITISH SOCIAL AND MILITARY EXPERIENCE IN THE FIRST WORLD WAR (Peter H. Liddle, ed. London, 1985).

> A bomber equipped with radar could do as much as half-a-dozen without. A Coastal Command aircraft could search the seas for enemy submarines indefinitely and fail to find them unless it had an [air-to-surface-vessel radar] set. All the courage of [RAF] Fighter Command and the skill of the Few would have been wasted, had it not been for the timely installation of the primitive radar system which saved us in 1940.[388]

Seven significant developments or devices grew to maturity during World War II. They are atomic energy, rocket propulsion, jet propulsion, radar, automation, the proximity fuse, and operational research. All involved major research and development by civilian scientists. The development of radar offers one of the better examples of the close working relationship between civilian scientists and the military, not only in the research and development stages, but in the operational employment of radar. The radar story has been told many times, and need not be retold here; it was a success for those nations which chose to exploit civilian scientific capabilities, and contributed to the loss of the war by those nations that failed to do the same, or do so to the maximum extent.[389]

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388. Lord Bowden, in the Foreword to G. HARTCUP, *supra* note 385, at 11. The reference to "the Few" is to the praise of RAF Fighter Command by Prime Minister Winston S. Churchill on August 20, 1940, when he said "Never in the field of human conflict was so much owed by many to so few." R. HOUGH & D. RICHARDS, *supra* note 379, at 199; and M. GILBERT, FINEST HOUR: WINSTON S. CHURCHILL, 1939–1941 736, 742 (London, 1983). The discovery and employment of radar by the British was a critical factor in the success of "the Few"; equally critical was the Luftwaffe failure to recognize its importance.

Lord Bowden further emphasizes the value of the use of civilian scientists by noting that "Without some of the devices which this book describes, our soldiers and sailors would have been as hopeless as the troops of the Mahdi at Omdurman who were mown down by the Maxium guns of the British Army." G. HARTCUP, *supra* at 11. The 1898 battle referred to by Lord Bowden has been described by one historian as follows:

> In the opening phase of the battle thousands of Dervishes charged across an open desert in plain sight, waving their spears and screaming. Kitchener's howitzers, machine guns and rifles cut them down. Not a single Dervish reached the Anglo-Egyptian lines. Few even came as close as 500 yards. . . . An estimated 10,000 Dervishes fell, and few of the wounded survived. . . . In the subsequent phases an attack by twice as many Dervishes was defeated by an Anglo-Egyptian force 1/10th the strength of the attackers.

B. FARWELL, QUEEN VICTORIA'S LITTLE WARS 336–37 (London, 1973); and B. FARWELL, PRISONERS OF THE MAHDI (1967).

389. The proximity fuze is discussed in R. BALDWIN, THE DEADLY FUZE (1980), and G. HARTCUP, *supra* note 385, at 170–81. The proximity fuze would emit radio waves, detect their reflection from the target, and detonate the shell at the optimum point. Originally developed by British civilian scientists, the project was transferred to the United States in the course of the Tizard Committee visit in August 1941. Further development was undertaken by Dr. Merle A. Tuve, chief physicist, Department of Terrestial Magnetism, Carnegie Institution of Washington, and subsequently by the Applied Physics Laboratory of the Johns Hopkins Laboratory—in essence, by civilian scientists working in a civilian laboratory.

The first successful use of the VT-fuzed ammunition was by the U.S.S. *Helena* (CL–50) on January 4, 1943, when a Japanese Val bomber was shot down near Guadalcanal. R. BALDWIN, *supra* 234–35. The British put VT-fuzed ammunition to great effect in defending against German V–1 rockets. *Id.* at 253–71. VT-fuzed howitzer ammunition was used against ground targets commencing December 16, 1944, by U.S. Army forces during the German offensive through the Ardennes, where it was credited by General George S. Patton with winning the Battle of the Bulge. *Id.* at 279.

For the story of radar development and employment, *see* A. ROWE, ONE STORY OF RADAR (London, 1948); B. COLLIER, *supra* note 1, at 36–40; D. SAWARD, THE BOMBER'S EYE (London, 1959); R. WATSON-WATT, THE PULSE OF RADAR (1959); M. Poston, *supra* note 176, at 373–430; J. NISSEN, with A. COCKRILL, WINNING THE RADAR WAR, 1939–1945 (1987); D. FISHER, A RACE ON THE EDGE OF TIME (1988); and D. PRITCHARD, THE RADAR WAR: GERMANY'S PIONEERING ACHIEVEMENT, 1904–1945 (London, 1989).

As the Pritchard book indicates, radar was a German discovery, but one which British authorities were more successful in exploiting during World War II. The lesson is that invention alone is not enough; organization of the scientific community for national defense and exploitation of its work was a fundamental difference during World War II. As one historian has noted, "technical ingenuity was not

As a second example, operational research has been defined as "the subjection of military operations to quantitative analysis for the purpose of making a more efficient use of military force."[390] It began in World War I, but had to be re-invented

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enough. If there was one lesson to be learned . . ., it is that at a time when all seemed lost, we survived because of extraordinary effective collaboration between the fighting men and the civilians who helped them." G. HARTCUP, *supra* at 12. British civilian scientists anticipated military requirements, developed equipment to meet those requirements, trained the military in its operation, maintained that equipment, and in some cases actually controlled its use in combat. *See*, *id.* at 118–21. In contrast, R. J. Overy makes the following comments regarding German collaboration with scientists:

> The people in power were unsympathetic to academic scientists, and were too technically unschooled to be able to arrive at sound scientific judgments themselves. Goering and Udet prided themselves on their amateur qualifications. Radar, for example, Goering considered "simply a box with wires." Udet could not understand, for he had never heard of it, how Heinkel's experimental jet aircraft could fly "with no engine." Even Milch for all his organizational skills was basically unsure of himself with more sophisticated equipment and was uncertain how to extract the most from the research establishment. This scientific philistinism earned the leadership the animosity and ridicule of the researchers. War-winning projects got lost in the system and the political effort of resurrecting them was often more than the researchers were willing or able to supply.

R. OVERY, *supra* note 85, at 199. Goering (at Speer's suggestion) had founded the *Reichsforschungsrat* (Reich Research Council) in 1937 as an instrument for centralizing and directing all German research. But scientific work suffered for the reasons stated above, and others. In the latter part of 1942, Hitler took steps to involve German scientists to a greater degree in the military effort. As R. J. Overy notes, however, "The reforms of the research system in 1942 came too late and were difficult to enforce." *Id.* at 198–99. *See also* S. GOUDSMIT, ALSOS—THE FAILURE OF GERMAN SCIENCE (1947). The Japanese were equally slow in exploiting radar. Guy Hartcup notes that:

> The Japanese services were rigidly conservative in outlook. There was no collaboration between the Army and Navy. . . . It was said by a Japanese scientist that a general would rather lose the war than shake hands with an admiral. The Army and the Navy each had its own radar equipment. An army radar was unable to distinguish between an enemy and friendly naval aircraft and the same confusion applied to naval radar when trying to locate enemy aircraft. Not until the autumn of 1944 did the Japanese Army and Navy set up a joint technical control committee with civilian representations, but then it was too late.

G. HARTCUP, *supra* at 30. The official history of the U.S. Army Air Force in World War II similarly states that "the Japanese possessed neither the economic potential nor the extensive skill necessary for developing and maintaining a first-class air force." W. CRAVEN & J. CATE, I PLANS AND EARLY OPERATIONS: JANUARY 1939 TO AUGUST 1942 81 (1948).

The degree to which the Axis powers failed to harness science was not total, but relative, and the radar war between Germany and Great Britain was a constant one of measures, countermeasures, counter-countermeasures, etc., all fought principally in civilian laboratories by civilian scientists working closely with the military. For a brief discussion, *see The Radar Chess Game* in M. POSTON, *supra* at 418–28; *see also* A. PRICE, INSTRUMENTS OF DARKNESS, *supra* note 110, and M. STREETLY, *supra* note 110. Poston discusses the role of the universities and industry in the development of radar. M. POSTON, *supra* at 428–30.

The references emphasize the critical value of certain civilians to a nation's ability to wage war and conduct military operations, and the necessity for a nation to organize its civilian technical and scientific expertise for national defense purposes. Most nations have undertaken this effort to some degree; distinctions can be made between those civilians performing functions critical to national defense and the private citizen who has no connection to the nation's defense. The Diplomatic Conference responsible for the negotiation of Protocols I and II failed to address this issue, however, thereby jeopardizing the safety of the private civilian through a demand of protection from direct attack for all persons not in uniform.

390. G. HARTCUP, *supra* note 385, at 25. The official Royal Air Force operational research history defines *operational research* as "numerical thinking about operations, with the aim of formulating conclusions which, applied to operations, may give a profitable return for a given expenditure of effort." BRITISH AIR MINISTRY AIR PUBLICATION 3368, THE ORIGINS AND DEVELOPMENT OF OPERATIONAL RESEARCH IN THE ROYAL AIR FORCE xvii (London, 1963), [hereinafter RAF OPERATIONAL RESEARCH]. The original terms of reference for operational research, prepared by Sir Robert Watson-Watt, were to

> examine quantitatively whether the user organization is getting from the operation of its equipment the best attainable contribution to its overall objective, what are the predominant factors governing

two decades later. Its story also has been told elsewhere.[391] One example will illustrate its importance to battlefield performance.

> [T]he paradigmatic case [for operational research] arose out of antisubmarine warfare. One of the techniques adopted by Britain to counter attacks . . . by German submarines . . . was . . . by depth charges dropped from aircraft. . . . Experience showed that the rate of destruction was sporadic and unsatisfactory.
>
> Scientists began flying with RAF Coastal Command to observe minutely the sequence of events and operations in hunting submarines over a large number of sorties. The observations were then correlated and analysed. . . . [Their] conclusions were tried out in practice . . . and the rate of successes improved. The German authorities concluded that their enemy must have a new secret weapon. In fact, the results rested on the strictly scientific analysis of what was to hand.[392]

This author went on to observe, "When scientists went on operations they ceased to

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the results attained, what changes in equipment or method can be reasonably expected to improve these results at a minimal cost in effort and in time, and the degree to which variations in the tactical objectives are likely to contribute to a more economical and timely attainment of the over-all strategic objective.

S. ZUCKERMAN, SCIENTISTS AND WAR: THE IMPACT OF SCIENCE ON MILITARY AND CIVIL AFFAIRS 18–19 (1967). Zuckerman lays out clearly the purpose for operational research, and who did it: "The primary purpose of operational research . . . at [RAF] Fighter Command . . . was to make the best use of the weapons and equipment the United Kingdom had. . . . [T]he work was done not by the military, who wanted the equipment, but by the scientists." *Id.* at 18.

391. RAF OPERATIONAL RESEARCH, *supra* note 390; L. THIESMEYER & J. BURCHARD, COMBAT SCIENTISTS (1947); R. CLARK, TIZARD (Cambridge, 1965); V. BUSH, MODERN ARMS AND FREE MEN: A DISCUSSION OF THE ROLE OF SCIENCE IN PRESERVING DEMOCRACY (Cambridge, 1968); and M. GORN, HARNESSING THE GENIE: SCIENCE AND TECHNOLOGY FORECASTING FOR THE AIR FORCE 1944–1986 (1988).

In October 1941, Professor P.M.S. Blackett set forth the functions of an operational research section. As the RAF OPERATIONAL RESEARCH explains:

> The first was to advise the Commander-in-Chief and his staff on matters which were not handled by the research and experimental establishments. . . . It was essential that such scientific analysis should be done in or near operations rooms, as the data on grounds of security could not be made available to the technical establishments. The chief objection to staff officers carrying out this sort of work was, firstly, that their time was largely taken up with making executive decisions and, secondly, that scientists were often better equipped to deal with certain aspects of operations, particularly those in which probability considerations and the theory of error entered. The work of an operational research section was performed at command or group headquarters, or at stations or squadrons, as circumstances dictated. The second function of an operational research section was to act as a link between the command and the technical and research establishments.

RAF OPERATIONAL RESEARCH, *supra* at xix.

Operational research within the RAF considered the following issues, among others: development of an air defense enemy aircraft reporting system; night interception of enemy aircraft; offensive operations by night; defensive operations by day; armament problems; problems relevant to the improvement of night bombing; assessment of bombing efficiency; problems affecting the cost of night bombing; problems involved in the attack of U-boats; the camouflage of antisubmarine aircraft; attack of the German "V" weapons; attacks on rail communication and shipping; and assessment of close air support operations. RAF OPERATIONAL RESEARCH, *supra* at 10–177.

The staff of an operational research section were civilian scientists. However, if they deployed overseas (permanently or temporarily), they were issued uniforms and granted honorary commissions. RAF OPERATIONAL RESEARCH, *supra* at xx.

It is the author's view that civilian scientists involved in operational research as described above clearly played a combatant role within the British military, and under customary international law could have been made the object of lawful attack. Article 51, paragraph 3 of Protocol I would protect these individuals from attack until they deployed overseas and donned their uniforms, bearing their honorary commissions. Hence though their duties would be the same, they would be subject to attack while in uniform overseas, but immune from attack while on a domestic base in civilian attire.

392. M. PEARTON, *supra* note 22, at 231–32.

be just purveyors of laboratory results to the military but participated in the making of tactical decisions."[393]

Scientists during World War II became a critical part of the war and military effort. More than ninety-five percent of the German scientists working on the V–1 and V–2 rocket programs were civilians, as were the individuals working on Project Manhattan—the development of atomic weapons—in the United States. As Maurice Pearton has observed, "The tart observation that wars were won by weapons and not by slide-rules ignored the fact that war had got to the point at which it could be lost by not using them."[394]

The predicament for the law of war was yet another increase in persons in civilian attire who were full-time participants in the military effort of their nation, even in some cases in military operations, and not with a weapon, as the ICRC *Official Commentary* suggests is necessary in order to become a combatant. These scientists were engaged in the military effort of their nation, in a capacity in which they were of greater value to their nation's war effort than they would be as uniformed soldiers. Under customary international law, there seems to be no reason why these individuals would not be regarded as combatants and subject to attack at all times; under Protocol I, they are protected from attack.[395]

Further Blurring of Civilian and Combatant. War has undergone immense change over the past two centuries. The traditional distinction between the civilian and the combatant has been blurred by myriad political and technological factors, as well as by war itself. This blurring is not unique to developed societies. During the United States' Rolling Thunder air campaign against North Vietnam, for example, the Government of North Vietnam mobilized and organized a force of more than 500,000 civilians to handle the movement of military supplies along lines of communication (LOC) and to maintain the LOC, repairing battle damage caused by the air strikes. It also mobilized another 250,000 to organize and construct its sophisticated, integrated air defense system, and to deploy and man portions of the antiaircraft defenses, while employing others to disperse North Vietnamese military supplies to minimize their risk of loss.[396]

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393. *Id.* at 232. Similarly, the views and recommendations of civilian scientists were critical to the decision on the timing for Royal Air Force employment of the radar countermeasure "Window," metal foil strips dropped from aircraft to confuse enemy radar. Window was first employed (with substantial success) during the RAF Bomber Command mission against Hamburg on the evening of 24/25 July 1943. *See* Jones, "*Lord Cherwell's Judgment in World War II*," CVII J. ROYAL UNITED SERVICE INST. 321–27, at 325–26 (Nov. 1963); G. HARTCUP, *supra* note 385, at 148–56; A. HARRIS, *supra* note 4, at 132–34, 172–76; J. TERRAINE, *supra* note 171, at 546, n.2; A. PRICE, INSTRUMENTS OF DARKNESS, *supra* note 110, at 112–21, 124–27, 140–42, 148–49, and 151–65; G. ADERS, THE HISTORY OF THE GERMAN NIGHT FIGHTER FORCE 1917–1945 94–95 (London, 1978); and M. MIDDLEBROOK, THE BATTLE OF HAMBURG 68–70 (London, 1980).

394. *Id.* at 233.

395. For further discussion of the role of science during World War II, *see* L. THEISMEYER & J. BURCHARD, COMBAT SCIENTISTS (1949), and R. CLARK, THE RISE OF THE BOFFINS (London, 1962). The term "boffin" has been defined as "a civilian technician who advises air crew and others on specialized subjects." *Id.* at vii. Clark continues, stating that "Whatever its exact origin, "boffin" had become, long before the end of the war, a word for one particular type of scientist—the man who could understand the viewpoint of the Services, who worked with them, and who frequently shared their dangers." *Id.* at viii. His words suggest the directness of the role this nonuniformed individual played and the degree to which the RAF, perhaps more than any other service, relied upon his advice. Today that experience has been duplicated in virtually every armed service around the world.

While a boffin should be regarded as a combatant, there is of course the question as to whether he would be pursued and attacked away from the place of employment. That is a question of practicality rather than legality, *i.e.*, in most cases it would not be militarily efficient to pursue a single individual away from his place of work, whether that person is a civilian-combatant or a uniformed member of the military.

396. Parks, *supra* note 109, at 7; *see also* Cagle, *Task Force 77 in Action Off Vietnam*, 98 U.S. NAVAL INST. PROC. 76, n.10, 87 (May 1972). North Vietnamese development and employment of its

This blurring should not necessarily suggest deviousness on the part of a nation. Nations have realized that it costs more to maintain an individual in uniform than it does a civilian, and military personnel are used to perform certain national defense functions only where it is necessary for there to be a uniformed person.[397] Hence the blurring has occurred through two concurrent approaches: (a) the intentional substitution of civilians in many traditionally military positions, and (b) an increased dependence by the military upon skilled engineers, scientists, and other civilians to assist in research, development, deployment, maintenance, upgrade, and employment of weapons systems. Whether intentionally or through ignorance, the participants in the Diplomatic Conference failed to reconcile the change that has occurred over the past two centuries with the need to distinguish the true civilian from the combatant.

Clearly the work of some "civilians" has become so critical to military success that those individuals are civilians in name and garb only. They remain a very small minority, and their continued protection from attack places the innocent civilian population at risk, while greatly damaging the credibility of the law of war. Who are they, and what impact does Protocol I have upon this issue?

Figure 2 at page 133 divides the civilian population into the four categories considered by the 1971 ICRC Conference of Government Experts and illustrates those points at which certain segments of the civilian population have been the subject of attack. In the author's view, civilians working directly towards the military effort—and this would include those scientists employed on the various research projects such as radar, rockets, etc., during World War II—by the nature of their duties are far more combatants than civilians. Their civilian status should not be permitted to jeopardize the safety from attack of the innocent civilian, whose numbers make up the vast majority of any nation's population.[398]

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highly integrated, sophisticated air defense system was accomplished through the assistance of military and civilian scientific personnel from the Soviet Union, illustrating that the technological and scientific revolutions benefit all.

Civilians were used in combatant positions throughout World War II. The United States, Great Britain, and the Soviet Union relied heavily on partisan forces to fight in the enemy's rear. *See* M. FOOT, SOE IN FRANCE (London, 1966); J. GARLINSKI, POLAND, SOE AND THE ALLIES (London, 1969); D. SCHOENBRUN, SOLDIERS OF THE NIGHT: THE STORY OF THE FRENCH RESISTANCE (1980); C. CRUICKSHANK, SOE IN SCANDINAVIA (1986); and A. BANK, FROM OSS TO GREEN BERETS (1986).

In the Pacific war, civilians, including members of the clergy, were employed as coastwatchers to provide early warning to Allied forces of approaching Japanese ships and aircraft. In addition to their intelligence-gathering, their activities included rescuing downed United States and Allied aviators, and sailors from sinking ships, including the crew of John F. Kennedy's PT–109. The work of coastwatchers in the Solomon Islands was especially critical to United States operations on Guadalcanal. Said Vice Admiral William F. Halsey of their effort: "The coastwatchers saved Guadalcanal, and Guadalcanal saved the Pacific." W. LORD, LONELY VIGIL: COASTWATCHERS OF THE SOLOMONS 292 (1977). *See also* E. FELDT, THE COASTWATCHERS (1946). The language of Protocol I fails to take into consideration the work of such individuals.

397. For example, the aircraft of the Swiss Air Force are maintained by civilians. *The Swiss Confederation*, 5 J. DEF. & DIPLOMACY 30–39, at 33 (June 1987). By the terms of Protocol I, they would be protected from attack so long as they did not pick up a weapon or, if they did, only during the time they used it.

398. For example, Sir Solly Zuckerman cites a U.S. study that concludes that five percent of the total employment in the United States is related to national defense. S. ZUCKERMAN, *supra* note 390. This number would be substantially smaller in most nations, and the number involved in the military effort (as it is defined in this article) would be substantially less, and perhaps as little as one percent of total employment. The failure of Protocol I to recognize the combatant role of that one percent in essence provides those individuals protection from intentional attack, but in so doing places the innocent ninety-nine percent of the population at risk through a loss of credibility for the law of war. The 1941 warning of Professor Philip C. Jessup bears repeating at this point: "The law often lags behind facts, but if it does not correspond to facts it is eventually nullified or modified." Jessup, *supra* note 191.

THE CIVILIAN EXPERIENCE

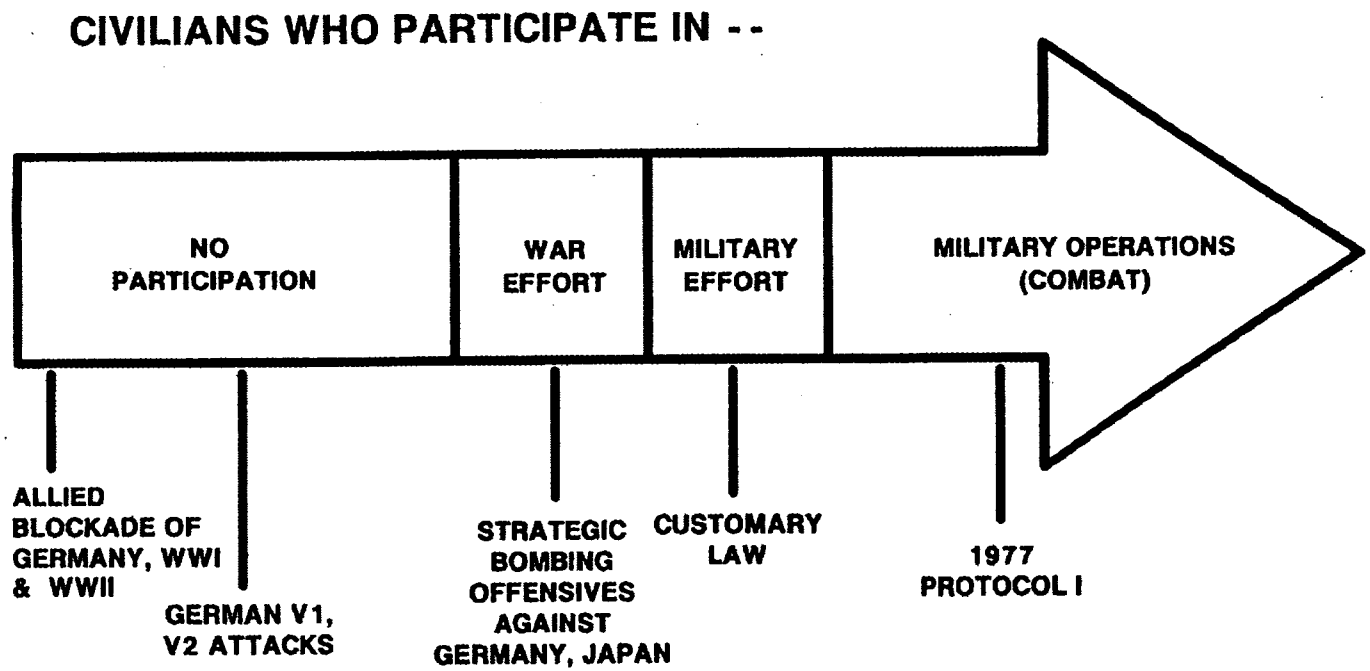

Figure 2.

But Protocol I takes an extreme view, placing "civilians" at risk only when they are actually carrying out combat operations in which harm can come directly to enemy military forces. This is an unrealistic view that ignores the practice of nations, and prompted a continuous debate between two members of the United States delegation to the Diplomatic Conference that will serve to illustrate the impracticality of Protocol I:

> A civilian is driving a military truck filled with ammunition towards his front lines. If the civilian dies incidental to the attack of the truck, there is no crime; but if the driver is attacked directly, the soldier who has fired at him has committed a violation of article 51 (3) and 85 (3) (a) and must be brought to trial for a war crime.[399]

Some legal scholars have endeavored to avoid the issue by suggesting that, for example, if a military base were under attack, civilians employed thereon would be at risk from incidental injury and such injury would not be prohibited. Yet the same scholars, when asked if those civilians may be attacked directly, have stated that such intentional attack would be prohibited.

That answer may reflect the view of Protocol I, but it is not an accurate portrayal of history. For these reasons, the provisions of Protocol I related to the distinction between civilians and combatants were not militarily acceptable to the United States. In essence, a very small portion of a nation's civilian population working directly with a nation's military effort was provided protection from intentional attack to the potential detriment of the overwhelming majority of the civilian population of any nation. That was not regarded as advancing the law of war.[400]

What, then, should be the answer? In the past, that has been a policy decision made by national leaders. If one were to offer some guidelines, however, several points could be made:

> (a) if a civilian's position is important enough for him to be employed on a military base during hostilities, that civilian is at risk from attack during the time in which he is present within that objective, whether his death is incidental to the attack of the military objective or results from a direct attack;
>
> (b) the substitution of a civilian in a position that normally would be occupied by a member of the military will not make that position immune from attack;[401]

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399. The debate was brought to the attention of the author by each of the participants. It was never resolved.

400. The Office of The Judge Advocate General of the Army formally addressed this issue, and concluded that war-essential civilian employees working on a U.S. military base during time of war would be subject to direct attack. Letter from DAJA-IA to Counselor for Defense Research and Engineering (Economics), Embassy of the Federal Republic of Germany (January 22, 1988).

401. For example, the Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities signed by representatives of those nations in Moscow on June 12, 1989, entered into force on January 1, 1990, defines "personnel" as "any individual, military or civilian, who is serving in or is employed by the armed forces of the Parties." 28 INT'L LEGAL MATERIALS 877.

Article II of the agreement then proceeds to obligate each Party to "take necessary measures directed toward preventing dangerous military activities, which are the following activities of personnel and equipment of its armed forces when operating in proximity to personnel and equipment of the armed forces of the other Party during peacetime."

While the definition of personnel was intended for the limited purpose of this agreement, its purpose is clear: if a military person is prohibited from carrying out a particular activity, a Party cannot carry out that activity by employing a civilian in the place of a military person. By analogy to the point at hand, if a position normally would be occupied by a member of the military, the law of war cannot provide immunity from attack for that position if a civilian has been substituted for the military person. Protocol I fails to take this issue into account.

(c) A civilian may be subject to lawful attack if his immunity from military service is based upon the conclusion that continued service in his civilian position is of greater value to a nation's war effort than that person's service in the military.[402]

Protocol I has not resolved this important issue, but rather compounded it. Its danger is greater than a mere exclusion, however, inasmuch as its violation constitutes a grave breach for which the person responsible must be brought to trial. The matter will be resolved only with the passage of time, during which the continued practice of nations will reject the language of the treaty or by actual amendment of the treaty.

Military Objectives and Civilian Objects. Military objectives may be attacked wherever they are located and are defined in article 52 of Protocol I as being "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[403]

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402. This is a position of employment, not an exemption from military service as the sole surviving son, *etc*. Obviously some people who are exempted from military service because of their contribution to the war effort would also be immune from attack, such as individuals involved in medical research, in the same way that medical personnel in the military are protected from attack.

The type of individual who is not a civilian in the traditional law of war sense of the word is the person who is working directly on weapons-related research or assisting in operational intelligence. An example of the latter would be Professor R. V. Jones, who served as the scientific advisor for air intelligence in Great Britain during World War II. Professor Jones informed the author that he declined to put on a uniform at the start of hostilities because he believed that his civilian stature provided him greater authority and "clout," as proved to be the case. Author's conversation with Dr. Jones, Conference on the Conduct of the Air War in World War II, Freiburg im Bresigau, Federal Republic of Germany, 2 September 1988.

As previously noted, one project in which Professor Jones had the principle hand was defeat of the Luftwaffe's *Knickebein* radio-guidance system, which he discusses at length in his MOST SECRET WAR, *supra* note 110, at 92–105, 127–45; *see also* B. COLLIER, *supra* note 1, at 157–58, and A. PRICE, INSTRUMENTS OF DARKNESS, *supra* note 110, at 19–51. The importance of Professor Jones' work is noted by Telford Taylor, who observed that "The early detection and partial frustration of *Knickebein*—a feat then known only to a few—was an early and major British victory in the Battle of Britain." T. TAYLOR, *supra* note 145, at 120. Dr. Jones' work clearly took precedence over uniformed military service, and there is no doubt that he would have been regarded as a legitimate target under customary international law, as would have been the U.S. scientists working on the Manhattan Project (development of the atomic bomb) or the German rocket developments. With regard to the latter, British historian Martin Middlebrook correctly states that "every technical man at Peenemunde was a legitimate target." M. MIDDLEBROOK, THE PEENEMUNDE RAID 218 (London, 1982). Yet all would be protected from intentional attack by Protocol I.

Consideration of the legality of attack on certain quasi-civilians (or quasi-military personnel) who are providing direct support to a nation's military effort should not be taken to the extreme of suggesting that every one of them would be pursued to their homes and attacked. It would take a person of extraordinary importance to a nation's military effort to generate such a mission by an enemy. Such persons generally would be at risk only while at their place of duty. The fundamental problem is not that these people would be sought out individually, but that their intentional attack in the course of an attack of the objective in which they are working not only is prohibited by Protocol I, but constitutes a grave breach under article 85, paragraph 3(a).

A simple example will illustrate the hypocrisy of this rule *vis-à-vis* the traditional law of war rule of protection for innocent civilians. Sergeant Jones serves as an electronic warfare technician in his nation's air force maintaining the radar intercept equipment on frontline fighters. He decides to leave the military. However, his nation recognizes that he is irreplaceable and offers him a civilian position doing the same work at three times the pay. On his last day in the military, he is working on the "black boxes" in one of these fighter aircraft. He is unable to complete the job, so the next day, as a civilian, he picks up the same tools and continues the same maintenance project he was working on the previous day. If his airbase had been attacked on his last day in uniform, Sergeant Jones lawfully could have been attacked. If the base is attacked on his first day as a civilian, an attack on Mr. Jones would constitute a grave breach under article 85, paragraph 3(a), of Protocol I.

403. Article 52 (2), SCHINDLER & TOMAN, *supra* note 27, at 652.

In contrast, article 52 establishes that civilian objects "are all objects which are not military objectives."[404] In case of doubt whether an object normally dedicated to civilian purposes, such as "a place of worship, a house or other dwelling or a school," is being used to make an effective contribution to military action, "it shall be presumed not to be so used."[405] The last requirement was a manifestation of a failure, perhaps intentional on the part of the ICRC acting in its capacity as an agent of Switzerland, to consider the practice of some nations in intentionally camouflaging military objectives to appear as civilian objects.[406] As the language of paragraph 3 would tend to favor a defender over a military force engaged in offensive operations, and encourage a defender to camouflage military objectives as civilian objects, in actual practice the provision ultimately would place the civilian population and legitimate civilian objects at greater risk.

The presumption regarding civilian objects becomes increasingly less realistic as opposing forces move to contact, in that units and personnel from each force will use civilian structures for cover and concealment from enemy observation and fire. This problem was recognized in the course of the Diplomatic Conference, where some delegations proposed that the presumption contained in paragraph 3 of article 52 be relaxed "in the contact zone where the security of the armed forces requires a derogation from this presumption."[407] One commentary explains the debate that ensued:

> The exception was urged on the ground that infantry soldiers could not be expected to place their lives at great risk because of such a presumption. It was also stated that civilian houses which

404. Article 52 (1), *id.*

405. Article 52 (3), *id.*

406. The practice of intentionally camouflaging military objectives as civilian objects should be distinguished from the commingling (intentional or unintentional) of the two.

The language of paragraph 3, article 52 must be read while bearing in mind the practice of Switzerland of camouflaging its defense positions, command centers, and storage facilities as civilian objects, or concealing them within or beneath civilian buildings. This was brought home to the author during his participation in the United Nations Conference on Certain Conventional Weapons (1978–1980), when a Swiss officer pointed out a "house" north of Nyon. The "house" is in fact a wartime military command center, carefully camouflaged as a house, complete with flower boxes and lace curtains. A photograph of the "house" is contained in Parks, *supra* note 5, at 111. The presumption benefits the "house" in Nyon; it is *not* humanitarian.

This type of action is not unique to Switzerland; the author has seen similar steps taken in Sweden, for example. Camouflaging military objectives as civilian objects is an integral part of the defense program in each nation, however, which is a principal reason why the practice is neither prohibited nor discouraged in Protocol I. It could be argued that such a prohibition would not be feasible, as a nation has the inherent right to use its property in its national defense as it pleases. This is not entirely correct, however, as illustrated by the prohibition on the use of military and civilian hospitals for acts outside their humanitarian duties, as contained in article 13 of Protocol I.

During World War II, both the Axis nations and the Allies routinely camouflaged military positions, command centers, *etc.*, as civilian objects, one of the most extensive examples being the Lockheed-Vega aircraft factory and its runway in Burbank, California, that appeared from the air to be a residential suburb—including clothes drying on outdoor clotheslines. Photographs of the aircraft plant before and after its camouflaging are contained in Parks *supra* at 110–11, and London, *Remembering Then*, 4 LOCKHEED LIFE 4–5 (Aug. 1980). For further discussion, *see* S. REIT, MASQUERADE: THE AMAZING CAMOUFLAGE DECEPTIONS OF WORLD WAR II (1978); C. CRUIKSHANK, DECEPTION IN WORLD WAR II (1979); and D. FISHER, THE WAR MAGICIAN (1983). The Reit and Cruikshank books contain numerous illustrations of military positions and equipment camouflaged as civilian objects, including an anti-tank position made to resemble an automobile service station, a pillbox camouflaged as an ice cream stand, and an aircraft hangar disguised as a gamekeeper's cottage.

One commentary has suggested that "The presumption's relation to Art. 37, Prohibition on Perfidy, may affect a not uncommon practice of camouflaging anti-tank gun emplacements to create the appearance of civilian dwellings, particularly along picturesque defiles." The fact that the author viewed the Swiss "house" in Nyon after Switzerland had become a party to Protocol I indicated that this view is speculative at best; certainly it is neither commonly held nor obligatory. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 327.

407. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 326–27.

happen to be in the front lines are usually used as part of the battle position. The Rapporteur recommended approval of the exception: "The presumption . . . will be a significant new addition to the law, and is of the greatest importance that it be respected in practice. It would be unfortunate to draft the provision so that it requires something we know in advance is unlikely to be lived up to."[408]

The proposed exception was rejected by a vote of 36 to 12, with 23 abstentions.[409] Refusal to recognize the realities of combat, as illustrated by this episode, continuously plagued the Diplomatic Conference.

From a military standpoint, the presumption is tailor made for a defender. He may use civilian objects in his defense, exacting significant losses from an attacker who must identify *which* civilian objects are being employed for military purposes before they are attacked. From a historical standpoint, this is a shifting of the obligations previously imposed upon both the attacker and the defender to take all reasonable measures to separate military personnel and equipment from civilian objects and the civilian population as such (as exercised during World War II through the evacuation of civilians from areas near or adjacent to potential military targets). The presumption shifts the burden entirely onto a force engaged in offensive operations. It places an unprecedented obligation on an attacker for the protection of civilian property in the hands of the defender; this obligation will not survive the harsh realities of combat. From a "humanitarian" standpoint, the placing of a higher value on an inanimate civilian object than on human life hardly can be considered humanitarian.

A potential difficulty for the use of airpower in support of troops in close contact is obvious. A beleaguered ground force commander could request close air support to assist him in holding or extricating himself from his position. The aircraft arrive overhead, but find the enemy troops concealed in civilian structures adjacent to the friendly unit positions. Under the terms of paragraph 3 of article 52, the air mission would have to abort "in case of doubt" whether the civilian structures were being used to "make an effective contribution to military action." The problem could be particularly acute where the air assets belong to a nation that is a party to Protocol I, but the nation of the supported ground troops is not, or even if both nations were party to Protocol I, if there were disagreement between the nations regarding interpretation of the presumption.

There have been several attempts at defining "military objective," each of which has been discussed previously.[410] As with consideration of other portions of Protocol I, the United States military review was concerned less with how the Diplomatic Conference arrived at a particular formula than with what it would mean in practice. The ordinary meaning of the language in a particular provision took precedent over the recollections of former members of the American Delegation to the Diplomatic Conference as to the meaning they thought the provision was intended to have at the time it was negotiated. Soldiers on the battlefield do not enjoy the luxury of consultation with the negotiating history of a treaty, and it had become clear that many of the provisions contained in Protocol I had been drafted in language that would permit different nations to come away with different ideas as to what each provision was

408. *Id.* at 327.

409. *Id.* In discussing this debate, the ICRC COMMENTARY states that "Therefore even in contact areas there is a presumption that civilian buildings located there are not used by the armed forces, and consequently it is prohibited to attack them unless it is certain that they accommodate enemy combatants or military objects." ICRC COMMENTARY, *supra* note 247, at 638.

410. See the discussion of article 25 of the 1907 Regulations to Hague Convention IV, articles 1 and 2 of the 1907 Hague Convention IX, article 24 of the unadopted 1923 Hague Air Rules, and article 8, paragraph 1 of the 1954 Hague Cultural Property Convention.

intended to mean. Of particular concern was the meaning of "military action" and "definite military advantage."

It was clear that the ICRC sought to return to the restrictions in range on combat operations sought in the 1923 Hague Air Rules, that is, to force the fighting back to the immediate battlefield. To that end the language regarding "military advantage" mirrored that contained in article 24, paragraph 1, of the 1923 Hague Air Rules. But paragraph 2 of article 24 of the 1923 Hague Air Rules contained a list of specific targets, while paragraph 3 specifically prohibited the attack of targets "not situated in the immediate vicinity of the operations of land forces." Did the ICRC intend to attempt the same range limitation through the language of article 52?

The ICRC response was provided in its *Official Commentary*. Although broader than the list contained in the 1923 Hague Air Rules, its intent clearly was to limit legitimate targets to those objectives connected to a nation's military effort rather than its war effort. The *Official Commentary* offers the following list as a model:

1. armed forces, including auxiliary or complementary organizations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting;

2. positions, installations or constructions occupied by the forces . . . as well as combat objectives (that is to say, those objectives contested in battle between land or sea forces, including airborne forces);

3. installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and other organs for the direction and administration of military operations;

4. stores of arms or military supplies, such as munition dumps, stores of equipment or fuel, vehicles [*sic.*] parks;

5. airfields, rocket launching ramps and naval base installations;

6. those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance;

7. the installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance;

8. industries of fundamental importance for the conduct of the war:

a. industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war materiel;

b. industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces;

c. factories or plant constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military;

d. storage and transport installations whose basic function it is to serve the industries referred to in (a)–(c).

e. installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.

9. installations constituting experimental, research centres for experiments on and the development of weapons and war material.[411]

Although the ICRC list is an improvement over the list of lawful targets contained in article 24(2) of the 1923 Hague Air Rules, it and the definition of military objective in article 52 continue to resemble the philosophy of the 1923 targeting list more than the practice of nations. Each continues to require a nexus to military operations.[412] Each fails to appreciate the necessity for attack on target systems.[413]

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411. ICRC COMMENTARY, *supra* note 247, at 632–33, n.3. In contrast, while AIR FORCE PAMPHLET (AFP) 200–17, *An Introduction to Air Force Targeting* (23 June 1989) incorporates an amended version of the definition of *military objective* contained in paragraph 2 of article 52 of Protocol I (stating that the *military objectives* "include" rather than being "limited to" the objects described therein), paragraph 3–3a continues to state that "The key factor is whether the object contributes to the enemy's *war fighting or war sustaining capability*." [Emphasis added.]

412. As previously noted, military objectives were defined by Air Marshall Trenchard in 1928 as "any objectives which will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight." IV C. WEBSTER & N. FRANKLAND, *supra* note 81, at 96. The practice of nations and the language of AFP 200–17, *supra* note 411, are consistent with Trenchard's definition of military objectives, and inconsistent with the definition contained in article 52, paragraph 2 of Protocol I. The discussion that follows in this text at the point at which Trenchard's definition appears illustrates the fact that the distinction between military and war effort is not always as clear as the "model" ICRC list would attempt to make it.

But the problems of targeting are even more complex. The attack of targets beyond the battlefield occurred during World Wars I and II, Korea, Vietnam, and the recent Iran-Iraq conflict to avoid repetition of the frittering away of vast amounts of manpower as occurred in the trenches of World War I. In each conflict, airpower offered a means for attacking an enemy's ability to wage war. If the enemy's ability to manufacture tanks, ships, aircraft, or small arms were thwarted, it would frustrate his ability to continue the war. Hence destruction or denial of the means to import raw materials was as important as destruction of the plants in which the engines of war were manufactured. *See e.g.*, W. MEDLICOTT, 1–2 THE ECONOMIC BLOCKADE, (London, 1952, 1959), for steps taken by Great Britain to deny critical war materials to Germany and Japan; J. TERRAINE, *supra* note 99, for German U-boat efforts against British import of war materials during the two world wars; and C. BLAIR, *supra* note 293, for U.S. submarine efforts to deny critical war materials to Japan during World War II.

Today, the issue in some conflicts is both the same, and different. Few nations can afford to manufacture all of their own weapons, choosing instead to import them from other nations. Weapons also have become substantially more expensive, and a nation at war must increase its foreign exports if it is to afford the weapons it desires. Hence targeting may emphasize the attack of materials being exported by a nation as a means for acquiring the income to purchase weapons needed to continue its war effort. This is not entirely unique to modern war; Union forces endeavored to deny Confederate export of cotton to finance its war effort during the United States Civil War. *See* F. OWSLEY, KING COTTON DIPLOMACY (1931); V. Jones, I THE CIVIL WAR AT SEA, THE BLOCKADERS 182–83 (1960), and W. SPENCER, THE CONFEDERATE NAVY IN EUROPE 1–2, 5, 94–97 (1983). This also was the case in the "war of the tankers" waged during the 1980s between Iran and Iraq, in which each sought to deny the other the ability to export oil in order to finance its purchase of new weapons. In ignoring the connections between export/import and modern warfare, or in attempting to force warfare back to the immediate battlefield, article 52, paragraph 3 of Protocol I and the ICRC "model" list fail miserably in identifying legitimate targets that will be attacked in any conflict by any nation with the means to do so.

413. Ignorance of the importance of attack of target systems is illustrated by the ICRC's limited list of military targets and by the language of paragraph 3 of article 57 of Protocol I, which states that "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." This paragraph is totally inconsistent with the doctrine of the United States as well as targeting doctrine of NATO and the Warsaw Pact. For example, were attacks made only on "lines and means of communication (railway lines, roads, bridges, tunnels and canals) of fundamental military importance," an enemy simply would switch to other railway lines, roads, bridges, *etc.* An example would be the Allied attack on the German transportation system during World War II, which is described in the UNITED STATES STRATEGIC BOMBING SURVEY, THE EFFECTS OF STRATEGIC BOMBING ON GERMAN TRANSPORTATION, 2d ed. (1947), and in A. MIERZEHEWSKI, *supra* note 20.

Today, national funding for highway construction and maintenance is directly tied to their value to national security. For example, U.S. funding is justified in 23 U.S.C., sec. 101(b), which states:

Neither considers the importance of subcontracting in the manufacture of modern weapons systems, or of dispersion in time of war.[414] Each assumes a greater degree of certainty in the mind of an attacker as to the connection between a segment of a

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It is hereby declared to be in the national interest to accelerate the construction of the Federal-air highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs for local and interstate commerce, for the national and civil defense.

See also 23 U.S.C., §§ 210 and 310–12. Similar provisions exist for the construction of ports, harbors, and airports. One commentary suggests that "Means of transport and communication fall into a category where their use for military purposes cannot be excluded through the presumption [of civilian use contained in paragraph 3 of article 52]." NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 326. This is evident, for example, in the use of the Autobahn in Germany as an airstrip for U.S. Air Force F–16 Falcon fighters and C–130 Hercules transport aircraft during NATO exercises such as REFORGER. The ICRC's list fails to consider the national defense basis on which much modern construction is undertaken. This appears not to be entirely accidental. Swiss construction of civilian buildings, roads and bridges is done with national defense in mind. Swiss-ICRC influence in the negotiation of Protocol I was intended to deny an enemy's right to attack structures, facilities, *etc.*, unless and until some direct connection to military use is established.

Similarly, the destruction solely of petroleum, oil and lubricants (POL) located in (using the ICRC's language) "military stores of fuel" or in "installations providing energy for the national defence" would attack far less than the entire POL system, and merely allow an enemy time to draw POL from "civilian" storage areas and installations or disperse his POL. On Swiss mobilization, for example, strategic components (including POL) normally found in concentrated storage are systematically dispersed while other POL storage is contained underground beneath "civilian" structures. J. MCPHEE, *supra* note 361, at 41.

But the Swiss example is not the only one. In late June and early July 1966, U.S. Navy and Air Force tactical aircraft attacked the Hanoi and Haiphong POL storage facilities. *See* Kasler, *The Hanoi POL Strike*, 26 AIR U. REV. 19–28 (Nov.–Dec. 1974). While the attacks destroyed substantial amounts of POL, equally substantial amounts already had been dispersed and stored in urban areas (usually near schools, hospitals, or in residential areas) and alongside earthwork dikes to shield the POL from attack. Moreover, it would be impossible to say conclusively that the POL stored in the facilities attacked was to be used for military rather than civilian use. As with food, a nation will divert POL from civilian sources to carry out its military operations, and there is no magical process by which a targeting intelligence officer may separate "civilian" POL from that of the military. For discussion of POL as a military asset in modern war and as a target, *see* U.S. STRATEGIC BOMBING SURVEY, OIL DIVISION FINAL REPORT (Jan. 1947); D. PAYTON-SMITH, OIL: A STUDY OF WAR-TIME POLICY AND ADMINISTRATION (London, 1971); R. COOKE & R. NESBIT, TARGET: HITLER'S OIL (London, 1985); and R. GORALSKI & R. FREEBURG, OIL & WAR (1987). The components of POL flow as a target system as illustrated in AFP 200–17, *supra* note 411, at 11, and include all components engaged in the extraction, transportation, distillation, storage, and distribution of POL products, whether distribution is intended for civilian or military use.

It is important to emphasize that there is a distinction between an object being a part of a target system or a lawful target and the likelihood that it will be attacked. For example, at any given time a substantial portion of gasoline for motor vehicles in the United States is located in tanks at individual service stations. In the event of a war, the United States Government could restrict sale of that gasoline through rationing, as it did during World War II, or seize or otherwise procure the gasoline for military use. That being the case, ostensibly the gasoline at private service stations would be part of the POL target system and could be attacked. In practical terms, however, individual gasoline stations would not be attacked because of the "cushion" in the target system, *i.e.*, the total number (approximately 120,000) would make such an effort militarily infeasible. Part of the role of target intelligence is to distinguish critical nodes in target systems from those parts the attack of which would be militarily infeasible. *See* Gilster, *On War, Time, and the Principle of Substitution*, 30 AIR U. REV. 2–19 (Sept.–Oct. 1979). The provisions of article 52 of Protocol I fail to comprehend the targeting process in practical terms.

414. Subcontracting for national defense was the pre-World War II inspiration of Sir Ernest Lemon in Great Britain, but was brought to a substantially higher level of efficiency by Speer in Germany as aircraft and other war materials production was dispersed in order to avoid destruction by the Allied Strategic Air Offensive. Today, for example, components of the Air Force's B–1 and B–2 bombers are built by subcontractors in almost every state of the union.

For discussion of the U.S. experience with enemy dispersion of war materials during the Korean and Vietnam Wars, *see* Haering, *How Tactical Air Works*, 108 U.S. NAVAL INST. PROC. 63, 65 (November 1982); Cagle, *supra* note 396, at 84, 85, 87 and Parks, *supra* note 109, at 8, 15.

target system and military operations than an attacker normally would possess.[415] And each is fundamentally ignorant of the modern target intelligence process.[416]

The principal problems with the definition of military objective contained in article 52 are the phrases requiring that any attack make an "effective contribution to military action" and constitute a "definite military advantage." The first requires that any destruction have a nexus to a "military" rather than strategic, psychological, or other possible advantage. In this the drafters of Protocol I displayed a serious ignorance of the art of war. As Michael Howard has noted, "Wars are not simply acts of violence. They are acts of persuasion or of discussion; and although the threat of destruction is normally a necessary part of the persuading process, such destruction is only exceptionally regarded as an end in itself."[417]

In explanation of this phrase the ICRC *Official Commentary* states that "it is not legitimate to launch an attack which only offers potential or indeterminate advantages."[418] This point is reemphasized by the phrase "under the circumstances ruling at the time," which another commentator has stated does not include "some hypothetical future time."[419] These statements suggest that leaders are possessed of a clearer vision of war and the battlefield than the experience of war reflects. Three historical examples illustrate the problem associated with this narrow view.

On April 18, 1942, twenty-six U.S. Army Air Corps B–25 Mitchell bombers took off from the aircraft carrier U.S.S. *Hornet* (CV–8) to bomb the Japanese mainland.[420] Historians are not in agreement as to the military value of the air strike, but agree that the attack provided a tremendous boost to the morale of the American people after the string of defeats U.S. forces had suffered in the preceding five months.[421]

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415. For example, electric grids are so complex that it is not possible to ascertain whether a given power plant is "providing energy mainly for national defence," as stated in paragraph 8(e) of the ICRC model list. Even were it to be so identified, attacked, and put out of action, power would simply be transferred from another power plant. Power plants in the United States today can transfer power to other plants on the opposite side of the nation, suggesting the infeasibility of the standard contained in the ICRC model list. This capability is not unique to the United States.

416. *See* AFP 200–17, AN INTRODUCTION TO AIR FORCE TARGETING (23 June 1989), chapters 5, *The Target Intelligence Process*, and 6, *Target Analysis*; and the 1989 edition of this pamphlet, *supra* note 411, at chapter 5, *Target Development*. Para. 5–1 of the 1978 edition of AFP 200–17 explains the target intelligence process as "a sequence of steps by which target intelligence and target materials are produced (through the fusion and analysis of multiple sources of intelligence) and used to support operational decision-making and force employment."

417. Strategy and Policy in Twentieth-Century Warfare, HARMON MEMORIAL LECTURES IN MILITARY HISTORY 1959–1987 354 (1988).

418. ICRC COMMENTARY, *supra* note 247, 636. Similarly, the commentary states that "the adjective ('definite') is a word of limitation denoting in this context a concrete and perceptible military advantage rather than a hypothetical and speculative one." NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 326.

419. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257.

420. The attack is described in T. LAWSON, with R. CONSIDINE, THIRTY SECONDS OVER TOKYO (1943); C. GLINES, DOOLITTLE'S TOKYO RAIDERS (1964); C. GLINES, THE DOOLITTLE RAID (1988); and D. SCHULTZ, THE DOOLITTLE RAID (1988).

421. Rodenhauser, *The Doolittle Influence on the Pacific War*, 3 AIR U. Q. REV. 25–30 (Spring 1950), concludes that the Doolittle raid had significant impact on Japanese strategy because the Japanese high command thought the raid originated in Midway, leading to the Battle of Midway, in which the Imperial Japanese Navy suffered a disastrous defeat less than two months later. *See* M. FUCHIDA, MIDWAY, THE BATTLE THAT DOOMED JAPAN: THE JAPANESE NAVY'S STORY (1955) and S. MORISON, IV OFFICIAL HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II, CORAL SEA, MIDWAY AND SUBMARINE OPERATIONS 69–159 (1949). Colonel Rodenhauser's conclusion was based on his interviews with key Japanese military officers as a member of the Military Analysis Division of the United States Strategic Bombing Survey (USSBS). The USSBS report entitled JAPANESE AIR POWER concludes in part that:

> The raid was too small to do substantial physical damage, but its repercussions on the planning level of the high command were considerable. . . . [A]ttention was focused on the eastern approaches

In October 1972, the North Vietnamese delegation walked away from negotiations being held in Paris with the United States in an effort to end the Vietnam War. On December 18, 1971, President Richard M. Nixon authorized the commencement

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to the home islands, and additional impetus given the prewar plan to attack Midway and the Aleutians . . . [and] the Japanese began to implement their plans for air defense of Japan which before that time had received scant consideration. Two new Army fighter groups were organized and based in Japan, and three more were converted from a training to a defense status. A total of four Army fighter groups were held in Japan throughout 1942 and 1943 for the defense of the homeland when the Japanese Navy was urgently demanding that the Army send reinforcements to the Solomons.

UNITED STATES STRATEGIC BOMBING SURVEY, JAPANESE AIR POWER 10 (July 1946).

Colonel Rodenhauser's views are corroborated by one of the more notable histories of the Pacific war. Ronald H. Spector reports that:

The damage actually inflicted by the raid was small, but its psychological effect on the Japanese was all that might have been desired. The army and navy had failed in their duty to safeguard the homeland and the Emperor from attack. . . . All opposition to the Midway operation on the part of the Naval General Staff abruptly ceased.

R. SPECTOR, EAGLE AGAINST THE SUN 155 (1985).

Agreeing with Professor Spector, John Keegan observes that:

The Doolittle raid might . . . have been judged a fiasco if it had not registered with the Japanese high command. The citizens of Tokyo, to whom no public acknowledgment of the raid was made by the government, did not associate the scattering of explosions with an American attack; but the generals and admirals, as servants of the god-emperor, were horrified by the threat to his person the bombing represented.

J. KEEGAN, *supra* note 378 at 271. Similarly, Samuel Eliot Morison notes that:

This 'answer to Pearl Harbor' did not inflict one thousandth part of the damage it was supposed to revenge; but it gave the American public . . . a great lift. The Japanese authorities . . . pinned down hundreds of planes to defend Tokyo. And, what is more important, the event expedited plans for an overextension that led to the Japanese defeat at Midway.

S. MORISON, THE TWO-OCEAN WAR 140 (1963).

The views of other historians on the effect of the Doolittle Raid are mixed. One author notes that:

The raid had done little real damage apart from wrecking ninety buildings and causing the death of fifty civilians. But as the President had foreseen, it scored a direct hit on the morale of the United States. . . . The most far-reaching impact of the Tokyo raid was the psychological effect it had on the [Japanese] Imperial General Staff. The generals and admirals had suffered a tremendous loss of face, and their angry overreaction eventually brought a succession of strategic disasters. . . . [The raid] briefly cheered American spirits, but the Joint Chiefs of Staff, like the [Japanese] Imperial General Staff, saw it as little more than a propaganda raid. They were both to be proved wrong. In the months that followed, Doolittle's raid would prove to have initiated a chain of events through which the United States found the opportunity to dam the tide of Japanese conquest.

J. COSTELLO, THE PACIFIC WAR 235, 236, and 245 (1981). *But see* P. CALVOCORESSI, G. WINT & J. PRITCHARD, TOTAL WAR: THE CAUSES AND COURSES OF THE SECOND WORLD WAR 1030–37 (rev. 2d ed. 1989). The raid does not even receive a mention in M. GILBERT, THE SECOND WORLD WAR (1989).

There are two points that may be drawn from the Doolittle Raid that bear on consideration of the language contained in article 52, paragraph 2 of Protocol I. The first is that while some military operations may not "make an effective contribution to *military action*," as required by article 52(2), they may have significant psychological and strategic value, which is not even contemplated by article 52(2) or any other provision of Protocol I.

The second is that the requirement that an operation offer a "definite *military* advantage" suffers similar problems *vis-à-vis* psychological or strategic gains, and assumes that wartime command decisions can be made with greater certainty than usually exists. As the editor of AIR FORCE QUARTERLY REVIEW commented within the body of Colonel Rodenhauser's article, the Doolittle Raid "transformed into one of those incidents of warfare that yield rich results unplanned or undreamed of when they occur." Protocol I failed completely to consider the fog of war and the speculative nature of many decisions made in war. Rodenhauser, *supra* note 421, at 26.

of Linebacker II: bombing missions against targets in the Hanoi-Haiphong area of North Vietnam relying principally on B–52 heavy bombers. Its principal intention was not military, but to persuade the North Vietnamese to return to the negotiating table. Eleven days later, after they had exhausted their supply of 1,100 SA–2 missiles, the North Vietnamese Government indicated not only its willingness, but its desire, to return to the negotiating table and reach agreement as quickly as possible. The war ended three weeks later.[422]

In April 1986, in response to Libyan-supported terrorist attacks on the Rome and Vienna Airports and on the LaBelle Discotheque in West Berlin, President Ronald Reagan authorized an air strike against terrorist-related targets in Libya. The air strikes, carried out on the night of 15/16 April 1986, by U.S. Air Force, Navy, and Marine Corps aircraft, were intended to have more of a psychological than military purpose, to let Libya and other nations relying on terrorism as a foreign policy means know that the United States would no longer condone state-sponsored terrorism.[423]

In each of the preceding cases, the United States would have been hard pressed to state that there was a "definite military advantage" resulting from the operations described, or that the gain sought was not "potential" or "indeterminate;" the result sought in each was speculative, as are most actions in war, and more psychological than military, although each had military effects. The same may be said for many of the British commando operations and RAF Bomber Command missions in the early phases of World War II, that is, the desire by Prime Minister Winston S. Churchill to take some offensive action in order to bolster the morale of the British people.[424] Does the requirement of article 52(2) regarding a definite *military* advantage prohibit an attack where the principal purpose of that attack is psychological or political rather than military? Such an argument was raised even before the negotiation of Protocol I was completed, but the language of article 52(2) was not amended in such as a way as to address this point or rectify the identified ambiguity.

In a 1975 article, using the language of article 52(2) requiring that an attack have a definite *military* advantage, Professor Hamilton DeSaussure suggested that the 1972 United States Linebacker II bombings against military targets in North Vietnam could be regarded as illegal, as attacks "on military targets may be unjustified when the military advantage to be gained is not significant and political motives for the attack predominate."[425]

These are not the rantings of an extremist or potential enemy. This argument was made by an established international lawyer who enjoyed a long and distinguished career in the United States Air Force before taking up an equally distinguished career teaching international law. Although his argument has been refuted by other international lawyers,[426] it illustrates the ambiguity of Protocol I and the potential danger

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422. *See* Parks, *supra* note 208. M. CLODFELTER, *supra* note 224; and K. ESCHMANN, LINEBACKER 61–214 (1989).

423. *See* Parks, *supra* note 86; and B. DAVIS, QADDAFI, TERRORISM, AND THE ORIGINS OF THE U.S. ATTACK ON LIBYA (1989).

424. With regard to commando operations, *see* H. SAUNDERS, THE GREEN BERET: THE STORY OF THE COMMANDOS (London, 1949); C. MESSENGER, THE COMMANDOS, 1941–1946 (London, 1985); and W. SEYMOUR, BRITISH SPECIAL FORCES (London, 1985). Early Bomber Command operations are discussed in C. WEBSTER & N. FRANKLAND, *supra* note 81; and A. VERRIER, *supra* note 183; N. LONGMATE, *supra* note 183; D. SAWARD, *supra* note 183.

425. DeSaussure & Glaser, *Air Warfare—Christmas 1972*, in LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE 119–39 (1975).

426. *See* Hoopes, *Comments, id.* at 140–44; Thorpe & Miles, *Comments, id.* at 145–49; and Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91–127, at 123 (Fall 1982).

posed to American military personnel in the hands of an enemy. If reasonable men on friendly terms with one another can disagree as to the meaning of a treaty provision, the ability for an enemy to exploit that ambiguity in order to deny prisoner of war protection to captured American military personnel can be neither underestimated nor ignored; and no reservation or statement of understanding can rectify this problem. Refusal of the United States to ratify Protocol I will not necessarily preclude such arguments by a future opponent, but American refusal to ratify Protocol I will preclude the United States from placing its imprimatur on such ambiguous language.

Setting aside this issue, what, then, does the United States regard as lawful targets? The difference between the ICRC model list and customary international law is primarily one of range, but in that respect the two lists literally are miles apart. The practice of nations identified during World Wars I and II has continued over the half-century since the latter conflict, and the target categories previously listed remain valid.[427] The list of targets developed through the customary practice of nations and the listing contained in Air Force Pamplet (AFP) 200–17 are consistent:

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427. *See supra* text at section XII.

428. AFP 200–17, *supra* note 411, at 9. Similarly, AIR FORCE MANUAL 1–1, *supra* note 363, at 3–2, lists as vital targets "concentrations of uncommitted elements of enemy armed forces, strategic weapon systems, command centers, communications facilities, manufacturing systems, sources of raw material, critical material stockpiles, power systems, and key agricultural areas." There are other sources. In 1987 the author was a member of the Moscow Assessment Review Panel (The Laird Commission) appointed by President Reagan to examine the security breaches in U.S. Missions in the Soviet Union. On arrival in Moscow the author received the following "Soviet Regulations on Photography." Through reverse engineering, that is, by examining those objects which may not be photographed or sketched, one may ascertain those objects the Soviet Union regards as lawful targets. The Soviet list coincides with the conclusions of the author with regard to the customary practice of nations and AFP 200–17; each is far more extensive than the ICRC's "model list."

Summary Guidance

Permitted	Prohibited
You are permitted to photograph or sketch, except in those specific places and locations closed to foreign travelers:	You are forbidden to photograph or sketch any of the following:
a. architectural monuments	a. military equipment, installations or facilities
b. cultural, educational or medical institutions	b. seaport harbors
c. theaters, museums, and stadiums	c. fuel storage facilities
d. public parks of culture and rest	d. railroad junctions, tunnels, and railroad and highway bridges
e. streets, squares, and housing	e. hydroelectric installations and electric power stations
f. scenes and landscapes (provided none of the objects listed in the right hand column are in the background)	f. industrial complexes dealing with the production of military equipment
You may also photograph, *after obtaining explicit permission of the management:*	g. scientific research facilities, design offices, and laboratories
a. industrial complexes producing civilian products	h. radio beacons and radio stations

Customary Practice	AFP 200–17[428]
Military equipment, units and bases	Military forces, equipment and facilities
Economic targets - power sources - industry - transportation	Economic targets - industrial complexes - production facilities - transportation
Command and control	Leadership targets - government centers (political)[429] - military headquarters

Permitted	Prohibited
b. state and collective farms	i. telephone and telegraph exchange facilities
c. tractor repair stations	j. Soviet territory from aircraft in flight
d. railroad stations	k. surface panoramic photographs and sketches of industrial complexes
e. river ports	l. in the 25-kilometer frontier (except for the places and cities which foreigners may visit, where you may photograph the objects described in the left column).
f. civilian airports	
g. educational and social organization buildings	

In contrast, open-source material indicates that Soviet KGB (Soviet Intelligence) *Spetsnaz* (Department 8) has the following guidance for targeting at the commencement of hostilities with a view toward complete and total demoralization of the targeted nation through creation of maximum chaos:
(1) key government officials and facilities, regardless of connection with the military or war effort;
(2) public utilities, regardless of connection with the military or war effort; and
(3) general population, regardless of connection with the military or war effort.
The GRU (Soviet Military Intelligence) *Spetsnaz* will attack military and/or sustainability targets. The philosophy of Soviet targeting is explained in Pipes, *Militarism and the Soviet State*, DAEDALUS 1–12 (Fall 1980), where he states that:

> The concept "correlation of forces" frequently used in Soviet literature relates to the science of war by assessing not only the balance of power narrowly conceived to include troops and weapons, but also the entire panoply of nonmilitary factors that come into play when a modern country wages war. . . .
>
> As a consequence of this approach, . . . contemporary Soviet military doctrine places the economic and "moral" cohesion of the home front quite on par with the battle readiness of the military front. The armed forces must be prepared for combat long before the outbreak of hostilities, and so must the civilian population. This line of thinking . . . requires . . . that the line that in noncommunist societies separates the military from the civilian sectors be made much less distinct.
>
> *These considerations apply, of course, not only to defensive calculations, but also to offensive ones.* Given the importance attached to industry, transport, communications, energy, and morale as factors that make for victory, Russian doctrine assigns urgent priority to strikes against these targets.

Id. at 8 (emphasis added).

While *Glasnost* may change one's view toward the probability of war between the Warsaw Pact and NATO in the near term, these lists should be viewed in the light of the worst case, *i.e.*, war, rather than the best, *i.e.*, peace, in considering a nation's thoughts on targeting.

Prior to the outbreak of World War II, the British Home Defence Committee carried out similar reverse engineering in an effort to determine those target categories most likely to be subjected to Luftwaffe attack. The list included factories; commercial oil installations; telegraph, telephone, wireless telegraph and cable systems; lighting and power plants; docks; mills; bridges; places where large quantities of food or other materials were stored, or would be stored; industrial centers; ports; naval, army and air force bases; railway junctions; and manufacturing facilities associated with the aircraft industry. B. COLLIER, *supra* note 1, at 45, 70, and 79.

429. Political targets are undefined, though generally they are regarded as members of the government infrastructure directly involved in managing the war effort. For the purpose of avoiding confusion,

Protection for noncombatants vis-à-vis civilian objects. As previously noted, article 48 of Protocol I obligates a party to that treaty at all times to "distinguish between the civilian population and combatants and between civilian objects and military objectives. . . ."[431] As an expression of the fundamental principle of discrimination, this is a correct statement of the goal of the law of war, i.e., to take reasonable steps to minimize injury to innocent civilians and damage to civilian objects incidental to the conduct of combat operations.

But there exists in the law of war an equally fundamental distinction between the protection of life—all life, including the lives of combatants—and the degree of protection afforded civilian objects. The prohibition on the taking or abuse of human life is unequivocal. But if required by military necessity, civilian objects may be taxed, purchased, requisitioned, seized, confiscated, or destroyed, and damage or destruction incidental to legitimate combat operations is not unlawful unless it occurs as a result of wanton negligence.[432] Thus a building or other form of civilian

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the author prefers the term "command and control" to "political." While a head of state may be a legitimate target in time of war, generally nations at war avoid attack of each other's leader(s) on the basis of comity. In addition, because each nation recognizes that war is not a permanent state, ultimately there must be someone with authority with whom each may negotiate.

430. In the course of its 1977 signing of the 1977 Protocols, the United Kingdom presented a statement of understanding to the effect that "in relation to Article 52, that a specific area of land may be a military objective if, because of its location or other reasons specified in the Article, its total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers definite military advantage." SCHINDLER & TOMAN, *supra* note 27, at 717. An example of a geographic target is an unoccupied mountain pass through which enemy units are about to pass.

431. SCHINDLER & TOMAN, *supra* note 27, at 650. This rule is basic to the entire section (part IV, section I) of Protocol I. But though it was adopted by consensus, it was and remains the subject of disagreement on the question of responsibility between defender and attacker for collateral civilian casualties incidental to the attack of legitimate military objectives. One treatise correctly notes that the

> affirmative obligation to protect actively can have relevance only to the Party that has the capability to take the appropriate protective measures. Generally speaking, this is the Party that has control over the area in which the persons to be protected are located.
>
> The Party which controls the area in which civilians and civilian objects are located is under a strong obligation to distinguish between civilians and combatants by refraining from using the civilian population as a shield for military operations. They are also under an obligation to do what is feasible to take certain specific precautions against the effects of attacks, including the evacuation of civilians, avoiding the location of military objectives in densely populated areas, and to take other necessary precautions which are particularized in article 61 [*e.g.*, warning and evacuation]. It should also be remembered that the obligation to distinguish combatants from the civilian population is for the purpose of promoting the protection of the civilian population from the effects of hostilities. It thus follows that an important share of the responsibility for implementing the principle of distinction rests on the Party which controls the civilian population.

NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 282–84.

The ICRC COMMENTARY observes that France noted that "if there had been a vote, it would have abstained" on the grounds that the article "has direct implications as regards a State's organization and defense against an invader." The delegate from India commented (correctly, in this author's opinion) that:

> [T]his article will apply within the capability and practical possibility of each party to the conflict. As the capability of the parties to distinguish will depend upon the means and methods available to each party generally or at a particular moment, this article does not require a party to do something which is not within its means or capability.

ICRC COMMENTARY, *supra* note 247, at 599.

432. There are certain constraints on the degrees of taking of civilian objects, depending upon whether the property is public or private, movable or immovable. For example, movable cultural property may not be requisitioned, seized, or confiscated. In contrast to the protection of human life, however, *all* types of property may be destroyed in the course of military operations and without compensation if required by military necessity.

object may be destroyed to clear a field of fire or to block an enemy avenue of approach where military necessity dictates; yet military necessity may never be used as a justification for the killing of innocent civilians.[433] Article 147 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War makes this distinction in identifying those acts that are regarded as "grave breaches":

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of rights of a fair and regular trial prescribed in the present Convention, taking of hostages *and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*.[434]

Article 48 of Protocol I places the protection of civilian property on the same level as the protection of civilian lives. This would be a quantum leap over customary practice in protection of civilian property by any military commander, whether attacker or defender, but particularly for an attacker. Paragraphs 2 and 3 of article 57 contain language indicating a similar lack of distinction between damage to civilian property and injury to the civilian population. Paragraph 2(a)(ii) requires a military commander to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians *and damage to civilian objects*. . . ."[435] While paragraph 3 of article 57 states that, "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives *and to civilian objects*."[436]

The grave breach provisions of Protocol I indicate that the lack of distinction between the protection of civilian lives and civilian objects was intended. While paragraph 3(a) of article 85 makes it a grave breach to make the civilian population or individual civilians only the object of an attack, paragraph 3(b) makes it a grave breach to launch "an indiscriminate attack affecting the civilian population *or civilian objects* in the knowledge that such attack will cause excessive loss of life, injury to civilians or *damage to civilian objects*. . . ."[437]

The domestic law of the United States, derived from English common law, clearly values life over property. In law of war practice and in common sense terms, a distinction exists between the two; civilian property has never been given the same degree of protection from damage as civilian and combatant lives from the risk of injury or death. Again, as a general rule, the language of article 48 states every pilot's ideal, that is, to place "bombs on target" while distinguishing legitimate

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433. *See* 2 OPPENHEIM'S INTERNATIONAL LAW, DISPUTES, WAR AND NEUTRALITY 413 (H. Lauterpacht ed., 7th ed. London, 1952) [hereinafter LAUTERPACHT]. Destruction of a civilian object to clear a field of fire may or may not make that civilian object a military objective, as that term is defined in article 52 of Protocol I. Thus a commander setting up his defense of a position may not be sure of the direction from which the enemy is likely to attack, and may destroy civilian structures to clear a field of fire or to obstruct possible avenues of approach. Unless and until he knows precisely the direction of the enemy attack, it would be difficult for him to meet the rather stringent test that his actions offer a "definite military advantage" as required by article 52, paragraph 2. Neither the ICRC COMMENTARY (*supra* note 247, at 635–37) nor the NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 323–27, are of assistance in providing guidance.

434. SCHINDLER & TOMAN, *supra* note 27, at 547 (emphasis added). For discussion of the property phrases of article 147, *see* GC COMMENTARY, *supra* note 208, at 601.

435. SCHINDLER & TOMAN, *supra* note 27, at 654–55 (emphasis added).

436. *Id.* at 655 (emphasis added).

437. *Id.* at 671.

targets from innocent civilians and civilian objects. But as a legally binding rule, Protocol I has raised the protection of civilian objects to an unprecedented, unrealistic and unacceptable level.

The distinction in values between civilian lives and property can be illustrated by two hypothetical situations. An aircraft enroute to its target is seriously damaged by enemy anti-aircraft fire. The pilot decides that he must jettison his bombs if he is to keep his aircraft in the air. He realizes that he has two choices: if he jettisons them immediately, they will fall in a schoolyard full of children; if he delays a matter of a few seconds, his bombs will strike a farmer's barn. Assuming he has this choice, there seems to be no question but that the destruction of the barn would be of less consequence than dropping the bombs in the schoolyard, even if there were only one person in the schoolyard.

In the second scenario, a commander of an armored column pursuing a retreating enemy force finds his route of advance through a city clogged with civilian refugees. He tries in vain to move the refugees out of the way. He has two options: he may continue his advance on the road, with the refugees assuming the risk for any injuries they may incur, or he may "make a road" by destroying some of the structures in the city. (A third option, machinegunning refugees who refuse to move, clearly is out of the question.)

Once again, if all other factors in the hypothetical situation are equal, the choice remains clear: civilian lives take precedence over the protection of any form of civilian property, as they have throughout the history of warfare and of the law of war. In considering the protection of civilian property *vis-à-vis* the protection of *any* life, however, including the lives of combatants, the protection of life always will take precedence. Given a choice between the damage or destruction of a civilian building and the loss of a single life among the personnel of his command, most military commanders would opt for preserving the lives of their men. While this may not be true of all nations, most certainly it is true with regard to American values. As one historian has observed,

> To Americans, flesh and blood have always been more precious than sticks and stones, however assembled. An American commander, faced with taking the Louvre from a defending enemy, unquestionably would blow it apart or burn it down without hesitation if such would save the life of one of his men. And he would be in complete accord with American ideals and ethics in doing so. . . . If bombing and artillery would save lives, even though they destroyed sites of beauty and history, saving lives obviously had preference . . . .[438]

The practical difficulties of the presumption regarding civilian objects contained in paragraph 3 of article 52 have been discussed previously.[439] The provisions in articles 48, 52(3), 57(2)(a)(ii) and (3), and 85(3)(b) establish an intent in Protocol I

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438. T. FEHRENBACH, *supra* note 303, at 234. The same distinction is made in General Eisenhower's 1943 admonishment to his forces, as quoted in full at *supra* note 215, where General Eisenhower stated that "If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count infinitely more and the building must go." The author, who has experienced the unpleasant task of writing letters to the next of kin of men in his command who died in combat, can imagine the language of a letter to an American family from the military commander of a soldier killed in action were the United States to follow the Protocol I requirements under discussion. The letter would contain a sentence to the effect that "Your son's life was lost because there was this vacant house . . . ," or "Your son gave his life not in defense of his country, but so that an abandoned barn could remain standing another day . . . ," or words to that effect. The response from the dead soldier's family (in all likelihood transmitted by way of the family's United States Senators and Congressman) would be swift and certain.

439. As discussed in conjunction with *supra* notes 407–09.

to give priority to the protection of inanimate civilian objects over the lives of combatants. In placing civilian property protection on an equal footing with civilian lives, particularly if such protection must be advanced at risk to American combatant lives, Protocol I jeopardizes the continued credibility of the law of war.[440] It also places U.S. military personnel captured by enemy forces at unnecessary risk of spurious allegations of violations of the law of war in cases where civilian property has been damaged or destroyed in the ordinary conduct of combat operations.

Responsibility for collateral civilian casualties. Two issues relate to consideration of the Protocol I provisions regarding the responsibility for collateral civilian casualties: (a) the question of responsibility as such; and (b) the so-called rule of proportionality. The two are inextricably intertwined, and must be discussed together.

Unavoidable collateral casualties among the civilian population or other protected persons are an unfortunate but inevitable part of war. Thus article 15 of the 1863 Lieber Code provides that, "Military necessity admits of all direct destruction of life or *armed* enemies, and of *other persons* whose destruction is incidentally *unavoidable* in the armed contests of war."[441]

Similarly, certain provisions in the Annex to Hague Convention IV of 1907 have been interpreted as prohibiting the use of weapons or means of warfare in a manner that would be tantamount to the intentional attack of the enemy's civilian population.[442] The difficulty has been in narrowing the ground between that which is unavoidable and that which is prohibited. Certain World War II aerial bombardment practices illustrate the necessity for narrowing the difference in order to provide better protection for the innocent civilian.[443]

Various factors have entered into the equation in the past. The first is the general attitude that collateral civilian casualties are the "cost of doing business," that is,

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440. While one treatise suggests that the "military advantages" to be weighed by a commander in attacking a military objective include "the security of the attacking force" (NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 324), the ICRC COMMENTARY makes no such allowance.

441. SCHINDLER & TOMAN, *supra* note 27, at 6.

442. For example, article 22 provides that "The right of belligerents to adopt means of injuring the enemy is not unlimited," while article 23 provides that "[I]t is especially forbidden . . . (e) To employ arms, projectiles, or material of a nature to cause superfluous injury." SCHINDLER & TOMAN, *supra* note 27, at 82–83. The latter provision has been interpreted to protect the combatant from weapons that cause unnecessary suffering and to protect the civilian population from indiscriminate attack.

443. For example, while Allied aircrews generally exercised caution with regard to the jettisoning of bombs over Nazi-occupied territory (such as France, Belgium, Norway or the Netherlands) to protect the civilian population in those countries, there was a widespread practice within those same air forces of jettisoning munitions over Germany without any consideration for injury to innocent civilians. The same was true with regard to the selection of targets of opportunity. Where mission targets could not be attacked owing to weather or other difficulties, any German town could be attacked, whether it contained military objectives or not. *See* C. MCBRIDE, MISSION FAILURE AND SURVIVAL 39–40, 74, 79 (1989). *See also* Davis, *Bombing Strategy Shifts, 1944–45*, 36 AIR POWER HIST. 33–45 (Winter 1989), in which the following 1944 Eighth Air Force directive regarding attack of secondary and Last Resort Targets is quoted:

> 1. No towns or cities in Germany will be attacked as secondary or last resort targets, targets of opportunity, or otherwise, unless such towns contain or have immediately adjacent to them, one (1) or more military objectives. Military objectives include railway lines; junctions; marshalling yards; railway or road bridges; or other communications networks; any industrial plant; and such obvious military objectives as oil storage tanks, military camps and barracks, troop concentrations, motor transport or AFV parks, ordnance or supply depots, ammunition depots; airfields; *etc.*
>
> . . . .
>
> 3. It has been determined that towns and cities large enough to produce an identifiable return on the H2X [airborne radar bombsight] scope generally contain a large proportion of the military objectives listed above. These centers, therefore may be attacked as secondary or last resort targets by through-the-overcast bombing technique.

engaging in war; this has been discussed. Another factor is the belief that responsibility for the minimization of collateral civilian casualties lies primarily, if not exclusively, with the nation with control of the civilian population, and with the individual civilian. This is evidenced by the steps taken prior to and during World War II to develop civil defense measures in each nation, also previously discussed.

The number of civilian deaths attributable to combat operations (aerial bombardment, artillery fire, etc.), notwithstanding precautions on the part of a defender, serves as a tragic illustration of the necessity for additional measures of protection or precaution if the loss of innocent civilians is to be narrowed to an absolute, unavoidable minimum. There is little doubt that most nations agree that the death of innocent civilians accomplishes nothing in the achievement of any nation's war objectives; it strikes at the very heart of the reason for the law of war. The difficulty, however, lies in writing rules for the use of force that do not provide one side a potential advantage over its opponent, whether perceived or actual. This was the difficult task laid before the delegations at the Diplomatic Conference.

Several provisions in Protocol I relate to concern for collateral civilian casualties. The first is the requirement in article 48, for both the defender and attacker in their military operations to distinguish between the civilian population and military objectives.[444] With regard to specific requirements, paragraph 1 of article 57 provides that, "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."[445]

Portions of paragraph 2 of article 57 elaborate the responsibilities expected of a military commander in providing this care:

> With respect to attacks, the following precautions shall be taken:
>
> (a) those who plan or decide upon an attack shall:
>
> (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of article 52 and that it is not prohibited by provisions of this Protocol to attack them;
>
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
>
> (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
>
> (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[446]

In an attempt to balance the responsibility for minimization of collateral civilian casualties and collateral damage to civilian objects, article 58 of Protocol I states that:

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444. *See* discussion at *supra* note 431.
445. SCHINDLER & TOMAN, *supra* note 27, at 654.
446. *Id.* at 654–55. Paragraph 5 of article 57 admonishes that "No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."

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

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

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

(c) take the necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.[447]

Other provisions in Protocol I complement the requirements of articles 57 and 58. Paragraph 7 of article 51 provides that:

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor, or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attack or to shield military operations.[448]

However, in apparent recognition of the practice of some nations that would constitute a violation of article 51(7), paragraph 8 of article 51 states that, "Any violation of these provisions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in article 57."[449]

The concept of proportionality was codified into several provisions within Protocol I. The previously-quoted paragraphs 2(a)(iii) and (b) of article 57 constitute attempts to address this concept. In a related vein, paragraph 5(b) of article 51 defines as indiscriminate "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[450] Paragraph 5 also condemns as indiscriminate "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian

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447. SCHINDLER & TOMAN, *supra* note 27, at 655–56. Article 49 of the Fourth Convention (the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War) provides in part that:

> Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.
>
> The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

SCHINDLER & TOMAN, *supra* note 27, at 516.

448. SCHINDLER & TOMAN, *supra* note 27, at 651–52.

449. *Id.* at 652.

450. *Id.* at 651. As noted in the text accompanying *supra* notes 17–18, the principle of *discrimination* and the concept of *proportionality* are not synonymous.

objects,"[451] while paragraph 3 of article 85 specifies those offenses that will be "grave breaches" in those instances where certain of these provisions are violated.[452]

On their face, the cited provisions appear to offer battlefield commanders a reasonable set of standards that will provide protection for civilians not participating in the hostilities[453] without unduly hindering a commander's accomplishment of his mission. But appearances can be—and are—deceiving. As with previously-discussed articles in Protocol I, the drive for consensus in articles 48–58 necessitated agreement on provisions that are purposely vague, concealing substantial differences among the delegations.[454] The problems with articles 48–58 are far more basic, however.

A fundamental problem in modern war is the commingling of the civilian population and civilian objects with military objectives, and/or the dual use of certain objects for civilian and defense-related purposes.[455] This problem has been discussed previously in conjunction with the definition of military objectives contained in article 52 of Protocol I. In that context, however, it was considered with regard to what may be considered a legitimate target. Commingling also places individual civilians and the civilian population as such at risk incidental to an opposing force's attack on legitimate targets, and it is in that context that the minimization of collateral civilian casualties requires consideration.[456] The problem was recognized prior to World War II. For example, British authorities concluded that the 1923 Hague Air

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451. *Id.*

452. To wit:

> (a) making the civilian population or individual civilians the object of attack;
>
> (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a) (iii); and
>
> (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a) (iii).

Id. at 671.

453. A matter itself subject to disagreement in interpretation, as indicated previously.

454. An indication of this is the fact that more reservations and statements of understanding have been made with respect to articles 48–58 by nations that have signed, ratified or acceded to Protocol I than all other portions of the treaty combined.

455. A classic photograph from World War II is that of the magnificent Cologne cathedral standing amidst the ruins of that great city. Several different views are illustrated in E. TAYLOR, *supra* note 3, and W. RANKE, *supra* note 3; another is contained in Parks, *supra* note 5, at 99. The latter illustrates the problem of commingling. To the immediate left of the Cologne cathedral is the *Hauptbahnhof*, or principal railroad passenger terminal, through which civilian and military passengers passed, along with freight trains. The tracks progressed in one direction five hundred meters to the *Guterbahnhof Gereon*, major marshalling and switching yards. Immediately behind the *Hauptbahnhof* and the cathedral flows the Rhine River, across which runs the Mullheim railway bridge which connects the *Guterbahnhof Gereon* and the *Hauptbahnhof* to another marshalling yard. The Rhine itself was a major line of communication for the movement of bargeloads of raw materials for manufacture of military equipment, war supplies, and civilian goods throughout the war. On October 14, 1944, the Mullheim bridge was blasted into the Rhine incidental to the airstrike directed against that city, effectively interdicting Rhine River traffic at that point for the duration of the war, notwithstanding superhuman efforts to remove the obstacle. 200 UNITED STATES STRATEGIC BOMBING SURVEY, THE EFFECTS OF STRATEGIC BOMBING ON GERMAN TRANSPORTATION 2, 5 (2d ed. 1947). The inevitability of collateral civilian casualties and damage is a direct result of the commingling of civilian objects and military objectives that exists in modern society.

456. As previously indicated, the author does not accept as valid or practical the Protocol I emphasis on protection of civilian objects from collateral damage *vis-à-vis* the risk of loss of life to combatants. The Protocol I approach has little humanitarian value. The analysis that follows will concern itself only with the practical problems of minimization of collateral civilian casualties.

Rules would provide "no appreciable protection" for the civilian population because of the problem of commingling, and accordingly developed an elaborate program for the protection and/or evacuation of the civilian population.[457]

In customary international law the primary responsibility for preventing collateral civilian casualties rests with the defender and the individual civilian, with little or no responsibility imposed upon an attacker.[458] The reason for the existing rule is simple. Under most circumstances, the attacker has no idea where civilians are located and, except for a warning, has no way of controlling the location or movement of individual civilians or the civilian population; the civilian population is in the exclusive control of the defender.

The practice of *all* nations that carried out aerial bombardment operations during World Wars I and II establishes clearly that *no* nation concerned itself with the risk of injury to the civilian population of an enemy nation incidental to the conduct of military operations. Protocol I constitutes an improvement in the law of war in recognizing that an attacker should, in most cases, give consideration to minimiza-

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457. I. O'BRIEN, *supra* note 111, at 18.

458. For example, The British Air Raid Precautions Committee (A.R.P.), which began meeting in May of 1924, determined in the 1930s that:

> "Total war" would be met, in the first instance, by democratic self-help, with responsibility placed squarely in each local community and factory to take the major part in organising its own defences. Service in the A.R.P. was to be looked upon by the individual citizen less as a new form of national service than as service to the particular community in which he lived or carried on his business.

Id. at 14, 284. State responsibility for evacuation of civilians was discussed in the text accompanying *supra* note 111. Two further illustrations are as follows:

From June to September 1939, more than 3,500,000 British civilians were moved by authorities from areas that were believed most likely to be the targets of Luftwaffe bombing attacks. During the month of September 1939, alone, "an incredible quarter of the population [of London] had changed their address, including 825,000 schoolchildren, 624,000 mothers with children under school age, 13,000 expectant mothers, 7,000 blind people, and 113,000 schoolteachers." B. WICKS, NO TIME TO WAVE GOODBYE 32 (1988).

North Vietnam issued its first order for evacuation of nonessential civilians from the vicinity of Hanoi on February 28, 1965, two days *before* the United States commenced its Rolling Thunder bombing campaign. Only 50,000 persons heeded the order, many of whom subsequently drifted back to their homes once the precise nature of Rolling Thunder was realized. In late 1967, however, as the bombing briefly intensified, mandatory evacuation decreased the civilian population of Hanoi from 600,000 to 400,000. One report stated that:

> Many towns, particularly in the Hanoi/Haiphong area, with their small industry and their local government agencies, have literally moved everthing into the countryside to escape the bombing. The North Vietnamese leave for the country early in the morning and return to their homes in town in the evening. In the Hanoi area, many towns conduct their entire daily business in the suburbs and outlying regions.

Butler, *Analysis and Evaluation of Enemy Capabilities to Degrade Out-Country Interdiction Tactics*, AIR. U. RES. REP. 3575, at 67 (Maxwell Air Force Base, Ala., April 1968). In the lull between the subsequent Linebacker bombing campaigns of 1972, officials on December 4, 1972, ordered the evacuation of all women, children and elderly persons from Hanoi. M. CLODFELTER, *supra* note 224, at 136, 197; Parks, *supra* note 208, at 17.

That most civilians recognize their responsibility to remove themselves from the vicinity of hostilities could be characterized as nothing more than a commonsense rule of self-preservation. It can be illustrated by the fact that in the opening days of the German invasion of France in May 1940, as many as two million Dutch and Belgian civilians and eight million French refugees left their homes to avoid the German advance and hostilities between German and French forces. A. HORNE, TO LOSE A BATTLE: FRANCE 1940 451 (1969).

Chapter VI of Protocol I (articles 61–67) provides protection for civil defense personnel and units. However, it does not obligate a nation to establish a civil defense program for the protection of the civilian population except in occupied territories.

tion of collateral civilian casualties. The issue is the degree to which an attacker should assume this responsibility. If the new rules of Protocol I are to have any credibility, the predominant responsibility must remain with the defender, who has control over the civilian population. A serious stumbling point for Protocol I is that the new rules were seen by some of its drafters, and have been seen by some proponents of the new rules (in most cases the same nations, groups or individuals), as a way of *preventing* attacks entirely. Such a view is unrealistic. Any law of war rule that offers the potential for a military advantage for the defender over the attacker, or vice-versa, is a rule doomed to failure. It not only would increase the risk to the innocent civilian, but in all likelihood would jeopardize the credibility of the law of war itself.

There is no doubt that an attacker can take certain measures to minimize collateral civilian casualties, and bears a reasonable measure of responsibility for doing so. In the 1972 Linebacker II B–52 air strikes against targets in the vicinity of Hanoi and Haiphong, for example, and in the face of the most intense and sophisticated air defenses in military history, measures were taken by aircrews that permitted them to execute and survive their missions while reducing civilian casualties to one of the lowest levels in the history of aerial bombardment.[459] Fourteen years later, U.S. Air

459. For example, Strategic Air Command B–52 radar navigators were briefed to return from their missions without dropping their bombs unless they were one hundred percent certain of their aiming point. All B–52 target maps contained the locations of schools, hospitals, and POW camps, and briefers brought such sites to the attention of a crew if its bomb run was in the proximity of any such object. M. CLODFELTER, *supra* note 224, at 191; and Parks, *supra* note 208, at 19–20. As a result of these and other precautions, the author's research and calculations reveal the following ratio of civilian deaths per ton of bombs dropped during the twelve days of Linebacker II, as compared to other historic bombing missions:

Target	Date(s)	Bomb Tonnage	Civilian Deaths	Deaths per Ton of Bombs
Guernica	26 Apr 1937	40.5	1,654	40.83
Great Britain	Battle of Britain (June–Dec 1940)	40,885	23,002	.56
Coventry	14 Nov 1940	533	568	1.06
Hamburg	24–30 July 1943	5,128.12	42,600	8.03
Remscheid	30–31 July 1943	860	1,120	1.30
Darmstadt	11 Sept 1944	979	8,433	8.61
Dresden	14–15 Feb 1945	7,100.5	25,000	3.52
Tokyo	9–10 Mar 1945	1,655	83,793	50.33
Osaka	13–14 Mar 1945	1,732.6	3,988	2.30
Linebacker II	18–29 Dec 1972	20,237	1,623	.08

For a detailed discussion of the Linebacker II missions, as well as most of these figures, *see* Parks, *supra* note 208. The figures reported therein for Linebacker II tonnage and "civilian" casualties have been amended based on additional information. Strategic Air Command B–52 aircraft delivered 15,000 tons of bombs, while Air Force, Marine Corps and Navy tactical aircraft dropped an additional 5237 tons. The original article considered only the 1318 casualties reported from Hanoi by North Vietnamese officials; another 305 died in Haiphong. M. CLODFELTER, *id.* at 195. However, the deaths per ton of bombs remained the same incredibly low .08, even accepting the North Vietnamese claim that all dead were in fact entitled to classification as noncombatants, and that all deaths could be attributable to combat actions by United States forces.

Force F–111F aircrews in April 1986 attacked terrorist-related targets in Tripoli, Libya, while operating under rules of engagement that maximized concern for collateral civilian casualties.[460] Similarly, American ground and air forces involved in the 1983 Grenada rescue operation and the December 1989 operation to install the democratically-elected government in Panama exercised precautions to protect the lives of individual civilians and the civilian population that exceeded the requirements of Protocol I.[461]

Each of these examples illustrates the basic fact that an attacker can take precautions to minimize collateral civilian casualties. But each should be considered in the context in which it was executed. Linebacker II was an operation with extremely limited objectives, and as a result targets were approved only if they were removed from populated areas, were large enough to ensure that the B–52 bomb train would fall entirely within the target, and could be approached on an axis of attack that avoided overflight of populated areas.

The 1986 Libyan airstrike also had a limited objective, that is, to dissuade Moammar Gadhafi from his continued use of terrorism as a foreign policy tool. Although a target located in a populated area was selected for attack (Aziziyah Barracks, Gadhafi's military headquarters), steps were taken to provide maximum protection to the civilian population. The target had large dimensions—roughly equivalent to the area covered by the Pentagon and its vast parking lots—and the attack was carried out late at night in part because it was known that the civilian population would be off the streets. Following the guidance provided by higher authority, aircrews established mission parameters, including weapons selection, to take all measures possible to minimize the risk of collateral injury or damage. Stringent rules of engagement for the F–111F aircraft assigned to attack Aziziyah Barracks led to a number of aircrews abandoning their mission rather than drop their 2,000-pound GBU–10 laser-guided bombs. Although the weapon itself was selected because of its extremely accurate delivery parameters, and notwithstanding the fact that the aircrews still had the capability to bomb accurately, abandonment of the mission was the result.

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460. *See* Parks, *supra* note 86, and Parks, *Righting the Rules of Engagement*, 115 U.S. NAVAL INST. PROC. (May 1989), for discussion of the United States airstrike against Libya.

461. The best analysis of the 1983 Grenada rescue operation is M. ADKIN'S URGENT FURY: THE BATTLE FOR GRENADA (1989). The United States emphasis on minimizing civilian casualties during the Panama operation is illustrated by the use of Marine Corps and Army light infantry forces and certain special operations units *vis-à-vis* firepower (artillery or airpower) to attack the Panamanian Defense Forces. This emphasis paralleled the Grenada experience. In each case, however, operations were carried out in the midst of a friendly (or at least benign, as opposed to hostile) population against relatively limited resistance.

A nation may impose limitations upon its forces that are more stringent than those contained in the law of war. For example, consider the way in which U.S. Air Force aircraft were employed in Operation JUST CAUSE, the American military incursion into Panama that commenced on 20 December 1989, to oust dictator Manuel Noreiga and to allow the democratically-elected government of Guillermo Endara to assume office. In the few minutes before U.S. Army Rangers landed near the Rio Hato barracks of the 6th and 7th Rifle Companies of the elite Battalion 2000 of the Panamanian Defense Forces (PDF), United States Air Force F–117A "stealth" fighter-bomber aircraft dropped 2000-pound bombs at the PDF barracks. Originally the barracks, and the PDF forces they housed, were the F–117A targets. The law of war unequivocally recognizes military barracks and the military personnel within them as legitimate targets. But the F–117A mission was changed to drop the bombs on a field near the barracks to confuse, stun and disrupt the PDF rather than kill them. This was because of the desire by American national leaders to accomplish the mission while minimizing alienation of the people of Panama—including PDF members and their relatives. The F–117A aircraft was selected for its precision bombing capabilities, rather than for its "stealth" characteristics. *See* Wilson, *"Stealth" Plane Used in Panama*, Wash. Post, Dec. 24, 1989, at 1; *Cheney Praises Stealth Jets' Role in Strike*, L.A. Times, Dec. 26, 1989, at 12; Morrocco, *F–117A Fighter Used in Combat for First Time in Panama*, 132 AVIATION WEEK & SPACE TECH. 32–33 (Jan. 1, 1990); Wilson, *Panamanian Commanders Fled Their Posts, Thurman Says*, Wash. Post, Jan. 6, 1990, at A13; and Jehl, *Ranger Force Bore Brunt of Panama Toll*, L.A. Times, Jan. 7, 1990, at 1.

In the Grenada and Panama operations, emphasis was placed on infantry operations under circumstances where firepower (air support or artillery) normally would be employed in a conventional combat environment. This suggests the distinction that United States military and civilian authorities placed on these operations. In each case, given the limited objectives of each mission or operation, American authorities were willing to assume a greater degree of responsibility for minimization of collateral civilian casualties than required by customary law or Protocol I, or that would be acceptable in general war.

The preceding examples illustrate the fact that the United States believes an attacker should accept some responsibility for minimization of collateral civilian casualties. But rules in a law of war treaty must be capable of application across the conflict spectrum. A nation's willingness to assume a greater responsibility for minimization of collateral civilian casualties in peacetime or in a military operation where objectives are limited and national survival is not threatened is not an adequate test for new rules; rules must be considered in the context of the worst case rather than the best. In examining the rules contained in Protocol I, there are two principal difficulties in determining the degree to which an attacker must assume responsibility.

The first is the degree of responsibility, consistent with mission accomplishment and security of the attacking force. The provisions of article 57 require that a commander "do everything *feasible*"[462] or "take all *feasible* precautions"[463] in order to minimize collateral civilian casualties. Protocol I fails to define *feasible*, however. In the course of the Diplomatic Conference the NATO allies defined the term as "that which is practicable or practically possible, taking into account all circumstances ruling at the time, including those relevant to the success of military operations."[464]

At the time of their respective ratifications of Protocol I, Switzerland and Austria took reservations to paragraph 2 of article 57 to the effect that the information available at the time of the decision is decisive as to the steps required of a commander.[465] The *ICRC Commentary* rejects the NATO-nation definition with an

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462. Article 57(a)(i).

463. Article 57(a)(ii).

464. Statement of the United Kingdom at the time of signature (12 December 1977), as found in SCHINDLER & TOMAN, *supra* note 27, at 717. India "expressed the understanding that Art. 57 as a whole will apply in accordance with the limits of capability, practical possibility and feasibility of each Party to the conflict. . . . These capabilities will vary, and 'this article does not require a Party to undertake to do something which is not within its means or methods or its capability. In its practical application, a Party would be required to do whatever is practical or possible.' " NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 362, n.8.

Subsequently the term *feasible* was defined in paragraph 5 of article I of Protocol III (Incendiary Weapons) of the 1980 United Nations Conventional Weapons Convention as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." SCHINDLER & TOMAN, *supra* note 27, at 190. The statements upon ratification of the 1977 Protocol I of Belgium (*Id.* at 707), Italy (*Id.* at 712), and the Netherlands (*Id.* at 714) reflect the wording contained in this definition.

465. ICRC COMMENTARY, *supra* note 247, at 682, n.9. As indicated earlier, the Protocols were heavily influenced by Swiss diplomatic authorities, but were not the product of the closest of coordination with Swiss military authorities. The Swiss military review was highly critical of Protocol I, and the Government of Switzerland managed to obtain consent for ratification only after heavy lobbying by the ICRC and diplomatic officials who argued that it would be a substantial embarrassment if Switzerland did not ratify, because (a) the Diplomatic Conference had been financed and hosted by Switzerland, and (b) the Protocols were home grown, *i.e.*, a product of the ICRC. The Swiss reservation to paragraph 2 of article 57 was a concession demanded by the Swiss military before consenting to ratification.

explanation that repudiates the basis for the Swiss and Austrian reservations as well, stating that:

> The last-mentioned criterion [success of military operations] seems too broad, having regard to the requirements of . . . [article 57]. There might be reason to fear that by invoking the success of military operations in general, one might end up by neglecting the humanitarian obligations prescribed here . . . . What is required of the person launching an offensive is to take the necessary identification measures in good time in order to spare the population as far as possible. It is not clear how the success of military operations could be jeopardized by this.[466]

The ICRC statement illustrates a basic problem in implementation of the requirements of Protocol I. It also manifests the lack of appreciation by the ICRC of military operations. Most important, it indicates the radical shift intended by the ICRC and certain nations from the customary practice of nations with regard to responsibility for minimization of collateral civilian casualties.

A standard has been arrived at in a law of war treaty that has been praised for its "consensus"—yet there is no agreement on what the standard really means. One would hope that common sense and good faith would be the basis for the implementation of any law of war treaty. But on the battlefield, general, hortatory statements lose their value if they fail to follow common sense or established battle procedures and the principles of war. Moreover, lack of agreement places military commanders at undue risk of war crimes allegations for good-faith decisions made in the heat of battle and the fog of war.

Two essential elements appear to have been lost in the process to date. The first is the principle of war of *surprise*. It has been recognized in the codified law of war throughout this century. Article 26 of the Annex to Hague Convention IV of 1907 provides: "The officer in command of an attacking force must, before commencing a bombardment, *except in cases of assault*, do all in his power to warn the authorities."[467] This has been amended by paragraph 2(c) of article 57 of Protocol I,

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466. ICRC COMMENTARY, *supra* note 247, at 682. As will be noted in the adoption of a similar definition in the 1980 United Nations Conventional Weapons Convention, contained in *supra* note 460, the rationale of the ICRC in opposition to this definition was rejected by this later conference. Whether the definition in the 1980 treaty will be applied by nations to the 1977 Protocol remains to be seen, although the statements on ratification by Belgium, Italy, and the Netherlands suggest that such may prove to be the case.

467. SCHINDLER & TOMAN, *supra* note 27, at 84. Article 3 of Hague Convention IX of 1907 (Concerning Bombardment by Naval Forces in Time of War) states that, "After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings or buildings may be commenced." However, article 6 of the same treaty provides that: "If the military situation permits, the commander of the attacking force, before commencing the bombardment, must do his utmost to warn the authorities." *Id.* at 813. During World War II, warnings generally were not given prior to air raids in enemy territory, because enemy radar and signals intelligence generally would detect a bombing force as it assembled for a strike. Also, while perhaps not knowing the precise target, in tracking the force would be able to ascertain the approximate geographic area against which the attack would be directed. Warnings were given, on the other hand, for enemy-occupied territory, though usually for the area to be raided rather than for the target *per se*. In at least one case, the target was specified. Ninety minutes before the United States Eighth Air Force B–17 bombers attacked the Skoda armament works in Pilsen, Czechoslovakia, on 25 April 1945, the following warning was broadcast: "Allied bombers are out in great strength today. Their destination may be the Skoda works. Skoda workers get out and stay out until the afternoon." J. SPAIGHT, *supra* note 137, at 242.

A warning may be general rather than specific. Thus in 1945 the United States Twentieth Air Force dropped leaflets listing cities that would be bombed, and which were bombed subsequently. *Id.* at 242. On 23 July 1950, the following warning was broadcast by the United Nations Command to the civilian population of North Korea:

> [W]e are asking you to please leave any areas in North Korea where there are military targets, because the [United Nations] bombers will be back again and again. The United Nations planes

which states that, "Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[468]

The first element that has been lost in the ICRC's rejection of the suggested definition of *feasible* is the necessity for surprise. Perhaps more critical, however, is the reason behind the requirement for warning stated in Hague Conventions IV and IX, and in article 57(2)(c) of Protocol I: it enables the Government controlling the civilian population to see to its evacuation from the vicinity of military objectives that might be subject to attack; it also permits individual civilians to remove themselves and their property from high-risk areas.[469] There is little else that an attacker can do to avoid injury to individual civilians or the civilian population as such. Any attempt to increase an attacker's responsibility—particularly where a defender has failed or elected not to discharge his responsibility for the safety of the civilian population—will prove futile.

Recognizing this responsibility, and the dilemma posed by commingling, aside from the fundamental requirement imposed by article 48, two other provisions of Protocol I set out obligations for a defender. Each has been quoted previously. The

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have no desire to harm individuals who are not engaged in war work at military targets. Military targets are: railroads and railroad facilities, docks and harbors, bridges, power plants, factories helping the war, ships and boats, air fields and supply warehouses.

If you work and live near any of these areas, get out now before it is too late. Refuse to endanger your lives.

10 DIGEST OF INTERNATIONAL LAW 140 (1968).

468. SCHINDLER & TOMAN, *supra* note 27, at 655.

469. LAUTERPACHT, *supra* note 433, at 420, deals with the matter rather unequivocally: "The purpose of notification is to enable private individuals within the locality to seek shelter for their persons and for their personal property." Similarly, in describing low-level strafing attacks on German transportation in France and Belgium in the days following D-Day (6 June 1944), the biographer of RAF hero Stanford Tuck observes that:

> Inevitably, a number of Frenchmen and Belgians were killed or injured by the strafing [Hurricanes] —the pilots knew that, but they never talked about it, because there was no foolproof way of ensuring only that Germans died. Propaganda broadcasts strove to warn civilians to stay away from possible targets, and formation leaders often risked their lives, and those of their pilots, by making "dummy runs" over factories and crowded bridges and then holding off to give people time to run clear before they attacked.

L. FORRESTER, FLY FOR YOUR LIFE 258–59 (London, 1956, and New York, 1978). A fundamental problem that many proponents of Protocol I have is an overreliance on article 57(2)(b), which states in part that:

> An attack shall be cancelled or suspended if it becomes apparent that the . . . attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

SCHINDLER & TOMAN, *supra* note 27, at 655. In the course of numerous fora on the Protocols, the author has asked an equally numerous number of proponents what an attacker is expected to do if the enemy civilian population fails to heed warning of an impending attack, or if the defender forces the civilian population to remain in or near an obvious military objective. The answer inevitably has been to rely on the language from article 57 quoted above, an answer which is altogether impractical. Such a solution would encourage certain nations to continue to fail to discharge their responsibilities to separate the civilian population from military objectives, as specified in article 48, and not to shield military objectives from attack through use of the civilian population, as prohibited by article 51(7). Read together, the quotes from LAUTERPACHT and FORRESTER illustrate that the individual civilian has an obligation to remove himself from the vicinity of a military objective, particularly after being duly warned, and that there are a limited number of things an attacker can do to separate the civilian population from a military objective, after which the individual civilian and the defender must assume responsibility for the consequences of their action or inaction.

first, article 58, admonishes a defender (a) to "endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives," and (b) to "avoid locating military objectives within or near densely populated areas."[470]

In practical terms, article 58 can do little more than admonish. For hygiene, morale, communications and other reasons, military personnel and units historically have been billeted or housed in populated areas, and the doctrine of most nations provides for a continuation of this practice; it should not necessarily be viewed as sinister. Moreover, it is not always possible to remove the civilian population or individual civilians from the vicinity of a military objective for any extended period of time, particularly if there is a shortage of housing and/or the weather is severe. Nothing can be done to move immovable civilian objects in order to protect them from attack. Movable civilian objects can be removed from the proximity of military objectives, as was illustrated in the protection provided cultural property at the time of the German invasion of the Soviet Union.[471]

The provisions contained in article 58 are not obligatory. Had they been so drafted, individual nations would have fallen back upon the priority given sovereign rights over obligations incurred in an international law treaty with respect to obligations for defense of their own territory. Thus in accepting this article, the Republic of Korea offered the following statement in explanation of its vote at the Diplomatic Conference:

> [I]t is the understanding of my delegation that this provision does not constitute a restriction on a State's military installations on its own territory. We consider that military facilities necessary for a country's national defense should be decided on the basis of the actual needs and other considerations of that particular country. An attempt to regulate a country's requirements and the fulfilment of those requirements in this connection would not conform to actualities.[472]

In addition to the Korean statement, there were nations—including Switzerland—that had difficulty with article 58 following the Diplomatic Conference. The article requires separation of civilians and civilian objects from military objectives "to the maximum extent feasible." In ratifying Protocol I, both Switzerland and Austria reserved article 58, declaring that each would be bound by its provisions subject to the requirements for the defense of their national territory.[473] While many nations have become party to Protocol I without a similar reservation, the statements of Switzerland and Austria are entirely consistent with statements frequently made by Socialist nations regarding the precedent sovereignty has over law of war obligations in the defense of their territory.

Protocol I does make a distinction between a failure to separate civilians from the vicinity of military objectives and the intentional placement of military objectives in populated areas or the movement of civilians into the vicinity of military objectives in order to shield the military objectives from attack. Article 58 addresses the former to the extent that it can be resolved; paragraph 7 of article 51 (to be discussed, infra) is

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470. Quoted in its entirety in the text associated with *supra* note 447.

471. As detailed in *supra* note 215.

472. ICRC COMMENTARY, *supra* note 247, at 693. France voted against article 51 on the basis that paragraphs 4, 5, and 7 would seriously hinder the conduct of defensive operations against an invader. Sixteen other nations abstained without explanation, but for the same reason. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 317.

473. ICRC COMMENTARY, *supra* note 247, at 693; and SCHINDLER & TOMAN, *supra* note 27, at 705 (Austria) and 716 (Switzerland). This reservation is another example of the failure of coordination with the Swiss military during the course of the negotiation of Protocol I.

directed at the latter, which is the second provision setting out the obligations of a defender for minimization of civilian casualties. Jean S. Pictet's earlier comments regarding this practice of using the civilian population as a shield during World War II merit repeating:

> During the last World War public opinion was shocked by certain instances . . . of belligerents compelling civilians to remain in places of strategic importance (such as railway stations, viaducts, dams, power stations or factories), or to accompany military convoys, or again, to serve as a protective screen for . . . fighting troops. Such practice, the object of which is to divert enemy fire, have rightly been condemned as cruel and barbaric . . . .[474]

However much it may shock public opinion, the practice continues. Writing of his experience in the Korean War, a British officer reported that the North Koreans

> have concentrated, in a country which is a mass of small villages with few towns, always in the villages, where they could put their troops under cover, their trucks in houses, and their tanks in barns, and where, in a quite small village, two or three battalions could practically disappear from sight. To get them out of these hide-outs has required very extensive damage to the civilian population of Korea. It is one of the most unhappy and lamentable features of the campaign that in the effort to extract the Communists from these village strongholds, the civilian population has suffered abnormally, even worse than in wars in the West.[475]

The United States' experience during the Vietnam War was similar to that of Korea. In the Republic of Vietnam, Viet Cong routinely launched their 122mm and 140mm rockets at American and Allied positions, or cities, from the center of a village at night. They did this in the hope that American and Allied forces would initiate counterbattery fire that would destroy the village, or that the civilian population would shield their excape.[476] In the air campaigns over the Democratic Republic of Vietnam, the North Vietnamese purposely placed surface-to-air missile sites, antiaircraft gun positions, and ground-control radar equipment within or immediately adjacent to populated areas in order to shield this military equipment from attack. Convoys full of loaded military trucks were parked in full view on the streets of cities and villages during daylight hours, venturing onto the highways only under the cover of darkness, using populated areas and the civilian population as a screen from attack in daylight.[477]

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474. GC COMMENTARY, *supra* note 208, at 208.

475. Wykeham-Barnes, *The War in Korea with Special Reference to the Difficulties of Using Our Air Power*, J. ROYAL UNITED SERVICE INST. 149–58, at 153 (May 1952). Similarly, in a statement made on August 7, 1950, United States Secretary of State Dean Acheson issued the following statement in defense of American use of airpower in response to the North Korean invasion of South Korea:

> The air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets are enemy troop concentrations, supply dumps, war plants and communications lines. It is well known that the Communist command has compelled helpless civilians to labor on these military sites. Peaceful villages are used to cover the tanks of the invading army.

DIGEST OF INTERNATIONAL LAW, *supra* note 467, at 140.

476. Personal knowledge and experience of the author. For example, on November 20, 1968, the author's unit headquarters was struck by 140mm rockets fired from within the outskirts of the city of Da Nang. The rockets were fired on market day—the day in which the city was packed with civilians from surrounding villages who had come to shop—in the hope that U.S. forces would overreact with counterbattery fire that would kill or injure a maximum number of civilians. We realized the enemy's intent, however, and counterbattery fire was checked.

477. See the aerial photographs contained in Parks, *supra* note 109, at 14 and 19. The author's files contain a collection of more than 100 aerial photographs taken in the course of the United States air campaigns over North Vietnam illustrating the North Vietnamese practice of using its population and

These types of activities are addressed in Protocol I by several provisions. The first, however, shifts the burden for civilian casualty avoidance entirely to an attacker. Paragraph 5(a) of article 51 makes *indiscriminate* "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects . . . ."[478]

Throughout the Diplomatic Conference, the United States had serious objections to this article; these objections remain. One concerns the issue of ambiguity. In the course of the Diplomatic Conference, the American delegation expressed the understanding that the words "clearly separated" referred not only to a separation of two or more military objectives which can be observed or which are visually separated, but also includes the element of a significant distance between those military objectives. Further, the distance must be at least of such a distance as to permit the individual military objectives to be attacked separately, and the American Delegation stated unequivocally that "States are responsible themselves if they misuse their own civilian population by attempting to shield military objectives from attack."[479] While some delegations agreed with the position taken by the United States, there remains a fundamental disagreement as to the interpretation of this provision.

An issue not adequately addressed in the course of the negotiation of article 51(5)(a) but having specifically to do with a defender's actions and his responsibility for collateral civilian casualties is the practice of dispersal. While there has been condemnation of so-called area bombing during World War II,[480] and article 51(5)(a) was prepared with the intent of prohibiting this practice,[481] Protocol I failed to address actions taken by a defender to disperse military equipment, industrial facilities, and similar legitimate targets among civilian objects and the civilian population as such in order to screen those military objectives from lawful attack. While area bombing during World War II was caused in part by bombing inaccuracies and the intensity of enemy defenses, an equal cause was this dispersal of legitimate targets not only to prevent their detection but also to use the civilian population as a shield to preclude their attack. In the words of one law of war treatise, area bombing

> came about during the course of the Allied attempts to destroy German war industry. Much of the industry was concentrated in comparatively small areas, particularly that of the Ruhr. By 1942, such areas were so heavily defended against air attack and military objectives so carefully concealed and camouflaged that it was practically impossible for attacking aircraft to identify and attack particular targets.
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> In reply, the Allies evolved the tactic of target-area bombing. The idea behind this was that if the attackers cannot see their objective because of measures taken by the enemy, they will bomb the spot where they know the objective to be.[482]

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civilian objects to shield military targets from attack. One of the author's favorites is a photograph of the Haiphong cultural center, an amphitheater, with some 200 Soviet-built trucks, laden with military equipment, parked within or on its perimeter. The photograph is used in Parks, *supra* note 5, at 109, and Parks, *supra* note 109, at 19. It may be argued that under the circumstances the Haiphong cultural center could have been attacked inasmuch as the North Vietnamese actions had caused it to forfeit its protection as a civilian object. This entirely correct legal answer must be weighed against the propaganda value the North Vietnamese would have gained from worldwide headlines declaring that the United States had bombed a "cultural center."

478. SCHINDLER & TOMAN, *supra* note 27, at 651.

479. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 309; and Law of War Working Group, *supra* note 294, at I–51–7.

480. *See* Blix, *Area Bombardment: Rules and Reasons*, 49 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 31–69 (1978).

481. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 309.

482. M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 335–36 (1959).

The experience of World War II was repeated in Korea and in the air war over North Vietnam. Speaking of the former, one authority described the situation as follows:

> Segments of industry had located in residential sections of cities and towns, setting up dispersed production units in Korean homes. War materiel was again being manufactured . . . . This new move created a problem for U.N. commanders . . . . To destroy industry dispersed in residential areas would require area bombing of whole cities, entailing mass slaughter of thousands of innocent civilians forced to remain in the cities as a shield against attack.[483]

To remedy this problem, paragraph 7 of article 51 states that:

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military opertations. The parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.[484]

Under the customary law of war, casualties resulting from a defender's use of the civilian population as concealment or cover from attack of legitimate military objectives are not the responsibility of the attacker so long as he has exercised ordinary care. Writing in the first edition of his classic *Air Power and War Rights*, James Maloney Spaight observed that,

> as a belligerent cannot allow himself to be prejudiced because the enemy locates...[military] objectives in places where they cannot be destroyed without incidental injury to civilians, he is not responsible for the resulting damage provided all due care is taken to prevent unnecessary injury. . . .[485]

Similarly, the current Air Force law of war manual states that:

> The failure of states to segregate and separate their own military activities, and particularly to avoid placing military objectives in or near populated areas and to remove such objectives from populated areas, significantly and substantially weakens effective protection for their own population. A party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise lawful attacks upon valid military objectives in their territory.[486]

Professor Morris Greenspan comments that:

> Any legal justification of target-area bombing must be based on two factors. The first must be the fact that the area is so preponderantly used for war industry as to impress that character on the whole of the neighborhood, making it essentially an indivisible whole. The second factor must be that the area is so heavily defended from air attack that the selection of specific targets within the area is impracticable.

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483. AIRPOWER: THE DECISIVE FORCE IN KOREA 131 (1950). With reference to the U.S. air campaigns over North Vietnam, the author's collection of aerial photographs contains numerous pictures of North Vietnamese dispersal of war materiel (such as barrels of oil) to the center of villages or adjacent to or on the earthwork dikes and dams of the Red River Valley. Some of these photographs are contained in Parks, *supra* note 109, at 15.

484. SCHINDLER & TOMAN, *supra* note 27, at 651–52. Article 28 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War also is relevant to consideration of article 51 of Protocol I. It provides that "The presence of a protected person may not be used to render certain points or areas immune from military operations." *Id.* at 511.

485. J. SPAIGHT (1924), *supra* note 163, at 244.

486. DEPARTMENT OF THE AIR FORCE, AIR FORCE PAMPHLET 110–31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 5–13 (1976).

> In such circumstances, the whole area might be regarded as a defended place from the standpoint of attack from the air, and its status, for that purpose, assimilated to that of a defended place attacked by land troops. In the latter case, the attacking force may attack the whole of the defended area in order to overcome the defense, and incurs no responsibility for unavoidable damage to civilians and nonmilitary property caused by the seeking-out of military objectives in the bombardment.[487]

But Protocol I provides no language as to the responsibility for collateral civilian casualties in the event a defender resorts to actions in violation of article 51(7), or disperses military objectives amongst civilian objects or the civilian population to create the type of situation anticipated by article 51(5)(a). Placing civilians in proximity to a military position that is likely to be attacked with the intent of shielding that object from attack differs little from lining up those same civilians and executing them by firing squad; the same premeditation is required. Protocol I avoids the question, stating only that in the event a defender undertakes actions in violation of article 51(7), "any violation . . . shall not release the Parties from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in article 57."[488]

The rationale for article 51(8) is clear: the fact that one party to a conflict is violating the law of war should not be an excuse for the other party to cease to take reasonable steps to minimize injury to the civilian population in the conduct of combat operations. However, Protocol I fails to state the fact that the illegal act—the violation of article 51(7)—is the crime that places innocent civilians at risk, while attack of a lawful target is a legitimate act authorized by the law of war. While an attacker facing a target shielded from attack by civilians is not relieved from his duty to exercise reasonable precautions to minimize the loss of civilian life, neither is he obligated to assume any additional responsibility as a result of the illegal acts of the defender. Were an attacker to do so, his erroneous assumption of additional responsibility with regard to protecting the civilians shielding a lawful target would serve as an incentive for a defender to continue to violate the law of war by exposing other innocent civilians to similar risk. But a reading of Protocol I and the *ICRC Commentary* establishes that the question of responsibility was not avoided by the delegates to the Diplomatic Conference; it was the intent of the ICRC and the Group of 77 to shift entirely to the attacker the responsibility for civilian casualties incidental to a lawful attack upon a legitimate military objective.[489]

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487. M. GREENSPAN, *supra* note 482, at 336.

488. SCHINDLER & TOMAN, *supra* note 27, at 652. Although article 51(8) states "Any violations of these provisions . . .," the ICRC COMMENTARY, *supra* note 247, at 628 confirms that the prohibitions referred to in paragraph 8 are those contained in paragraph 7. The ICRC COMMENTARY correctly notes (a) that a defender's violation of article 51(7) should not be regarded as a material breach for which the attacker may suspend operation of the treaty or its provisions, and (b) that an attacker may meet its obligations in part through warnings (general or specific) to the civilian population, as the United States did in its air operations over North Korea and North Vietnam, and as the Israeli Air Force did in Lebanon. But it fails to address the issue of whether an attacker must assume a greater responsibility for collateral civilian casualties where a defender has violated article 51(7). The ICRC COMMENTARY does make reference to the fact that the attacker's responsibilities include those of article 57(2)(a)(iii), the so-called "rule" of proportionality. However, it is the author's view that the attacker's responsibility remains one of due care. Any interpretation that would provide a defender an advantage over the attacker through a violation of the law of war would be contrary to the very spirit of the law of war while placing innocent civilians at unreasonable risk.

489. Thus the ICRC COMMENTARY, *supra* note 247, at 620 states that:

> The armed forces and their installations may be attacked wherever they are, except when the attack could incidentally result in loss of human life among the civilian population, injuries to civilians, and damage to civilian objects which would be excessive in relation to the expected direct and specific military advantage.

In this respect, Protocol I departs from historic practice and customary international law. Civilians are protected from intentional attack so long as they do not participate in the hostilities, and civilian objects are protected from intentional attack so long as they are not being used for military purposes, subject to the exceptions previously discussed. But civilians and civilian objects are at risk of injury or damage if they are in the vicinity of a legitimate target. Thus article 8 of the 1954 Hague Convention on Cultural Property provides special protection for a limited number of refuges for movable cultural property on the condition that they:

> (a) are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication;
>
> (b) are not used for military purposes.[490]

Protocol I is a conscious effort by the ICRC, Switzerland, and Sweden—working through the Third World—to shift the responsibility for collateral civilian casualties from the defender to the attacker. The reason for this attempted shift is the tone the Diplomatic Conference took in favoring actions of the defender over those of an attacker, and in endeavoring to limit lawful attacks to the immediate battlefield. Thus a leading Swedish participant in the negotiation of the 1977 Protocols, in his condemnation of aerial bombardment operations, made a careful (but historically and legally incorrect) distinction regarding risk to the civilian population incidental to combat operations between land forces (that is, on the "battlefield," in its most limited sense) and extended air operations:

> Bombardment of a whole area within which various objectives are found can be used for other purposes than those which were common in Allied bombings of German cities during the Second World War. A whole area might be bombarded—by air or artillery—in preparation for an attack by land forces. The aim in such cases is to destroy *not productive capacity, but military personnel, arms and vehicles*. Although in such cases, too, civilians and civilian objects might be much

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The ICRC COMMENTARY makes no distinction between collateral civilian casualties incidental to legitimate military operations and those caused by a defender's action (such as in violation of paragraph 7 of article 51) or inaction (such as in violation of the fundamental principle of article 48, through a failure to evacuate the civilian population from a contested area), or those occurring as a result of actions not within the control of either the attacker or defender, such as the crash of an aircraft downed by enemy air defenses. The intent of Protocol I clearly is to shift the responsibility for collateral civilian casualties to the attacker, notwithstanding actions of the defender.

The problem is exacerbated by the prohibition on reprisals against the civilian population or civilians contained in paragraph 6 of article 51. SCHINDLER & TOMAN, *supra* note 27, at 651. Assume, for example, that a defender has shielded an important military objective from attack by placing it in the midst of a densely populated area of a city, notwithstanding warnings (radio broadcasts, leaflet drops) that targets placed in populated areas will not be immune from attack. Assume also that, despite the use of extraordinary care by the attack force, some collateral civilian casualties occur. Under customary international law the attacker would be justified in stating that the responsibility for the civilian casualties rests with the defender. He would still be able to make such an argument notwithstanding Protocol I, but the defender would be able to argue that the attacker's actions constitute a reprisal in violation of article 51(6). This may appear to be the usual propaganda battle that occurs in any conflict, but it is much more, in that the language imbalance of Protocol I has given the defender's argument the greater appearance of legitimacy.

490. SCHINDLER & TOMAN, *supra* note 27, at 749–50. Similarly, in its ratification of the 1977 Protocol I, Italy declared with respect to article 53, Protection of Cultural Property and of Places of Worship, that "If and so long as the objectives protected by Article 53 are unlawfully used for military purposes, they will thereby lose their protection." *Id.* at 713. Italy's declaration is particularly candid in light of its experience with the destruction of Monte Cassino by the Allies during World War II, as discussed *supra* note 215.

affected, this kind of area pounding or saturation bombing has hardly been criticized by modern authorities. The military need for it is evident and the humanitarian case against it is not strong. The areas that might be affected by such attacks are likely to be less numerous than the areas which might be chosen for attack, e.g. because they contain productive capacity that is deemed militarily relevant. Moreover, civilians are likely to have moved from areas which are on the verge of becoming battlefields. If, in exceptional cases, the civilian population is still present, e.g. in a city, the rules on siege would apply.[491]

This attempt is not new. Paragraph 3 of article 24 of the rejected 1923 Hague Air Rules states: "The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited. In cases where . . . [military] objectives . . . are so situated, that they cannot be bombarded without indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment."[492]

The purpose behind the language of article 24(3) of the 1923 Hague Air Rules was the same as that behind the language of articles 51(5)(a) and (b) and 57 of Protocol I, as illustrated by the comment above by the Swedish delegate to the Diplomatic Conference. Speaking of the 1923 provision, M. W. Royse wrote in 1928 that, "To interpret "indiscriminate bombardment," as laid down in paragraph 3 of article 24, on the basis of incidental damage to non-combatant populations, would thus, in effect, eliminate aerial bombardment."[493]

This was precisely the intent of the 1923 Hague Air Rules and the provisions under consideration. The fundamental problem with articles 51 and 57 and their emphasis on the minimization of collateral civilian casualties is the attempt to shift responsibility for collateral civilian casualties to an attacker, notwithstanding actions (or the failure to act) by a defender, and to attempt to make a distinction with regard to the legality of attacks in the vicinity of enemy lines as opposed to the extended battlefield. The intent of the latter was to limit the airpower capabilities of certain nations, particularly the superpowers and Israel. The effect on innocent civilians, however, can be seen in the following actions that have occurred since conclusion of the Diplomatic Conference. Viewed in this light, Protocol I loses a substantial amount of its humanitarian lustre:

— In response to the 1982 Israeli incursion into Lebanon, the Palestinian Liberation Organization (PLO) announced its intent to abide by the requirements of the four 1949 Geneva Conventions and the 1977 Protocols. It immediately shifted its defensive positions into Lebanese towns, villages, and cities, where it emplaced its artillery and antiaircraft weapons on top of or immediately adjacent to hospitals, churches, or mosques. The PLO did this in order to shield the weapons from attack or cause damage to these protected objects while attempting to negate the superiority the Israeli Defense Forces (IDF) and Israeli Air Force (IAF) enjoyed in firepower (armor and artillery) and airpower, respectively, and to increase the likelihood of heavy IDF and Lebanese civilian casualties in costly house-to-house fighting. On retreating to Beirut, the PLO positioned its weapons adjacent to foreign embassies in order to achieve the same protection. It moved other equipment and forces into the lower floors of high-rise apartment buildings, while forcing the civilian tenants of those buildings to remain in the upper floors to shield the PLO from attack.

The IAF employed certain steps and very strict rules of engagement to provide protection for the civilian population in the course of its attack of PLO fixed positions.

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491. Blix, *supra* note 478, at 52–53.
492. SCHINDLER & TOMAN, *supra* note 27, at 210.
493. M. ROYSE, 1928, *supra* note 156, at 232.

These included the dropping of several million leaflets to warn the civilian population to depart anticipated areas of conflict; development of highly detailed targeting maps for built-up areas to distinguish military objectives from civilian objects and other specially-protected property; positive verification of all objects as military objectives prior to authorization of any attack; establishment of a requirement to abort any bomb run if the aircraft lost the redundancy in its bomb-aiming equipment; marking of each target to minimize misidentification; delivery of a single bomb per bomb run; dropping each bomb at absolute minimum altitudes under visual (rather than radar-bombing) conditions only, at substantial risk to aircrews; verification of bomb damage where it was believed a hit had been achieved, before continuing strikes; and use of the most accurate munitions.

Notwithstanding these precautions, which are among the highest imposed by any nation in any armed conflict, the ICRC issued a public statement on 10 June 1982 calling upon Israel *only* to cease actions which placed the civilian population at risk. The ICRC also released erroneous, unconfirmed civilian casualty figures based upon information it had obtained from the head of the Palestinian Red Crescent Society—PLO Chairman Yasser Arafat's brother.[494]

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494. Author's personal knowledge. In May 1983 the author was sent to the Middle East by the Secretary of Defense to examine the law of war issues involved in the 1982 Israeli incursion into Lebanon, and specifically to investigate Israeli Air Force (IAF) employment of airpower in light of allegations of "indiscriminate bombing" by the ICRC and supporters of the PLO. The author had access to all-source intelligence, and met with military experts (United States and foreign) who witnessed PLO actions and IAF operations. Whatever the feelings of the observers toward Israel, and they were mixed, they were unanimous in their confirmation of the IAF's exercise of care for the civilian population of Beirut in light of the PLO's efforts at using that population as a shield from attack. The author also obtained an unpublished paper prepared by Trevor Dupuy, who witnessed Israeli Defense Force (IDF) and IAF operations, which confirmed official eyewitness accounts. For his analysis of the IAF attack of 12 August 1982 (the heaviest of the incursion) *see Journalism and the Conduct of War* in T. DUPUY & P. MARTELL, FLAWED VICTORY 167–74 (1986), which may be summed up with the following:

> The PLO gained a propaganda advantage by forcing the Israelis to fire on military targets in civilian environments that should have been protected under . . . [the law of war]. A propaganda victory was won in the western world, and even in Israel, because of the double standard applied by the news media, which—on balance—grossly distorted the facts, and failed to present all of the considerations affecting the civilian loss of life and private property damage.

Id. at 174. *See* R. GABRIEL, OPERATION PEACE FOR GALILEE 132–76 (1984), *see also* Z. CHAFETS, DOUBLE VISION 304–05 (1985). A classic example of the actions of the press was NBC's John Chancellor broadcasting from Beirut, describing the IAF air attacks on the PLO, with destroyed buildings in the background, suggesting that the destruction had occurred as a result of the Israeli air attacks on the PLO. In fact, the buildings were in an entirely different part of Beirut from the area in which the PLO was located, and had been destroyed in earlier fighting not involving Israel or its military forces during Lebanon's civil war.

The ICRC statement referred to in the body of this article is contained in ICRC Press Release No. 1444, Geneva, June 11, 1982, and states:

> Lebanon: Solemn Appeal by the ICRC on Behalf of the Population. Yesterday evening, 10 June 1982, the International Committee of the Red Cross (ICRC) appealed formally and solemnly to highest authorities of Israel, demanding that all measures possible be taken so that civilians, whatever their nationality, be spared in the conflict in Lebanon. Specific mention was made of the fighting in Beirut.

Representatives of the ICRC subsequently justified their actions on the basis of the authority provided them by article 81(1) of Protocol I, which provides:

> The Parties to the conflict shall grant to the [ICRC] all facilities within their power so as to enable it carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the [ICRC] may also carry out any

— In the days immediately preceding the 1986 U.S. airstrike against terrorist-related targets in Libya, Libyan leader Moammar Gadhafi warned that he was going to take hostage British, Italian, and American civilians working in his country, and place them within or around key military positions to shield those objectives from attack.[495]

— Upon discovery of the Libyan chemical weapon facility at Rabta in 1989, there was speculation of an attack upon it by American or other military forces to pre-empt its operation. Among those employed in its construction were 270 Thai nationals. The United States urged Thailand to remove its nationals from the Rabta construction facility so that they would not be at risk in the event of its attack. Gadhafi advised the Government of Thailand that he would expel all Thai nationals working in Libya—estimated at between 25,000 and 75,000—if Thailand acceded to the United States' request.[496] Notwithstanding the fact that Libya was the second nation to ratify Protocol I, its purpose was clear—to use the Thai nationals to shield the Rabta chemical weapons plant from attack.[497]

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other humanitarian activities in favor of these victims, subject to the consent of the Parties to the conflict concerned.

SCHINDLER & TOMAN, *supra* note 27, at 669–70. The ICRC statement departed from the ICRC's usual practice in calling upon *all* parties to a conflict to take appropriate steps to protect the civilian population. In contrast, for example, ICRC Press Release No. 1563, released on March 10, 1988, during the Iran-Iraq "war of the cities," states:

> The indiscriminate bombing of civilians in connection with the armed conflict between Iran and Iraq has been denounced by the . . . ICRC on several occasions.
>
> The ICRC is alarmed by the resumption of such bombing.
>
> The Parties to the conflict are directly responsible for the ever more cruel suffering being inflicted on civilians in this breach of the most fundamental precepts of humanity.
>
> The ICRC once more appeals to the Parties to put an end to this tragic escalation.

In singling out Israel, the ICRC failed to recognize the actions of the PLO that were a direct cause of civilian losses, while greatly facilitating the PLO's propaganda advantage. ICRC members subsequently acknowledged that their appeal had been directed at Israel only because of Israel's use of airpower. As previously mentioned, it was the opinion of those involved in the United States military review that while the ICRC may have provided substantial contributions to the law of war for the protection of war victims as contained in the four 1949 Geneva Conventions, the ICRC and its staff for political and technical reasons is singularly *unqualified* to be entrusted with the responsibilities provided it by article 81(1) of Protocol I insofar as those responsibilities include that part of the law of war related to warfighting as such. The ICRC's singling out of one party to the conflict in its call for restraint and its reliance upon disinformation provided it by one party to the conflict are but two examples of its technical incompetency in matters relating to warfighting, its long-held bias against airpower and its abandonment of its principles of *neutrality*.

495. Dickey, *Libya Said to Order Westerners to Bases*, Wash. Post, Apr. 14, 1986, at 1, A21.

496. Ottway, *U.S. Fails to Oust Thais at Libya Plant*, Wash. Post, June 1, 1989, at A10.

497. Libya became a party to both Protocols on 7 June 1978. Some might attempt to argue that inasmuch as neither Thailand nor the United States is a party to Protocol I, Libya was not bound to apply Protocol I in any potential conflict (including a single airstrike) with the United States. Such an argument would be incorrect for at least two reasons. Libya, Thailand, and the United States are parties to the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which under the terms of article 2 would apply even to an armed conflict as brief as a single airstrike. Article 34 of that convention unequivocally prohibits the taking of hostages. SCHINDLER & TOMAN, *supra* note 27, at 511. With respect to Protocol I, article 18 of the Vienna Convention on the Law of Treaties states that:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
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> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

Customary international law requires that an attacker exercise ordinary care in the attack of military objectives located near the civilian population, to minimize injury to individual civilians or the civilian population as such incidental to the attack. The defender's responsibility is to exercise an equal degree of care to separate individual civilians and the civilian population as such from the vicinity of military objectives. Where a defender purposely places military objectives in the vicinity of the civilian population or places civilians in proximity to military objectives, in either case for the purpose of shielding military objectives from attack, an attacker is not relieved from his obligation to exercise ordinary care. Responsibility for death or injury resulting from the illegal action of the defender lies with the defender, however. The language of Protocol I—particularly as it has been interpreted by the ICRC and many of the nations known in the course of the Diplomatic Conference as the Group of 77—casts doubt upon whether the limited credibility of the law of war relating to war-fighting *per se* will survive any serious challenge. In further consideration of the issue of responsibility for minimization of collateral civilian casualties, the second factor—the concept of *proportionality*—must be examined.

B. Proportionality

There is no question that the concept of proportionality is part of the Just War Tradition and the law of war. The classic example of a disproportionate action is the destruction of a village of 500, including its population, to destroy a single enemy sniper or machine gun position. This concept of proportionality also is consistent with fire-control procedures and the efficient use of assets and capabilities. No fire-control or air support center would approve a request to employ artillery or close air support against such a target, because it would be an inefficient use of a commander's usually-limited military assets on a battlefield that generally is target-rich with enemy objects of a higher priority. In his classic work on aerial bombardment, M. W. Royse recognized the principle when he stated, "If an act is essential, if the destruction is effective and not wanton, and if the results to be gained by such an act are not grossly disproportionate to the extent of destruction, then the act can hardly be condemned regardless of the amount of suffering and violence."[498]

The United States observes the concept of proportionality in its conduct of combat operations. An example is the 1972 Linebacker I air offensive against North Vietnam. In selecting North Vietnamese power sources for attack, target intelligence authorities identified the Lang Chi hydroelectric facility, a Soviet-built, 122,500-kilowatt electric generating plant 63 miles up the Red River Valley from Hanoi that was capable of supplying seventy-five percent of the electricity for Hanoi's industrial and defense needs. Without question, it was a valuable target.

However, it was estimated that as many as 23,000 civilians could perish if its dam were breached—a clear example of the balancing of the good to be realized by a war aim (destruction of the military objective) against the evil (civilian suffering) required

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(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. . . .

Article 26 states the international legal concept of *Pacta sunt servanda* that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." While Libya may not have treaty relations with the United States or Thailand with respect to Protocol I, it nonetheless is bound by the provisions of Protocol I with regard to civilians in its hands, regardless of their nationality.

498. M. ROYSE, 1928, *supra* note 493, at 137.

by the concept of proportionality.[499] The question of whether the target should be attacked was taken to President Nixon. He stated that he would not authorize the target's attack unless his military advisers could provide one hundred percent assurance that the electric generating plant at the top of the Lang Chi facility could be destroyed without breach of the dam.

It is at this point that the "friction of war" entered the picture. Admiral Thomas H. Moorer, USN, the Chairman of the Joint Chiefs of Staff, sought assurances from General John W. Vogt, USAF, Commander, Seventh Air Force that the President's criteria for attack of the target could be met. General Vogt responded that he had two squadrons of F–4 Phantom crews who had become experts in delivering laser-guided bombs (LGB), but that owing to the friction of war he refused to give complete assurance that the mission could be accomplished without breach of the dam. He had enough confidence in his crews, however, that he felt that there was a ninety percent chance of mission accomplishment without breach of the dam.[500] General Vogt's response was relayed to President Nixon, who authorized the attack. The Lang Chi hydroelectric facility was attacked by Air Force F–4 Phantoms using LGB on 10 June 1972. They placed twelve 2000-pound LGB through the roof of the 50-by-100-foot building, thereby destroying the electric generating plant without breach of the dam, despite the fact that the roof of the power plant was 100 feet below the top of the dam.[501]

There is value in codifying proportionality, if for no other reason than to define a concept that has been badly abused in the past. Thus in criticizing the 1972 Linebacker II air operations against military targets in North Vietnam, Telford Taylor argued that the use of B–52 Stratofortress bombers to attack military targets was a violation of the concept of proportionality from the standpoint of the possible risk to the civilian population of North Vietnam. He also suggested that the use of B–52 aircraft was an action that was disproportionate to American national security interests in Southeast Asia, and therefore illegal.[502] Similarly, following the 1981 downing of two Libyan SU–22 Fitter aircraft by American Navy F–14 Tomcats *after* the Fitters had fired air-to-air missiles at the Navy fighters, an American Coast Guard officer suggested that it was disproportionate for the United States to employ modern F–14s against the older, slower Fitters, even though the decision to engage was that of the Fitters.[503] While U.S. involvement in the Vietnam War remains a topic of popular debate almost two decades after the Linebacker operations, the Just War concept of proportionality does not mix *jus ad bellum* and *jus in bello* unless a combatant nation's actions become so patently illegal (that is, violations of the *jus in bello*) that they jeopardize any previously lawful reason for going to war. Lawful combat actions are not subject to some sort of "fairness doctrine," and neither the law of war in general nor the concept of proportionality in particular imposes a legal

499. For a description of the concept of *proportionality* and its balancing of these conflicting values, *see* W. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 38–42 (1981).

500. Author's conversation with General Vogt on 1 July 1982 and Admiral Moorer on 15 Sept. 1982.

501. Parks, *supra* note 208, at 11–12; and conversation with General Vogt, *supra* note 500; and M. Porter, *Linebacker: An Overview of the First 120 Days* 37–38 Headquarters, United States Air Force Pacific (27 Sept. 1973). A post-mission photograph of the dam and its destroyed power plant is in Parks, *supra* note 5, at 116.

502. Taylor, Defining War Crimes, N.Y. Times, Jan. 11, 1973, at 39.

503. McFaul, Comment and Discussion, 108 U.S. NAVAL INST. PROC. 42 (May 1982). The author believes it inappropriate to refer to the concept of proportionality as a "*rule*," because the term suggests something far more specific and binding that it is at this time, particularly in the context of responsibility for collateral civilian casualties.

or moral obligation on a nation to sacrifice manpower, firepower, or technological superiority over an opponent.[504]

In an equally egregious example, as a student at The Judge Advocate General's School, U.S. Army, in 1973, the author first heard of the concept of proportionality when he was instructed that the "rule" of proportionality could best be described with the following hypothetical scenario:

> An enemy platoon of forty men is in a defensive position on a hill, armed only with small arms. You have been assigned the mission of capturing the hill. You have the capability of attacking the hill with a company of two hundred men, supported by artillery, tanks, helicopter gunships and close air support fixed-wing aircraft. The "rule" of proportionality requires you to eschew the use of anything more than an infantry platoon armed with small arms.[505]

In a similar light, since codification of the concept into Protocol I, a former member of the U.S. delegation to the Diplomatic Conference has taught that, "The rule of proportionality means that if it takes five bombs to destroy a target and you drop six, your action violates the rule."[506] These examples ignore the military concept of bringing a *preponderance* of power to bear on a military objective, usually at a minimum ratio of three-to-one in favor of the assaulting force. It also suggests yet another danger of the concept as it has been bandied about by some international lawyers: that in some way the concept of proportionality can be applied or was intended to be applied in combat operations between combatants on a battlefield devoid of civilians. There is no viable precedent for such an interpretation.[507]

There is another reason why codification of the concept of proportionality was appropriate. It constitutes acknowledgment in Protocol I of the fact that collateral civilian casualties are in inevitable part of war where a defender has failed to separate civilians from military objectives, as required by article 48 of Protocol I.[508]

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504. For elaboration of the concepts of *jus ad bellum* and *jus in bello*, *see* W. O'BRIEN, *supra* note 499, at 9, 13–70.

505. The class was taught by a young Army lawyer who was long on the theory of the law of war but totally lacking in military training or experience. One-third of the class of judge advocates was made up of Army and Marine Corps officers who had served combat command tours in Vietnam. It was the consensus of those students that if the instructor were placed in a position of command in the hypothetical scenario he had posited, his view of what was *proportionality* would change markedly—provided his own men did not kill him first. His Army career did not extend beyond his initial tour of service.

506. His statement is not supported by the historical employment of force nor by the very comprehensive compilation of doctrine for weaponeering a target that exists in the multi-volume Joint Munitions Effectiveness Manual.

507. The author has heard some international lawyers pontificate various theoretical obligations combatant forces have with regard to enemy combatants, such as the erroneous interpretation of the concept of *proportionality* provided in the text at the preceding footnote. But the nations of the world wisely have elected not to attempt to legislate in this area beyond the prohibitions contained in articles 22 and 23 of the Annex to the 1907 Hague Convention IV. In this context, *proportionality* has been raised in consideration of the legality of weapons, that is, whether the suffering caused by a weapon is disproportionate to its military effectiveness. This is easier to theorize about than to articulate with specific examples, however, in that weapons development has become so expensive that nations are not prone to spend money on weapons or weapon systems that are not militarily effective. Thus, a nation today would not be inclined to develop a weapon that is indiscriminate *per se* because it would not be militarily effective. In considering weapons that might cause unnecessary suffering, the same *proportionality* test is considered. However, the nations that participated in the 1978–1980 United Nations Conventional Weapons Conference placed restrictions only on weapons with regard to their possible effect on the civilian population, and not as to the injury of combatants. Protocol I of the 1980 UN Conventional Weapons Convention prohibiting weapons utilizing fragments not detectable by x-ray was adopted by consensus as it outlawed a weapon that did not exist.

508. As the NEW RULES FOR VICTIMS OF ARMED CONFLICTS, notes, "Despite persistent criticism . . . that it sets a seal of approval on incidental civilian casualties, the ICRC persisted in proposing a codification of the principle of proportionality, recognizing that some collateral injury to civilians is inevitable." NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 361.

But in the context in which it has emerged, the concept of proportionality was—and remains—dangerously undefined. As previously noted by Just War scholar James Turner Johnson, the concept of proportionality in the context of collateral damage in modern war is a "pregnant one."[509]

The negotiation pertaining to the codification of the concept of proportionality into Protocol I will be covered only briefly, because it has been summarized in a scholarly piece by Commander William J. Fenrick and discussed in the two commentaries on the Protocols.[510] Codification was strongly opposed by most Eastern European and Third World delegations on the theory that it was contrary to the providing of immunity from attack to civilians and civilian objects;[511] for this reason, neither "proportion," "proportionate," nor "proportionality" appears in Protocol I.

As previously noted, the concept is codified in articles 51(5)(b), 57(2)(a)(iii), 57(2)(b), and 85(3)(b), the principal point of codification being article 57(2)(a)(iii). This requires that those who plan or decide upon an attack shall "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[512]

Beyond its codification, the concept runs into difficulty. While the concepts of discrimination and proportion are distinctive in the Just War Tradition, within Protocol I proportionality seems to be offered as little more than a synonym for indiscriminate. Thus, in the Just War Tradition, proportion within the *jus ad bellum* requires that "the good to be achieved by the realization of the war aims be proportionate to the evil resulting from the war," while within the *jus in bello* "the question immediately arises as to the referent of proportionality in judging the means of war."[513] The *ICRC Commentary* states unequivocally that codification of proportionality into Protocol I was not intended to address the former,[514] but Protocol I also in large measure ignores the latter. Thus, if a nation is attacked by an aggressor and lawfully responds in self-defense, the defender may violate the Just War concept of proportionality if its response is not proportionate to the threat, or if in responding its military force engages in wholesale violations of the law of war such as the denial of quarter and/or murder of prisoners of war.

In contrast, the principle of discrimination prohibits intentional attacks on noncombatants or nonmilitary targets.[515] But the concept of proportionality is codified in article 51(5)(b), which makes an attack indiscriminate if it is "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[516]

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509. J. JOHNSON, *supra* note 13, at 221.

510. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. at 91–127; ICRC COMMENTARY, *supra* note 247, at 683–85; NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 361.

511. *See* NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 361. The objection by Socialist and Third World delegations is illustrative of the fact that many were (and are) more interested in a basis for charging captured military personnel with violations of the law of war (to deny them prisoner of war protection, as North Korea and North Vietnam did during their respective conflicts with Free World nations) than in protection of their civilian population.

512. SCHINDLER & TOMAN, *supra* note 27, at 655.

513. W. O'BRIEN, *supra* note 499, at 38–39.

514. ICRC COMMENTARY, *supra* note 247, at 683. The statement in the ICRC COMMENTARY, "This article . . . is not concerned with strategic objectives . . . ," is itself subject to several different interpretations, as will be seen.

515. W. O'BRIEN, *supra* note 499, at 42.

516. SCHINDLER & TOMAN, *supra* note 27, at 651.

The codified language immediately was open to question. The phrase "concrete and direct military advantage anticipated" was defined by Belgium as being "that expected from an attack considered in its totality,"[517] while Italy stated that the phrase "is intended to refer to the advantage anticipated from the attack as a whole and not from isolated or particular parts of the attack."[518] Similar statements were made by Great Britain at the time of signature and the Netherlands at the time of its ratification of the Protocols.[519] With regard to a commander's expectations in commencing an attack, the same nations felt it necessary to accept the codification of the concept of proportionality subject to the *Rendulic* rule, namely that "military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time."[520]

There were other doubts. One commentary suggested that, "It is . . . doubtful that incidental injury to persons serving the armed forces within a military objective will weigh as heavily in the application of the rule of proportionality as that part of the civilian population which is not so closely linked to military operations."[521]

This statement, while appearing obvious, also raises doubts about the stringent distinction made between "civilians" and "combatants" in article 51(3), previously examined. In one of the earliest critiques of Protocol I, a member of the ICRC with considerable military training and experience in teaching the law of war expressed doubts as to the feasibility of the application of the concept of proportionality at the level of the individual soldier or small unit commander.[522] Violation of the concept of proportionality does not become a "grave breach" unless and until it involves the "launching of an attack affecting the civilian population or civilian objects *in the*

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517. *Id.* at 707.

518. *Id.* at 713. The same statement was made by the delegation of Canada in explanation of its vote on articles 51 and 57 at the Diplomatic Conference. Fenrick, *supra* note 510, at 107. The statement of the Delegation of the United States was similar but substantially longer:

> It is the understanding of the United States that the references in articles 51 and 57 to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack. The term "military advantage" involves a variety of considerations, including the security of attacking forces. It is further the understanding of the U.S. that the term "concrete and direct military advantage anticipated" used in articles 51 and 57 means an honest expectation that the attack will make a relevant and proportionate contribution to the purposes of the attack.

Law of War Working Group, *supra* note 294, at I–51–11.

519. SCHINDLER & TOMAN, *supra* note 27, at 717 and 714, respectively.

520. *See, e.g.*, the statement of the Netherlands to this effect in SCHINDLER & TOMAN, *supra* note 27, at 714.

521. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 295.

522. Mulinen, *The Law of War and the Armed Forces*, INTERNATIONAL REVIEW OF THE RED CROSS 18–44, at 42–43 (Jan./Feb. 1978), where Colonel de Mulinen correctly observes that:

> One cannot imagine, to take the case of an attacking tank battalion, that each of the 30 to 40 tank leaders would, on his own, and constantly, balance "the concrete and direct military advantage anticipated" against the losses and damage which might be entailed in the civilian sector. Nor can one imagine that each of these tank leaders would interrupt the attack, that is, that he would stop his own tank in the midst of the general advance. Such estimates and the decisions resulting from them are still not conceivable at the level of the platoon (or section), the company, or the battalion. It would produce enormous confusion on the battle area, such confusion as to forbid any co-ordinated and hence successful military action, unless it were conducted in a completely desert zone.

Based in large measure on Colonel de Mulinen's objections, the Swiss ratification of Protocol I was subject to a statement of understanding that "The provisions of Article 57(2) are binding only on battalion or group commanders and higher echelons." SCHINDLER & TOMAN, *supra* note 27, at 716.

knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)."[523] This leads one to conclude that the concept of proportionality (as it is codified in Protocol I) is not violated unless acts have occurred that are tantamount to the direct attack of the civilian population, a violation of articles 48 and 51(2), or involve wanton negligence that is tantamount to an intentional attack of the civilian population.[524] Yet a senior legal representative of the ICRC has hailed Protocol I as important in providing the authority to prosecute military commanders for violations of the "rule" of proportionality, as if violations were daily occurrences.[525]

In the course of the American military review of Protocol I, it was concluded that the concept of proportionality is not a rule of customary law, as it has been represented.[526] By American domestic law standards, the concept of proportionality as contained in Protocol I would be constitutionally void for vagueness.[527] State-

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523. SCHINDLER & TOMAN, *supra* note 27, at 671.

524. Such an interpretation would be consistent with the grave breach provision in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which defines a grave breach under that convention as

> those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing . . . wilfully causing great suffering or serious injury to body or health . . . and extensive destruction of property, not justified by military necessity *and carried out unlawfully and wantonly.*

Id. at 547 (emphasis added).

525. Hans Peter Gasser, law of war panel presentation at the annual meeting of the American Society of International Law, Boston, Massachusetts, April 9, 1987. The author was a member of the panel with Mr. Gasser. The statement by Mr. Gasser seemed particularly striking to the author, given the inability of the international community to arrive at a way in which violators of the 1949 Geneva Conventions can be brought to justice where a conflict does not conclude with total victory by one side over the other, as well as in light of the silence of the ICRC during the years 1965–1969 when it knew that U.S. prisoners of war in North Vietnam systematically were being tortured, a grave breach (article 130) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.

526. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 778 (1981); the claim that the concept of *proportionality* is part of customary law also has been made by Professor Green in *Aerial Considerations in the Law of Armed Conflict*, V ANNALS OF AIR AND SPACE LAW 104 (1980). Article 38b of the Statute of the International Court of Justice annexed to the Charter of the United Nations (59 Stat. 1055, T.S. 993, 3 Bevans 1153) defines international custom as "evidence of a general practice accepted as law." Custom has been further defined as involving four elements:

> a. Concordant practices by a number of nations with reference to a type of situation falling within the domain of international relations;
> b. Continuation or repetition of the practice over a considerable period of time;
> c. Conception that the practice is required by, or is consistent with, prevailing international law; and
> d. General acquiescence in the practice by other nations.

W. FRIEDMANN, O. LISSITZYN, and R. PUGH, INTERNATIONAL LAW 36 (1969). *See also* the discussion of custom in DEPARTMENT OF THE ARMY PAMPHLET 27-161-1, LAW OF PEACE 1-5 to 1-10 (1979). The military review of the practice of nations in war found little knowledge, much less acceptance, of the concept of proportionality, and in fact a substantial practice to the contrary, particularly with regard to responsibility for minimization of collateral civilian casualties.

A frequent statement by proponents of Protocol I is that the concept of *proportionality* is a part of the teachings of all the world's great religions. One need look only as far as the conflicting passages found in the Bible that require a Christian to turn the other cheek if struck *vis-à-vis* "an eye for an eye, and a tooth for a tooth" to realize that the holy documents of most religions contain passages that contradict one another or are subject to more than one interpretation. The superb books by Robin Wright on the rise of Islamic fundamentalism are a vivid reminder that the bloodiest wars in history have been fought over religious differences. *See* R. WRIGHT, SACRED RAGE: THE WRATH OF MILITANT ISLAM (1985), and R. WRIGHT, IN THE NAME OF GOD: THE KHOMEINI DECADE (1989); *see also* A. MAALOUF, THE CRUSADES THROUGH ARAB EYES (1985).

527. As part of the test as to whether a statute is constitutional, the statute must be specific enough to be fair notice of what conduct is forbidden or required. People v. Kirk, 362 N.E. 329 (1977). A statute is sufficiently definite if its terms furnish a test based on knowable criteria which men of

ments made by some nations in the course of the Diplomatic Conference or in conjunction with their subsequent signature or ratification of Protocol I make it clear that there is no agreement as to what the concept means, or the level at which generally it will be applied. Following more than five years of research and attendance of numerous meetings of legal and political experts, the author in 1983 prepared a document entitled "Proportionality in a Nutshell" ("Nutshell") which endeavored to provide some clarification of the concept, based upon the customary practice of nations, or at least to invite discussion among legal experts within the NATO nations, Australia and New Zealand. With respect to the issue of collateral civilian casualties, it provides:

> The intentional attack of individual civilians not taking part in the hostilities, the civilian population *per se*, or civilian objects, is prohibited. . . . Proportionality does not establish a separate standard, but serves as a means for determining whether a nation or military commander responsible for planning, deciding upon, or executing a military operation has engaged in the intentional attack of civilians not engaged in the hostilities. . . . Proportionality as used in this context constitutes acknowledgment of the inevitability of incidental or collateral damage and injury in war. Other aspects:
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> . . . .
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> b. The formula: The occurrence of collateral civilian casualties so excessive in nature when compared to the military advantage to be gained as to be tantamount to the intentional attack of individual civilians, or the civilian population, or to a wanton disregard for the safety of the civilian population.
>
> c. *Excluded* in determination of collateral civilian casualties are:
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> 1. Civilians taking part in the hostilities, such as those manning air defense positions, transporting military equipment, or providing other support to military forces.
>
> 2. Civilians injured or killed while working in or immediately adjacent to a lawful target.
>
> 3. Civilians injured or killed through action . . . attributable to enemy action, or beyond the control of either party, such as civilians killed by the crash of an attacking aircraft downed by enemy air defenses; civilians killed by munitions diverted from their intended target by obscurants or electronic countermeasures of the enemy; or civilians injured or killed as a result of the enemy placing them around a lawful target in an effort to shield it from attack.
>
> d. Generally measured against an overall campaign, rather than its isolated or particular parts; generally incapable of measurement on a target-by-target basis.

The "Nutshell" has been the subject of discussion at several international meetings, most recently one of senior military legal experts from Australia, Canada, Great Britain, New Zealand, and the United States who are responsible for preparing their respective law of war manuals, and held at Old Sarum, United Kingdom, 8–11 May 1989. While there has been general agreement with its language, there are points that have generated heated debate, such as the first phrase in the last paragraph. Although there was disagreement as to whether responsibility should be limited to comparison to an overall campaign, there also was a lack of agreement as to the level

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common intelligence who come in contact with the statute may use with reasonable safety in determining its command. Winters v. New York, 68 S. Ct. 665 (1948). It must be set out in terms that the ordinary person exercising common sense can sufficiently understand and comply with. It must inform persons with reasonable definiteness that any particular act is disapproved or required. This test has been reaffirmed in Wright v. New Jersey, 105 S. Ct. 8900 (1985), and Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984).

at which the standard should be measured. In the days since that meeting, discussions have been directed at other ways of determining the standard, with general agreement that the standard of care of any commander is one of ordinary or due care, the terms being regarded as synonymous.

At this point, the standard cannot be defined in a way that is entirely satisfactory. But that is not the issue at this point. Following more than a decade of research and meetings of international military legal experts who are anxious to implement the language contained in Protocol I to the extent it advances the law of war and the protection of the civilian population, there remains a substantial lack of agreement as to the meaning of the provisions in Protocol I relating to proportionality. This is a rather disconcerting situation given that other lawyers are claiming that the concept of proportionality is customary international law. There are several other disturbing factors:

> a. The assumption of risk by an attacker for the action or inaction of the defender. The "Nutshell" disagrees with the statement contained in the Bothe, Partsch and Solf treatise that suggests that individuals working within a legitimate military target must be considered in weighing the concept or proportionality. As has been indicated in this article, there is no precedent for such consideration with respect to the enemy civilian population, and there is a serious question as to whether these individuals are "civilians" in the context of those persons entitled to protection from attack. Any other approach would permit a defender to "cost out" an otherwise legitimate target by employing civilians exclusively at the target, and would violate the fundamental law of war obligation of discrimination codified in article 48.
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> b. "Results" versus intent. The "Nutshell" rejects the very dangerous tendency that has developed over the past decade or so to attribute all civilian casualties to the attacker. Thus even the scholarly article by Commander Fenrick concludes with the following:
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> One might hypothesize, perhaps mythologize, a Second World War in which the rules of Protocol I were applied. The city of Dresden was bombed in February 1945 by the United States Air Force and the Royal Air Force. . . . Civilian losses are unclear, but it appears at least 25,000 people were killed. . . . Would the attack decision have been the same if, before the attack decision was made, the military commander received a draft operations order from his planning staff including a provision stating: "The military advantage we expect to derive from this attack is _____, the probable losses are _____, your direction is requested concerning whether or not the probable civilian losses are 'excessive.' "[528]

Commander Fenrick's hypothesis suggests three fundamental problems with implementation of the concept of proportionality. The first is definition of the military advantage, and the level at which a determination would or should be made. The second concerns responsibility for the probable civilian losses that will result from the operation. The last deals with the friction of war.

Certainly there will be circumstances in which a small unit commander may be able to consider the consequences that might derive from his attack, and have some idea as to the location of civilians within his tactical area of operations or, if a pilot, within the vicinity of his target. An example would in fact be that cited at the outset of this discussion regarding the destruction of a village of 500 in order to neutralize a single sniper or machine gun position.[529] As with the concept of proportionality in

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528. Fenrick, *supra* note 510, at 127.

529. The ICRC COMMENTARY, *supra* note 247, at 684, provides two other examples: (a) the presence of a soldier on leave cannot serve as a justification to destroy the entire village, and (b) while conceding that an attack on a bridge in the center of a village may result in some collateral damage to civilian property, it would be disproportionate to destroy the entire village. As general examples, each is correct. But the second does not take into consideration the friction of war. The example is correct if it suggests that a commander would not be justified in attacking the entire village in order to destroy the

general, other specific examples are a little more difficult to identify. To the extent any small unit commander is possessed of information as to the location of civilians, he should exercise ordinary care to minimize collateral civilian casualties, consistent with mission accomplishment and the security of his unit, tank or aircraft. The primary responsibility for minimization of collateral civilian casualties continues to reside with the party to the conflict with control over the civilian population and with the individual civilian, however.

In many cases, small unit commanders or individual pilots will not be possessed of sufficient information to weigh a decision regarding proportion. Most small unit commanders have a limited objective that is part of an overall attack, just as individual pilots will be assigned a particular target to attack as part of an overall strike force; their latitude in achieving their objectives is limited at best. Neither may be briefed as to the value of their objective or target within the overall scheme of attack, and the value may fluctuate depending upon the success or failure of the overall attack.

For example, in the weeks preceding the 6 June 1944 Allied landing at Normandy, Allied aircraft flew thousands of sorties against targets in the Pas de Calais area to persuade the Germans that the Allied invasion would take place in that area, as well as to seal off the Normandy beachhead from Wermacht reinforcements. Assume a pilot of an American aircraft has been assigned the mission of destroying a heavily-defended bridge in the middle of a village in the Pas de Calais area. In that he will not be privy to D-Day plans as to where or when the invasion will take place, he will be unable to weigh the value of his mission against the risk to the civilian population—assuming he has any idea where the civilians in that village will be at the time of his attack. For sake of argument, assume that he does know that his mission is part of the deception surrounding the invasion plan. On an individual basis, he may feel that it is not worth risking his life or the lives of civilians in the village to attack a bridge merely for the purposes of executing a feint. But every portion of the feint may be critical to persuading the Germans that the Allied invasion may take place in the Pas de Calais, and therefore to the overall success of the operation. Only a commander at the highest level—such as General Dwight D. Eisenhower—can weigh such a decision.

The second part of the issue of military advantage is suggested by Commander Fenrick's hypothesis. That surrounds the question of the military value of (to use Commander Fenrick's example) the February 1945 attack on Dresden. This is neither the time nor place to debate the issues surrounding that attack. The overall question becomes one of the military advantage of an attack that cost 25,000 civilian dead. The *ICRC Commentary* states that codification of the concept of proportionality into Protocol I was intended for use at the tactical rather than the strategic level.[530] Yet the Dresden example illustrates the difficulty of application of proportionality at the tactical level. There is adequate evidence available to suggest that the decision to attack Dresden was made at the strategic level, where the factors weighed

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bridge. However, what if both attacker and defender realize this is the *only* bridge remaining that will permit the defender to rush reinforcements to the front to repulse a major offensive by the attacker, and the defender heavily fortifies his defenses around the bridge? The value of destruction of the bridge would be substantially greater, while the intensified enemy defenses (passive and active) would have a pronounced effect on the accuracy of the attacker's bombing of the bridge. Battlefield dynamics will cause the value of an objective to fluctuate markedly, sometimes in only a matter of minutes, while the success of enemy defenses—a matter not within the control of an attacker—will have considerable influence on the degree of collateral damage around a target.

530. ICRC COMMENTARY, *supra* note 247, at 683.

included providing support for the advance of Soviet forces into eastern Germany, destruction of the lines of communication at a critical chokepoint in order to prevent German reinforcement in opposition to the Soviet advance, and possible hastening of the end of the war. No tactical commander would be possessed of adequate information or authority to weigh such a decision and, at the strategic level, a national leader would be faced with the conundrum of weighing the loss of 25,000 lives against the possibility that a successful attack might end the war sooner, thereby saving hundreds of thousands of lives. This itself is a question of proportionality, of substantially greater importance than any decision made at the tactical level.

Within the issue of responsibility for collateral civilian casualties lies the equally fundamental issue of accountability. Commander Fenrick's hypothesis suggests a dangerous fallacy in tallying the total civilian casualties from an attack and holding the commander engaged in offensive operations accountable for them in their entirety, an approach made by the North Vietnamese in threatening captured American aircrews with war crimes trials in the course of the Vietnam War.

Attack of a military objective, wherever located, is lawful. While the number of civilian casualties that occur are the result of that attack, the attack is not necessarily the cause of those casualties, nor may they necessarily be attributable to the attacker. The approach under discussion suggests that "but for the attack, these civilian losses would not have occurred; therefore the attacker is responsible." This approach would make any attack on any target, wherever located, illegal, notwithstanding the actions of the defender. It would encourage a defender to leave his civilian population in place rather than evacuate them from the vicinity of a military objective, as required by article 48, or use his civilian population as a shield from attack in violation of article 51(7). It also would permit him to "cost out" a high-value target by surrounding a target with so many civilians that the effects of the attack would be disproportionate to the perceived value of the attack. The record of certain nations and "liberation movements" indicates that they would use the civilian population for this purpose, making a mockery of the law of war. In particular, a regime or organization with a consistent record of human rights violations or resort to terrorism would think little of sacrificing civilians in its defense, as was demonstrated by North Korea, North Vietnam, and the PLO during the Korean and Vietnam Wars and the 1982 fighting in Lebanon, respectively.

The question of accounting for civilian casualties also suggests the danger of this approach. As previously noted, according to North Vietnamese count, 1318 "civilians" were killed in the Hanoi area during the Linebacker II bombing campaign that took place from 18–29 December 1972. Several questions must be raised in the course of determining responsibility for the casualties. The first is whether each "civilian" was entitled to be considered a civilian based on his activities at the time he was killed. Was a particular person engaged in military activities at the time of death so as to cause a loss of civilian status? Second, even if a civilian, was that person working within a military objective? As previously indicated, there is an assumption of risk for civilians within or adjacent to a military objective, and a question should be raised with regard to any responsibility on the part of an attacker for deaths among those "civilians." Third, what was the cause of death? Was it caused by a bomb dropped by the attacker or by actions attributable to the defender? During the Linebacker II operations, for example, the North Vietnamese fired in excess of 1100 SA–2 surface-to-air antiaircraft missiles at U.S. aircraft which resulted in the loss of only fifteen B–52 aircraft. The SA–2 missiles that did not strike their targets either exploded in the air (into pieces large enough to be lethal on impact with the ground), or plummeted back to Earth intact, where they would have exploded.

The North Vietnamese also employed thousands of large-caliber antiaircraft guns firing millions of rounds of munitions, much of which had had the proximity fuze removed. Once those rounds reached the limit of their range, they also plummeted back to Earth, where they exploded on impact or were heavy enough (particularly as they were traveling at terminal velocity) to inflict a fatal wound. How many civilians were struck and killed by the debris from these SA–2 missiles or antiaircraft munitions?

Similarly, some B–52 aircraft crashed in Hanoi or its suburbs as a result of enemy actions. How many civilians died as a result of the crash of an out-of-control aircraft downed by enemy defenses?[531]

As previously indicated, the North Vietnamese did execute somewhat of an evacuation plan in the days immediately preceding the Linebacker II operations. However, how many civilian lives might have been saved with a more comprehensive evacuation plan, or better air raid precaution steps by the defender? Similarly, individual North Vietnamese civilians who had been evacuated were known to return to their Hanoi homes without authorization. Could any of the civilian deaths have been avoided by a better, enforceable air defense precaution plan? How many civilians lost their lives because they chose to continue to live in close proximity to a legitimate military target, or because North Vietnamese authorities moved antiair defenses or other military equipment near a civilian residential area? If an attacker is exercising ordinary care to minimize collateral civilian casualties, deaths attributable to the action or inaction of the defender or individual civilians are not the attacker's responsibility.

The recently concluded operations in Panama provide another illustration of the difficulty of accountability. Estimates are that as many as 300 civilians may have died in the course of the fighting. But officials have been unable to ascertain in all cases the status of the deceased, and the circumstances of death. Many members of the deposed Manuel Noreiga's Panamanian Defense Force (PDF) chose to fight in civilian clothing, for example. As a spokesman reported, "We couldn't always say if a casualty was a PDF, a civilian or what. If a guy was shot carrying a weapon, that was a pretty good indication that he was not a friendly. But troops under fire didn't always have time to label each corpse with the location where he was found."[532]

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531. The bombing of Bach Mai Hospital, described *supra* note 208, incidental to the crash of the B–52 struck by two SA–2 missiles, is illustrative of the problem. While it should be obvious that an attacker is not responsible for civilian deaths caused by aircraft that crash as a result of enemy action, the point has been lost on some in the past. During the conduct of Linebacker II, a representative of the Joint Chiefs of Staff (JCS) briefed the House Armed Services Committee (HASC) after each day's operations. The JCS took great pains to illustrate through photographs the extremes being taken at every level of command to minimize risk to the civilian population of North Vietnam, much to the chagrin of those members of the HASC who opposed the bombing. A concluding briefing was provided in January 1973. During the briefing a photograph was flashed on the screen showing damage in a residential section of Hanoi. A new member of the HASC seized upon the occasion to castigate the briefer for what appeared to be erratic bombing, demanding of the briefer that he explain the circumstances surrounding the damage. The briefer responded: "I regret . . . to say that the damage was caused by the crash of one of our B–52 aircraft after being hit by a North Vietnamese surface-to-air missile, with the loss of the entire crew." The new congresswoman was not to be denied, however, as she screamed: "Well, dammit, General! Can't you teach your pilots to crash somewhere else"? (The story was related to the author by an officer who was present at the hearing session.)

532. J. Omang & D. Priest, *Accounting for Panama's Dead: Uncertainty and Confusion*, Wash. Post, Jan. 7, 1990, at A23. A Panamanian source quoted in the same story estimated that thirty percent of the "civilian" deaths were PDF members in civilian clothing or members of Noreiga's die-hard Dignity Battalions. *See also* D. Pitt, *The Invasion's Civilian Toll: Still No Official Count*, N. Y. Times, Jan. 10, 1990, at A13; and J. Goshko, *U.S. Puts Civilian Toll at 220*, Wash. Post, Jan. 10, 1990, at A16. The two later news stories indicated that U.S. officials had put the civilian death toll at 220, while conceding that many of those "civilians" may have been members of the PDF or Dignity Battalions who were killed while fighting in civilian clothing. The New York Times story stated that the Panama-

The circumstances of death were equally difficult to establish. Some civilians died when caught looting by business owners. Others died when Noriega loyalists set fire to the poor neighborhood of Chorrillo. Still other deaths are directly attributable to actions by members of Noriega's paramilitary "Dignity Battalion," such as "drive by" shootings in which Dignity Battalion soldiers opened fire on crowds of innocent civilians as they drove by, apparently because the civilians were welcoming, rather than resisting, the American operation.[533]

The fighting in Panama prompted the American media to "round up the usual far-left critics"[534] to offer unfounded allegations that many more civilians had died.[535] Misallegations of civilian casualties for propaganda effect are a familiar part of war. A major weakness of the vaguely-worded formulae in articles 51 and 57 is that they provide both domestic critics and an enemy with an appearance of authority for charges of "indiscriminate bombing," or for target-by-target analysis of bombing results based upon alleged civilian casualties without consideration either of actual fact or cause of those casualties. This was intentional on the part of the principal drafters of Protocol I (such as Sweden, Switzerland, and the ICRC, through the Group of 77). They felt, based in part on the American experience in its bombing campaigns over North Vietnam, that claims of indiscriminate bombing would lead to considerable outcry of world public opinion that would pressure an attacker to cease or slow his actions, even if they were legal or as discriminate as possible. Soviet combat actions in Afghanistan, in which entire villages and their civilian population were destroyed by ground or air action in order to deny the Mujahadin access to the civilian population, suggest that the theory behind the purpose for the language will only have an impact in a democracy.[536] Given the United States experience in World

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nian Red Cross had put the number of deaths of unarmed civilians at 129, another indication of the possibility of disagreement or discrepancy in actual numbers, let alone cause of death. A later U.S. report put the figure of civilian deaths as 202, after Panama's Institute of Legal Medicine identified eighteen of those previously included in the earlier U.S. total as being members of the PDF. *U.S. Reduces Death Toll for Civilians to 202*, Baltimore Sun, Jan. 13, 1990, at 2.

533. Thus the first article cited in the preceding footnote begins with the following:

> For most of his life, Alberto Meija, 56, was a civilian cook for the Panamanian military.
> . . . .
> He was cleaning up after cooking a late dinner for Panamanian troops guarding the airport here when U.S. forces attacked it the morning of December 20. Meija ran for cover and was shot dead by PDF forces behind him, according to his daughter, who cited witnesses.
> Assuming her account is accurate, Meija's death raises a key question: Was he a civilian casualty of the U.S. invasion? Was he a military casualty? Or was he a murder victim?

534. Fred Barnes, The McLaughlin Group, Jan. 13, 1990. Mr. Barnes' statement was made in response to discussion by the group of an open letter to President Bush protesting U.S. operations in Panama that appeared as a full page advertisement in the New York Times on Jan. 10, 1990, at A28. It was signed by sixty-nine left-wing politicians and activists, including well-known Vietnam War protesters Ramsey Clark, William Sloan Coffin, Richard Falk, J. William Fullbright, George McGovern, and Cora Weiss, as well as Marcus Raskin of the far-left Institute for Policy Studies and Hollywood celebrities with reputations for supporting left-wing causes such as Ed Asner, Martin Sheen, and Oliver Stone. Protocol I would offer such groups increased credibility by providing them legal authority, but in the type of vague, ambiguous language that can be easily exploited in propaganda allegations of the sort published by the New York Times. As with use of the word "attack" in article 49(1), this was intentional on the part of the ICRC, Switzerland, Sweden, and the balance of the Group of 77. In specific response to the New York Times advertisement, *see* Broder, *Panama: An Intervention That Made Sense*, Wash. Post, Jan. 14, 1990, at B7.

535. For example, The New York Times advertisement referred to (*supra* note 534) alleged that "at least 400 Panamanian civilians" had been killed.

536. *See* TEARS, BLOOD AND CRIES: HUMAN RIGHTS IN AFGHANISTAN SINCE THE INVASION, 1979–1984 (1984); *see also* Brumley, *Afghan Atrocities Charged to Soviets and Their Cohorts*, Wash. Times, Nov. 19, 1987, at A10.

War II, Korea, and Vietnam, in which American aircrews were denied prisoner of war protection and in some cases executed because of spurious allegations of "indiscriminate bombing," the greater danger is that the language of Protocol I provides an enemy captor with an authentic basis for his misallegations in future conflicts, no matter how discriminate air operations may be in fact.

The difficulty of ascertaining responsibility for collateral civilian casualties also can be attributed to the confusion of combat. Reference to one incident from the early stages of the American military operations in Panama will serve to illustrate this point. News accounts stated that the 123-member U.S. Army 988th Military Police Company had assaulted a PDF dog kennel, where unit members engaged in a "fierce firefight" lasting three hours, resulting in three PDF dead. The story became somewhat of a *cause celebre* because the company commander was a woman, who (it was reported) had "crashed" through the kennel gate in her Jeep armed with a .50-caliber machine gun to lead the assault, while another woman in the unit had captured a member of the PDF "single-handedly."

Subsequent investigation determined that the firefight had lasted only ten minutes; there were no PDF casualties; neither PDF weapons nor spent enemy shell casings were found; the company commander was a half-mile away when she received reports of action, and used her jeep to break the lock on the gate; and a captured PDF soldier was found, unarmed, cowering in the ranks of the MP company when a muster was held at the end of the "battle." Initial news accounts were characterized by a later story in a competing newspaper as "grossly exaggerated," touching off a flurry of press in-fighting over the facts of the incident.[537]

The foregoing involved the simplest of attacks, a small-unit ground force operation of short duration in territory over which the American military had control and

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537. *See* Broder, *Army Says Role of Female Soldiers Was Exaggerated*, Philadelphia Inquirer, Jan. 6, 1990, at 4; Shabecoff, *Female Captain's Role is Called into Question*, N.Y. Times, Jan. 8, 1990, at B8; Richardson, *Female Heroics Set Off War of Words in Press*, Wash. Times, Jan. 10, 1990, at 1; and Gordon, *U.S. Tells Calmer Story of Woman's Invasion Role*, N.Y. Times, Jan. 9, 1990, at A14. The initial news report was based upon interviews with some members of the unit. It illustrates a rather common phenomenon known as scenario fulfillment in that combatants (particularly those going into combat for the first time) see what they are expecting to see. Apparently some of the soldiers believed they saw members of the PDF in the kennel and fired in reaction, at which time all of the unit members became engaged in a one-way firefight with a non-existent enemy force. Each member of the unit doubtless would be able to pass a polygraph that he or she had been in combat as a result of what each believes occurred that night, even though later investigation indicates that the only enemy soldier present at the kennel was unarmed and hid until the United States firefight was concluded. He was discovered in the ranks of the unit when a muster was held at the end of the action.

The author witnessed several similar non-attacks during his service in the Republic of Vietnam. The most spectacular was a three-hour firefight on the night of 22–23 February 1969 between the rear-area headquarters of two U.S. Marine units in a valley below the author's position. It was the night of the 1969 Tet Offensive in which the North Vietnamese succeeded in (among other things) infiltrating most headquarters areas of First Marine Division units located near Da Nang. The author's reaction company had secured part of the First Marine Division headquarters perimeter after brief fighting, and was situated on a hill overlooking a small Vietnamese village that was straddled by the headquarters of the 1st Motor Transport Battalion and the 26th Marines (Rear), each of which had repulsed enemy attacks with some losses earlier. It is not certain how the firefight between the two units began, but it continued until daybreak, by which time each unit had virtually exhausted its ammunition supply. In a subsequent infantry sweep through the Vietnamese village by the author's unit, no enemy soldiers were found and, miraculously, no civilians had been killed by the massive exchange of small-arms fire. Yet Marines in both units swore to the frontal assaults each had received during the time in which they had fired at one another, notwithstanding the fact that the units were approximately two hundred meters apart and neither had sent Marines out of their defensive positions.

These examples again serve to illustrate the danger U.S. officials found in providing the ICRC the authority (in article 81(1) of Protocol I) to scurry about the battlefield as some sort of referee of events. The potential for error is great, not only by combatant units but, as seen in the conflicting news stories regarding the PDF kennel "attack," by individuals endeavoring to ascertain what happened after the event.

to which a relatively supportive media had access. It serves to illustrate that it is difficult, if not impossible, to ascertain the facts related to an attack *after* it has occurred, let alone examine an attack and determine the precise number of casualties, the persons entitled to be characterized as civilians, and the cost of the attack in terms of civilian lives *vis-à-vis* its anticipated military advantage. If it is difficult to determine the facts for an operation as simple as an understrength company attack on an undefended objective, one can imagine the difficulty of determining the facts—such as accountability for a particular civilian casualty—in a complex air strike involving more than one hundred aircraft against a target defended by sophisticated air defenses. It is all the more difficult for an attacking commander to make any kind of determination *prior* to an attack, particularly when (as compared to a defender) he knows little, if anything, about the location of the civilian population or individual civilians. While battlefield intelligence capabilities are increasing, no nation possesses the capacity to locate, identify, or track civilians. Any attempt to depart from the customary practice of recognizing the defender as having the primary (if not exclusive) responsibility for separating the civilian population from military objectives while foisting the responsibility for minimization of collateral civilian casualties upon an attacker is doomed from the outset. It seriously undermines the law of war by encouraging a defender to use civilians as a point of exploitation for tactical and propaganda purposes.

One page from history will serve to illustrate the latter point. On 10 May 1940, the German city of Freiburg in Breisgau was struck by bombs from raiding aircraft. Although British officials denied any attack on or air operations in the vicinity of the city, the attack was widely exploited by Nazi propaganda officials as an example of British barbarism. Three years after the war British military author J.F.C. Fuller condemned the RAF for its attack on Freiburg.[538] Eight years later official German historians announced that they had determined that the bombing had been carried out by errant Luftwaffe aircraft.[539] The lesson from this incident is two-fold: (a) determining responsibility for an action is very difficult, particularly in war where one party controls the site at which an incident occurred, who (b) may exploit it for propaganda purposes. If a reputable military historian can commit such a serious factual error in the calm of postwar, unrushed research, it is evident that it will be difficult, if not impossible, to obtain an objective determination regarding responsibility for civilian casualties from a particular operation in the midst of a conflict. The susceptibility, apparently willing, of ICRC officials to accept without question PLO statements regarding civilian casualties during the 1982 Israeli incursion into Lebanon indicates the fallacy of such an approach. Any evaluation of an attack on the basis of reported civilian casualties is an evaluation based on substantially less than a complete picture, and the whole picture may not be ascertainable until some years later, if ever.

Very early in this article a fundamental distinction was noted between the law of Geneva and the law of The Hague. The former deals with the protection of war victims who have fallen into the hands of the enemy, while the latter addresses the

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538. J. FULLER, THE SECOND WORLD WAR, 1939–45, A STRATEGICAL AND TACTICAL HISTORY 222 (London, 1948).

539. *Lost Luftwaffe Aircraft Raided German City*, N.Y. Times, Apr. 5, 1956, at 1; Hackman, *The 1940 Bombing of Freiburg: Fuller and the Writing of Military History*, 25 AEROSPACE HISTORIAN 155–58 (Fall/Sept. 1978); and G. UEBERSCHAR & W. WETTE, BOMBEN UND LEGENDEN: DIE SCHRITTWEISE AUFKLARUNG DES LUFTANGRIFFS AUF FREIBURG AM 10 MAI 1940 (Freiburg, 1981). The author is indebted to Dr. Horst Boogof the *Militargeschichtlichen Forschungsamtes* for the last reference.

use of force on the battlefield. Although there have been violations, the law of Geneva has been relatively successful because the four Geneva conventions address a situation in which the obligated party is in total control.

The opposite is true with regard to the law of The Hague. Except for the obligation to provide warning, which itself is not absolute, an attacking force has no control over the civilian population in the vicinity of enemy military objectives, and in most cases will have no idea where the civilian population or individual civilians are at the time of his attack. It is a full-time task for a commander's intelligence staff to ascertain the location and strength of the enemy threat facing a command. Even where an attacking commander exercises ordinary care to minimize collateral civilian casualties, his responsibility traditionally has been tertiary—behind that of the defending commander (who has control over the civilian population) and the individual civilian (who must exercise common sense in the face of probable risks).

A fundamental problem with articles 48 to 58 of Protocol I is that those articles appear to be developed less for combat than for a basketball free-throwing contest in which each opponent obligingly permits the other to shoot his shots. The applicability of the rules to combat would be appropriate if neither opponent had consciously slept for forty-eight hours; each is ill-fed (if fed at all); the basket is constantly moving, at times obscured by smoke or fog; and the opponent is moving about the court in unknown strength, shooting at the player trying to make his baskets, who may be using a ball that is (perhaps unbeknownst to the shooter) defective or damaged by actions of his opponent. In the midst of this, the nonshooting opponent shifts his basket into the center of the spectator seats, in violation of the rules of the competition. The player attempting to make his baskets complains about his opponent placing the basket amidst the spectators, thereby endangering them. Officials do not penalize the offender, and the spectators remain in their seats. Under the rules of Protocol I, the basket shooter is admonished that he will be held responsible for any baskets that miss and cause injury to the spectators. The words of H. L. Mencken are an appropriate description of articles 48 to 58 of Protocol I, "For every problem there is a solution that is perfectly simple, perfectly obvious, and perfectly wrong."

A fundamental problem with articles 48 to 58 of Protocol I is that those articles fail to consider what Clausewitz referred to as the friction of war. His words are timeless, and are of greater value today than they were when they were written 150 to 200 years ago, not only with respect to the failure of the participants in the Diplomatic Conference to appreciate the endeavor they were trying to regulate,[540] but to the problems of the combat commander. As Clausewitz observed:

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540. Clausewitz states that:

> If one has never personally experienced war, one cannot understand in what the difficulties mentioned really exist, nor why the commander should need any brilliance and exceptional ability. Everything looks simple; the knowledge required does not look remarkable, the strategic options are so obvious that by comparison the simplest problem of higher mathematics has an impressive scientific dignity. Once war has actually been seen the difficulties become clear; but it is extremely hard to describe the unseen, the all-pervading element that brings about this change of perspective.

If CLAUSEWITZ, ON WAR 119 (M. Howard & P. Paret trans. 1976) [hereinafter CLAUSEWITZ, 1976]. Others have made similar observations. A young British officer writing almost one hundred years ago of his observations of combat in Afghanistan, roundly condemns those "serene critics who note the errors, and forget the difficulties, who judge in safety of what was done in danger, and from the security of peace, pronounce upon the conduct of war." W. CHURCHILL, THE STORY OF THE MALAKAND FIELD FORCE: AN EPISODE OF FRONTIER WAR 110 (London, 1898). Similarly, the late British naval historian Arthur J. Marder, remarking on the 31 May–1 June 1916 battle of Jutland, has written:

> Everything in war is very simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war . . . .
>
> Friction is the only concept that more or less corresponds to the factors that distinguish real war from war on paper. The military machine—the army and everything related to it—is basically very simple and therefore seems easy to manage . . . . In fact, it is different, and every fault and exaggeration of the theory is instantly exposed in war. The dangers inseparable from war and the physical exertions war demands can aggravate the problem to such an extent that they must be ranked among its principal ones . . . .[541]

Friction is brought about in large measure by uncertainty, about which Clausewitz wrote, "War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty."[542] Uncertainty is caused in part by a lack of information regarding the enemy. Clausewitz noted that, "Many intelligence reports in war are contradictory; even more are false, and most are uncertain."

For these reasons, Clausewitz rejects as "worse than useless" efforts to systematize warfare with rules and formulas, raising three objections:

> They aim at fixed rules; but in war everything is uncertain, and calculations have to be made with variable quantities.

> There has been altogether too much passion and bias in the "Jutland controversy," more particularly as regards the two British principals. . . . Throughout I have made a conscientious attempt to be dispassionate and to eschew "the lucid view afforded by hindsight," for, as Homer put it, "After the event even a fool is wise." Throughout I have also borne in mind how little those concerned in the battle really knew what was going on. To judge their actions from the comfort of an armchair, with the dispatches, a mass of elaborate and accurate diagrams, and descriptions of the battle from both sides—none of which material, of course, was available to the commanding officers at Jutland—spread out before one, and with utter disregard of the effect of smoke and mist and of what the [Commander-in-Chief] and squadron commanders knew at the time of the High Seas Fleet's strength, position, and formation, would be unjust to those officers and make a mockery of Clio, the Muse of History. The historian needs also to remember that ship-to-ship directional wireless telegraphy was then in its infancy, that air reconnaissance did not, practically speaking, exist, and that there was no radar. Where possible, I have endeavored to soften my criticism by charity for human frailty and by the knowledge that, as Captain John Cresswell has so well put it in another context, "in the stresses of a great war the Fates are often stronger than man, and man at his best; that an enterprise may fail, and fail disastrously, without the officer responsible for it necessarily deserving castigation.

III FROM THE DREADNOUGHT TO SCAPA FLOW, JUTLAND AND AFTER, vii (2d ed., London, 1978). A fundamental error of the participants in the Diplomatic Conference that drafted the 1977 Protocols was a disregard for the advice and experience of the Churchills and Marders of the world. Following more than a decade's research, including discussion of the events of the Diplomatic Conference with numerous participants, the author came to realize that this was intentional; many of the participants were striving for a strict liability standard in judging the battlefield decisions of military commanders.

541. CLAUSEWITZ, 1976, *supra* note 540, at 119–20. *See also* CLAUSEWITZ, ON WAR 24–25 (M. Howard tran. 1983) [hereinafter CLAUSEWITZ, 1983]; Cheesman, *Smart Weapons, Stressed Out Soldiers*, Wall Street J., Sept. 7, 1989, at 14; and Summers, *Where Confusion is Normal*, Wash. Times, Oct. 19, 1983, at F3, where Summers notes that:

> The military's version of Murphy's Law (except that it has far more serious implications), *friction* is an inherent part of military operations. Nothing ever goes as planned. Countless minor incidents—the kind you can never really foresee—combine to lower the general level of performance, so that one always falls short of the intended goal.

542. CLAUSEWITZ, 1976, *supra* note 540, at 101, 117. The remarks of Clausewitz are mirrored by those of Wellington, who observed that "All the business of war . . . is to endeavor to find out what you don't know by what you do. That's what I call guessing what was on the other side of the hill." Wellington's problem was lack of information. While intelligence-gathering capabilities have improved, a commander's lack of knowledge of his enemy's whereabouts, capabilities, and intentions has been exacerbated by an enhancement in deception.

They direct the inquiry exclusively toward physical quantities, whereas all military action is intertwined with psychological forces and effects.

They consider only unilateral action, whereas war consists of a continuous interaction of opposites.[543]

In considering articles 48 to 58 in the context of aerial bombardment and the friction of war, myriad factors contribute to the success or failure of an attempt of a pilot or aircrew to bomb accurately. Some are within the control of the attacking aircrew(s); some are within the control of the defender; and some are not within the control of either. The following table illustrates these factors and their normal degree of control:[544]

Factor	Control of Attacker	Control of Defender	Control of Neither
Target Intelligence	some	some	
Planning time	some		
Aircrews	some		
Crew experience	some		
Force integrity	some	some	
Distance to target	some	some	some

543. *Id.* at 136. For an analysis of Clausewitz's view of uncertainty in war, *see* Herbig, *Chance and Uncertainty in On War*, in CLAUSEWITZ AND MODERN STRATEGY 95–116 (Michael I. Handel, ed. London, 1986).

544. The ICRC COMMENTARY, *supra* note 247, at 684 makes reference to the existence of factors contributing to collateral civilian casualties, listing

> their location (possibly within or in the vicinity of a military objective), the terrain (landslides, floods, *etc.*), accuracy of the weapons used (greater or lesser dispersion, depending on the trajectory, the range, the ammunition used, *etc.*), weather conditions (visibility, wind, *etc.*), the specific nature of the objectives concerned (ammunition depots, fuel reservoirs, main roads of military importance at or in the vicinity of inhabited areas, *etc.*), technical skill of the combatants (random dropping of bombs when unable to hit the intended target).
>
> All of these factors must be taken into consideration whenever an attack could hit incidentally civilian persons and objects.

The ICRC COMMENTARY is significant in three respects: (a) it gives no consideration to the effect of enemy defenses; (b) it disregards the defender's responsibility for civilian casualties where military objectives have been commingled with civilian objects or the civilian population; and (c) it assumes (as illustrated in the last sentence of the quote) that the commander of an attacking force will be able to anticipate all of these problems in advance, and plan accordingly, or that even if he is unable to anticipate certain factors, that he will be able to do something about it. For example, General Curtis LeMay has stated that the B–29 Superfortress crews he commanded to bomb Japan in February 1945 were basically untrained, which he realized would lead to less accurate bombing than he would have preferred. However, General LeMay did not have the luxury of doing anything other than that which is referred to as "on-the-job training"—in combat. LEMAY & YENNE, SUPERFORTRESS: THE B–29 AND AMERICAN AIR POWER 120 (1987).

Factor	Control of Attacker	Control of Defender	Control of Neither
Mechanical problems	some	some	some
Weather at target	minimal		most
Enemy defenses		all	
Human factor	some		

Each of these factors will be examined briefly to illustrate their potential effect on bombing accuracy.

Target intelligence. Even in the best target intelligence systems, the quality of intelligence may range from excellent to none. The intelligence may be influenced by whether the target is fixed or mobile; confusion over the map name;[545] and by its timeliness.[546]

Planning time. Planning time is critical to mission success. The 1983 Grenada rescue operation was hampered by the minimal amount of planning time for deploying units (less than forty hours for most units from the time of receipt of their warning order to the time at which they were in combat). Conversely, delays that permitted the luxury of more planning and rehearsal proved of no value in the 1971 rescue operation to the Son Tay prisoner of war camp in North Vietnam, because the American prisoners had been moved.[547] Delays by key decision makers led to United States special operations planners planning the ill-fated 1980 Iranian rescue mission in approximate two-week cycles, rather than spending four months planning a single mission.[548]

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545. For example, there was considerable confusion regarding the 16 March 1968 massacre at My Lai village because there were several villages by that name and its correct name of Song My, all in the same area. During the 1983 rescue operation in Grenada, because of the suddenness of the operation American units were operating with three different maps, all with different map coodinates. But the crowning point of confusion was caught by U.S. intelligence sources who viewed an official Soviet news report of the American landing in which the Soviet briefer was discussing the operation while pointing to the city of Granada in southeast Spain.

546. Thus one author has observed that: "Intelligence types . . . routinely (usually quite innocently) withhold information aircrews would find of inestimable value or, more often, mistakenly edit the key fact of highest value to the tactician." Commenting on timeliness, he noted that

> I vividly remember watching a major [air] strike on a heavily-defended target being briefed in May 1965 using year-old U–2 [reconnaissance aircraft] photography. The same sort of thing happened when we returned to North Vietnam in 1972, in the same war, and most available photography dated to 1967–68. In 1968, a survey of targeting materials for a different target system in a different area found that three-fourths of the photographs in them were at least two years old.

Haering, *How Tactical Air Works*, 108 U.S. NAVAL INST. PROC. 62 (Nov. 1982). The interaction of the various elements under consideration can be illustrated by the fact that target intelligence photographs only one day old may be of little value to the strike force if the defender has shifted his mobile defenses to different locations, thereby affecting the way in which the strike force responds on arrival at the target. The success of the enemy defenses in turn will have a marked effect on bombing accuracy.

547. For discussion of the Son Tay mission, *see* B. SCHEMMER, THE RAID (1976).

548. Personal knowledge of author, who served as a legal adviser for portions of the rescue mission planning. To date, no accurate narrative or analysis of the 1980 rescue mission has been published. The forthcoming account by Colonel James H. Kyle, USAF (Ret.), THE GUTS TO TRY (1990), should do much to rectify this.

Adequate planning time is critical for a number of reasons, such as better intelligence, more time for pilots/aircrews to study the route to the target and the target itself, and deconfliction of the various parts of the strike force, particularly in the target area. It becomes more critical with increasing complexity and duration of the mission. At the same time, excess planning time can lead to a "wear-down process" in which the crews flying the mission are exhausted by mission preparation before they take off. Planning time is something over which operational commanders and aircrews in a perfect world would have exclusive control, but about which generally they have little control in actuality.

Aircrews. Several factors are affected by the aircrews involved in an airstrike. The strike commander does not have complete control over this factor, in that he must accept the men assigned him, and the aircrews are affected by the aircraft assigned them.

Part of the factor involves aircrew training. As one veteran of air combat over North Vietnam learned:

> Those who have not delivered weapons from an airplane have little or no conception of the problems involved or the requisite skills. There are so many variables in the accuracy equation and the chance for error is so great as to make one wonder how fighter pilots do as well as they do.[549]

Yet the United States has learned over and over that its forces usually have not trained for the war they are called upon to fight. This was true both in Korea and Vietnam.[550] Proper training or not, however, the missions must be flown. The United States is not unique in this respect, because opponents tend to change in identification or in their tactics, as the Israeli Air Force learned to its shock in its 1973 war.[551] This in turn can have an effect on bombing accuracy.

A debate has existed for years over whether tactical aircraft should have a pilot only or be multi-seated,[552] and whether aircraft should be single, dual, or multimission in design.[553] In theory, the more missions an aircraft can fly, the fewer types of aircraft that have to be bought, reducing logistics and maintenance costs. But there is a point of diminishing return, because the more missions for which an aircrew must train—for example, air superiority, battlefield interdiction, or deep-strike—the less skilled the aircrew is with each. Recent American Navy consideration of using its F–14 Tomcat fighters as strike aircraft is technically feasible, but would cause F–14 crews to train for a mission that has not been theirs for almost two decades; the same is true for the pilots making the transition from the F–15 Eagle to the F–15E Strike Eagle. In each case, the policy decisions made are reasonable and honest, often dictated by fiscal constraints as part of the normal budgeting process. But at the cutting edge, each affects potential bombing accuracy. In exercising the precautions in the attack called for by article 57 of Protocol I, a commander cannot point to these decisions in explaining his actions. He must fight the war and fly the mission with what is on the shelf.

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549. Appel, *Bombing Accuracy in a Combat Environment*, 26 AIR U. REV. 40 (July–August 1975).

550. This issue is discussed at length in J. BROUGHTON, GOING DOWNTOWN, *supra* note 109 [training for tactical airstrikes against pinpoint targets] and R. HALLION, *supra* note 221 [training for close air support missions].

551. *See* the description of IAF air losses in the opening days of that conflict in E. O'BALLANCE, NO VICTOR, NO VANQUISHED: THE YOM KIPPUR WAR, *supra* note 226.

552. *See* Flanagan, *The Fighter Force: How Many Seats?* 32 AIR U. REV. 3–21 (May–June 1981).

553. *See* Suter, *Janus: Concept for a Multipurpose Fighter*, 31 AIR U. REV. 22–41 (May–June 1981).

Crew experience. Just as flight experience (overall or in aircraft type) leads to a decrease in flying accidents,[554] combat experience affects bombing accuracy, aircrew survival, and mission accomplishment, as the following illustrates:

> attrition decreased markedly as the war progressed. This was clearly the result of an aircrew training process. . . . The most striking case involved the Hai Duong Bridge and nearby targets. We never made a strike there in 1965 [the first year of the bombing campaign] without losing at least one aircraft. That year, we lost aircraft at a rate of 39 per 1,000 attack sorties. By 1967, we had reduced attrition . . . by a factor of 13. In a randomly selected 30-day period, the attrition rate was 3 per 1,000 attack sorties. Improved hardware made a contribution and probably more important, we were striking two or three times a day in 1967 instead of once or twice a fortnight as we did in 1965. But the defenses had also improved in quality and substantially increased in quantity. The bottom line was that our aircrews had learned how to live within a defense [surface-to-air missile] and flak environment, and they learned faster than the defenders.[555]

Training programs at the Air Force's Fighter Weapons School, the Navy's Fighter Weapons School ("Top Gun"), and the Navy's Strike Warfare Center ("Strike U") have been developed to reduce the gap in experience between peacetime training and wartime missions. As with peacetime training programs throughout the history of aviation, however, realism is conditioned by safety conditions and environmental considerations, including the objections of the local population to the noise made by high-performance aircraft and/or low-level training. These factors in turn affect a commander's ability to accomplish his mission in the most accurate manner. Ironically, some of the persons who protest realistic training in peacetime are the same ones who in all likelihood will demand the greatest precision of aircrews executing their attacks once a conflict begins. But unless those aircrews are permitted to train as they would fight, their chance for successful (and discriminate) accomplishment of their mission—and survival—is substantially diminished.

Force integrity and distance to target. These two factors are considered together, as each ultimately has an effect on the degree of accuracy an aircrew may exhibit in attack of its target, either because of force attrition as a result of enemy action or mechanical failures, or crew fatigue brought on by combat enroute to the target (and the fear of more combat during egress) or mission length. Eighth Air Force attack of "milk run" targets close to their bases in England, where the bomber force was protected the entire time by a heavy fighter escort, as compared to the less-accurate attacks on the Swedish-owned ball-bearing factories at Schweinfurt-Regensburg in August and October 1943, following unescorted, heavily-attacked flights to the target, illustrate this point.[556]

The capabilities of a strike force to bomb accurately today would be seriously degraded if, for example, those aircraft assigned the responsibility for suppression of enemy air defenses (SEAD) were to suffer significant losses enroute to the target either as a result of mechanical failures or enemy action. The strike force undoubtedly would continue its mission, even though attack accuracy would be affected by the increased distraction of aircrews by enemy air defenses brought about by loss of portions of the SEAD support package. Similarly, the F–111F aircraft that flew from

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554. *See* Borowsky, *Pilot Flight Experience and Aircraft Mishaps*, U.S. NAVAL SAFETY CENTER; Borowsky, *Fighter Aircraft Class A F/FRM Rates vs. Pilot Experience CY 77–83*, 30 APPROACH 7 (Jan. 1985); and Borowsky, *Attack Aircraft Class A F/FRM Rates vs. Pilot Experience*, 31 APPROACH 9 (Mar. 1985).

555. Haering, *supra* note 546, at 65.

556. The latter raids are described in T. COFFEY, DECISION OVER SCHWEINFURT: THE U.S. AIR FORCE BATTLE FOR DAYLIGHT BOMBING (1977), and M. MIDDLEBROOK, THE SCHWEINFURT-REGENSBURG MISSION (1983).

the United Kingdom to attack terrorist-related targets in Libya in April 1986 suffered heavy attrition of aircraft from mechanical problems due to the distance flown to the target. While the unusually restrictive rules of engagement (ROE) prevented some aircrews from completing the mission, absent those ROE most could have attacked the target successfully, though with some degradation of their capability to bomb as accurately.[567]

Mechanical problems. Anything designed by man is destined to break, regardless of the degree of care and maintenance provided. This is particularly true of combat aircraft, which undergo considerable stress during routine flight operations. One need only read a weekly summary of military aircraft mishaps, or consider one's own experience with commercial airline flight cancellations or delays owing to mechanical difficulties, to appreciate the degree to which mechanical problems occur in a peacetime environment.[558] The likelihood of mechanical problems is compounded in military aircraft by the requirement for state-of-the-art equipment to enhance bombing accuracy and aircraft survival in an increasingly hostile air defense environment. That state-of-the-art equipment in turn may not have the same degree of reliability as equipment that has undergone reliability enhancements over a period of time. The failure of equipment due to mission duration during the 1986 Libyan airstrike has been mentioned as a way in which bombing accuracy can be degraded. Another example will further illustrate this problem.

On April 1, 1944, B–24 Liberator aircraft of the 392nd Bomb Group were part of a larger force assigned to attack the I.G. Farbenindustrie Chemical Works at Ludwigshaven, Germany. Due to human (navigational) error and weather (unexpectedly high winds), the group failed to reach its target. Instead, the group elected to attack an alternate target of opportunity, the town of Pforzheim.[559] Weather and human errors caused the group to fly into Switzerland and mistake the town of Schaffhausen for Pforzheim. As was the practice, all group aircraft would bomb on the signal of the lead aircraft. But early in the mission the crews of the lead aircraft discovered that its bomb bay doors would not open completely. In order to remedy this problem, the bomb bay door safety pins were removed by the top turret gunner. However, their removal apparently led to premature release of the bombs before the lead aircraft crossed the bomb release line. The other aircraft in the group then dropped on what they believed was the lead aircraft's signal. In this instance, a mechanical error served as a blessing, as it resulted in all of the group's bombs falling in open countryside outside of Schaffhausen.[560]

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557. *See* Parks, *supra* note 86, and Parks, *Righting the Rules of Engagement*, *supra* note 460, for detailed discussion of the Libyan airstrike. While the author has seen the official reports of the causes of attrition of the F–111F force, that information remains classified other than to say that the length of the flight to the target was a major factor.

558. *See* Casto, *A Week in Naval Aviation*, Weekly Summary of Aircraft Incidents, No.35–89 (20–26 Aug. 1989), at 1–3, which in providing a collage of excerpts from a typical week's message traffic lists twenty-nine mishaps. A separate feature prepared by the Naval Air Engineering Center entitled *Things Falling Off Aircraft This Week* lists 50 pieces of equipment lost in the course of flight operations during the week. Edition No. 41–89 (1–7 Oct. 1989) lists five aircraft lost in the course of flight operations during that week. Only one loss appears attributable to human error.

559. Pforzheim contained no targets of military value, but was to be bombed simply because it was a German town, as was the practice of the time. *See* C. McBRIDE, *supra* note 443, at 74. In this respect U.S. practice has improved markedly, as aircrews today would seek other targets of military value, jettison their bombs in nonpopulated areas, or return to base with their loads if possible.

560. C. McBRIDE, *supra* note 443, at 77–79. Unfortunately, other aircraft bombed not only Schaffhausen but Grafenhausen, causing considerable damage and resulting in the death or injury of 100 Swiss civilians. The United States paid reparations totaling $57,000,000 for the damages, injuries, and death that resulted from the incident. *Id.* at 96–125. Regrettably this was not the only occasion in which the United States Army Air Corps bombed Swiss towns or cities by mistake. While McBride

The mechanical problems discussed thus far have occurred as a result of breakdown of equipment. They also may occur due to damage from enemy air defenses which, while not causing an aircraft to break off its attack, do result in degradation of bombing accuracy, in some cases without the knowledge of the aircrew. As will be discussed, enemy air defenses have accomplished their mission if they have caused damage that will prevent the attacking aircraft's munitions from striking the intended target. But who is accountable for the collateral casualties that occur as a result? Nations award their highest decorations for valor to aircrews who press home the attack on a target in spite of enemy defenses and/or damage to their aircraft. It would be unreasonable to think that any nation would now expect its aircrews to break off an attack due to aircraft damage from enemy fire because of the concern for collateral civilian casualties expressed in Protocol I. This is particularly true because in most cases a pilot (or aircrew) will not be aware of the precise nature of damage to the aircraft until completion of the mission and return to base.

One may always hope for a "zero defects" environment; no aircrew wishes to undergo years of training and preparation, only to fly all the way to a target and miss because of mechanical failures. Nonetheless, there will be occasions where bombs or other munitions are dropped or launched with the honest expectation that they are directed at the intended target, only to find that they miss their target due to a malfunction in the aircraft, its bomb-aiming equipment, or the munitions. A strict accountability standard for collateral damage or injuries is not attainable by any nation, because of the degree to which mechanical failures are likely to occur in a modern combat environment.

Weather at target. Weather is a critical factor for bombing accuracy, and one over which an attacking force commander exercises little or no control, other than to cancel a mission until weather improves—a luxury that war does not always permit, or which may not otherwise exist. Thus the winter overcast that settled in over most of Germany during the fall of 1944 led to abandonment of the Eighth Air Force's effort at precision through visual bombing, and resulted in less accurate radar area bombing for a substantial number of the missions that followed.[561] B–29 force bombing of industrial targets in Japan during the closing months of World War II was shifted from daytime, high-altitude bombing using optical bombsights to nighttime, low-altitude radar bombing in large measure owing to high winds and cloud cover over the targets.[562]

The 1972 Linebacker I campaign against North Vietnam relied heavily upon tactical aircraft using precision-guided munitions (PGMs). But anticipating the possi-

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concentrates on the 1 Apr. 1944 mission in which he participated, his book discusses the other incidents as well. *Id.* at 126–30. *See also* Helmreich, *The Diplomacy of Apology*, 28 AIR U. REV. 19–37 (May–June 1977).

The 1 April 1944 bombing of Schaffhausen also illustrates the difficulty of an on-scene witness determining the cause of civilian casualties occurring as a result of combat operations. A primary cause of the misdirection of the bomb group was the fact that winds were sixty miles in excess of the winds briefed for the mission and not from the anticipated direction. The leader's bomb-aiming equipment functioned intermittently and while on bombing approach over 8/10ths clouds, the equipment failed completely. Seeing what he believed was the target (Pforzheim) through a hole in the clouds, he bombed Schaffhausen, and the other aircraft bombed on his lead.

The initial official explanation of the incident blamed "extraordinary navigation difficulties and bad weather" for the accidental bombing, which exacerbated the reaction by the Swiss inasmuch as the weather at Schaffhausen as viewed from the ground was clear. C. MCBRIDE, *supra* note 443, at 100–04. The difference in perspective can be appreciated.

561. The analysis in Shandroff, *supra* note 203, is particularly good in examining this campaign and the weather effects. *See also* C. MCBRIDE, *supra* note 443, at 22–24.

562. *See* LEMAY AND YENNE, *supra* note 196, at 87–88, 104–05, 108–09, 118–21, 130, 132–34, 141, 151–52, 154; *see also* H. HANSELL, *supra* note 195.

bility of bombing operations continuing through the monsoon months of the fall and winter, the Strategic Air Command was tasked to select targets outside populated areas that would be appropriate for attack by its B–52 aircraft using their less accurate but all-weather capabilities. Tactical aircraft continued to play an important role in the subsequent Linebacker II campaign, but the adverse effect of weather on PGMs severely curtailed their use, and resulted in some collateral damage to civilian objects and collateral civilian casualties where weather (fog, rain, mist) degraded sensor resolution in the PGM.[563]

The preceding illustrate how attackers have resorted to less discriminate methods of attack where weather precluded use of the most discriminate. But the largest impact of weather on collateral civilian casualties occurred in the firestorms that struck Hamburg and Dresden during World War II. In each, unique meteorological conditions were the principal contributing factor to the conflagrations that followed. These factors were not fully appreciated by meteorological scientists until years after the war.[564]

Weather has influenced military operations throughout history, and will continue to do so. As former Chief of Staff of the West German Air Force General Johannes Steinhoff has noted: "If the Russians come, they are unlikely to court suicide by choosing a bright summer's day with visibility to the horizon; they will come at night, exploiting the murkiest weather that their forecasters can predict and they will travel beneath a sophisticated and dense antiaircraft umbrella."[565]

As General Steinhoff indicates, military commanders are not always allowed the luxury of fighting under optimum conditions. A force facing an enemy possessed of air superiority will choose to fight under adverse weather conditions in order to degrade the air capabilities of its opponent. The force with air superiority must fight using those capabilities as best as they can be employed under the circumstances. If civilians are commingled with military objectives, or if the force bent on denying an enemy the full range of his air superiority fails to discharge his responsibilities as stated in articles 48 and 51(7) of Protocol I, adverse weather will increase the probability of collateral civilian casualties, in spite of the best efforts of the attacking air force to minimize such casualties.

Similarly, while the science of weather prediction has improved markedly over the past half century, predictions remain subject to myriad variables that preclude certainty. This is particularly true in predicting the weather over a target at the time of attack. If the weather is not such as to lead to abort of the attack or attack of an alternate target, or if military requirements necessitate the attack of a target regardless of the weather, then weather may have an impact on accuracy which is beyond the control of either the attacker or the defender. Collateral casualties occurring because of weather phenomenan or conditions are equally beyond the responsibility of attacker or defender.

Enemy defenses. Fundamental to aerial bombardment is the understanding that placing aerially-delivered munitions on target is the culmination of a very long and expensive chain of effort. This effort includes aircraft design, development, produc-

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563. *See* Ziegler, *Weather Problems Affecting Use of Precision Guided Munitions*, 32 NAVAL WAR C. REV. 95–106 (May–June 1979); and Samuel, *Tactical PGMs: Implications in Perspective*, 9 PARAMETERS 32–44, at n.36 (June 1979).

564. The reader is referred to the explanation of "the firestorm phenomenon" in particular in H. BRUNSWIG, FEUERSTURM UBER HAMBURG 264–73 (Stuttgart, 1978), and G. MOSGROVE, OPERATION GOMORRAH 102–16 (London, 1981), for a precise explanation of this phenomenon.

565. As quoted in Baldwin, *European Weather and Round-the-Clock Air Operations*, 32 AIR U. REV. 67–73 (May–June 1981).

tion, and acquisition, along with all associated equipment and munitions; selection and training of aircrew; the target intelligence process; and mission planning. A sortie flown ineffectively constitutes a tremendous loss of irretrievable combat power at very high risk and cost. It is somewhat of an understatement, then, to acknowledge the desire of attacking aircrews to be as discriminate as possible in order to strike their intended target.

Enemy defenses, on the other hand, are intended to create an environment that will *cause* an attack to be less discriminate. The purpose of enemy defenses is not necessarily to cause aircraft losses; the defender has accomplished his mission if he makes the attacker miss his target. This has been accomplished in a number of ways, such as through camouflage or other forms of visual deception; electronic deception or countermeasures; and active measures, including antiaircraft guns, surface-to-air missiles, and air defense aircraft. A few examples from history will serve to illustrate the point:

a. Antiaircraft fire historically has been employed to force aircraft to fly at higher altitudes, thereby decreasing bombing accuracy, or otherwise to disrupt aircrew concentration on striking the target. Thus in the 1930s:

> The [British] Committee [on air defense] came to certain conclusions on the role to be played by A.A. [antiaircraft] guns. They were (1) to destroy hostile aircraft; (2) to co-operate with fighter aircraft by disorganizing enemy formations so that our fighters might engage them with the best possible chance of success, and by indicating the position of enemy aircraft by shell-burst; and (3) to deny hostile aircraft opportunities of . . . accurate bombing by forcing them to fly high and alter course at critical moments.[566]

In the 1986 airstrike against Libya, aircrews encountered erratic Libyan antiaircraft fire that was not caused by American SEAD measures. The Libyans were employing tracer fire at night in the hope that it would affect the situational awareness of the American aircrews, causing them to miss their targets.[567]

b. Enemy fighters historically have been used not only to down attacking aircraft, but to force them to jettison their bombs prior to reaching their target, frequently with tragic results. James Maloney Spaight lists two such incidents:

> There were some unfortunate incidents in which jettisoned bombs hit hospitals, both civil and military. One occurred on 15 November 1940, in France. It was recorded by Mr. Narracott. "One [German] Heinkel," he wrote, "chased by a [RAF] Hurricane . . . jettisoned the whole of its load on to a maternity hospital at Bethenville. . . ."
>
> On 8 February 1944, it was reported . . . that an American field hospital, clearly marked, was dive-bombed on the preceding day and that 22 were killed and 63 wounded. The report was corrected on the following day. What had happened was that a [German] dive-bomber, trying to escape from an Allied fighter, had jettisoned its . . . bombs and they had unfortunately come down on the hospital.[568]

Another author recorded a similar incident with equally tragic results that occurred during the Battle of Britain:

> Another dark drizzly evening [Stanford] Tuck stalked a lone [German] Ju.88 for close on thirty minutes. . . . He was in the white bite of the moonlight, but Tuck pounced.

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566. F. PILE, ACK-ACK 59 (London, 1949).

567. Reported to the author by Navy, Marine Corps, and Air Force aircrews who participated in the airstrike.

568. J. SPAIGHT, *supra* note 137, at 393.

There was time to get in only one burst. . . . He thought he'd hit it, for just before it disappeared into the overcast again, very distinctly he saw a cluster of black dots fall from its belly. At this distance his bullets couldn't have inflicted serious damage, but it was enough to make the Ju. jettison his bomb load and abandon his mission. . . .

Very early next morning, he got a long distance telephone call. It was his father. . . .

"[B]ad news I'm afraid. It's Peggy's hubby. . . .
He was killed yesterday. . . ."

And then he remembered something . . .: John [Peggy's husband] had been moved . . . to an Army camp in South Wales [near the previous night's encounter with the Ju.88] . . . .

Terrible suspicion tightened its icy grip. . . . [He] called the Intelligence Officer [to inquire of Luftwaffe activity over Wales the day before. The Intelligence Oficer replied:]

"Very quiet day. Only one minor incident. A stick of four [bombs], late in the evening, near Porthcawl. . . . Hey, wait a minute!—that must have been from the 88 you took a crack at—yes, time coincides!"

"What about . . ." Tuck's breath wouldn't come evenly, he had to force it out. "What about Porthcawl? What was hit?"

"Oh, nothing much. The stick fell in open country, but one [bomb] was just on the boundary of the Army camp at St. Donat's Castle. Damaged a lorry and a Nissen hut."

"Casualties?"

"Well, if you must know. . . . One private killed."

[T]he astounding fact had to be faced, had to be lived with: out of all the millions of people in Britain, those jettisoned bombs had killed John King Sparks. Therefore Tuck was responsible for the death of his own brother-in-law—it was Tuck who had caused the bombs to fall.[569]

The practice of defending aircraft interdicting attacking aircraft in their bomb runs continues, and was a standard tactic of MiG pilots who faced American aircraft in the skies over North Vietnam.[570]

c. Electronic warfare (EW)[571] has a potential effect on collateral civilian casual-

569. L. FORRESTER, *supra* note 469, at 130–32.

570. ACES & AERIAL VICTORIES: THE UNITED STATES AIR FORCE IN SOUTHEAST ASIA 1965–1973 10 (J. Eastman, Jr., W. Hanak, & L. Paszek, eds. 1976).

571. Electronic warfare is defined as military action involving the use of electromagnetic energy to determine, exploit, reduce, or prevent hostile use of the electromagnetic spectrum and action which retains friendly use of the electromagnetic spectrum. There are three divisions of electronic warfare (EW):

(1) Electronic countermeasures (ECM): That division of EW involving actions taken to prevent or reduce an enemy's effective use of the electromagnetic spectrum. Electronic countermeasures include:

(a) Electronic jamming: The deliberate radiation, reradiation or reflection of electromagnetic energy for the purpose of disrupting enemy use of electronic devices, equipment or systems.

(b) Electronic deception: The deliberate radiation, reradiation, alteration, suppression, absorption, denial, enhancement or reflection of electromagnetic energy in a manner intended to convey misleading information and to deny valid information to an enemy or to enemy electronics-dependent weapons. Among the types of electronic deception are: (i) manipulative electronic deception: actions to eliminate revealing, or to convey misleading, telltale indicators that may be used by hostile forces; (ii) simulative electronic deception: actions to represent friendly notional or actual capabilities to mislead hostile forces; and (iii) imitative electronic deception: the introduction of electromagnetic energy into enemy systems that imitates enemy emissions.

(2) Electronic counter-countermeasures (ECCM): That division of EW involving actions taken to ensure friendly effective use of the electromagnetic spectrum despite the enemy's use of EW.

ties in two ways. A defender's EW actions may negate an attacker's means for accomplishing an accurate attack. Alternatively, an attacker's EW countermeasures may cause a defender's antiair munitions to go awry.

One of the earliest examples of electronic warfare occurred during the Russo-Japanese War. The Japanese armored cruisers *Kasuga* and *Nisshin* commenced a long-range bombardment of the Russian base at Port Arthur. A Japanese destroyer was positioned closer to shore to observe the cruisers' fire, and to call corrections by wireless. A Russian wireless operator, overhearing the Japanese signals, held his transmitter key down and effectively jammed further Japanese communications. As a result the bombardment caused little damage.[572]

Communications jamming is but a small part of EW. EW can prevent an attacker from acquiring a target, or jam or otherwise disrupt the signals to a munition launched from or against an attacking aircraft. Moreover, EW is silent and invisible. Hence a ground observer who sees a missile fly into a schoolhouse full of children might see that it was launched from a strike aircraft, but would have no idea whether it was caused by a defect in the missile, the defender's EW measures, or an intentional attack of the schoolhouse in violation of the law of war. The author's collection of official photographs of the air campaigns over North Vietnam, for example, contains a photograph of two Soviet-built SA–2 Guideline missiles that have been launched from a site near a small village. Missile "A" is clearly headed towards the American reconnaissance aircraft that took the photograph, but missile "B" went awry on launching and now is headed directly toward the village.[573] This may have occurred as a result of United States EW actions, or because of a malfunction in the SA–2 missile. EW is a lawful intervening act by an opposing force that prevents accurate attack of the target. But it also can result in collateral civilian casualties that are beyond the control of either party to the conflict, and in most cases cannot be attributed to a particular act by one party or the other because of the number of electronic measures, countermeasures, and counter-countermeasures that may be occurring at any given moment.

d. Consider related activities, including effect of previous strikes. In the days following May 1972, when PGMs were used to great effect during the Linebacker I operations over North Vietnam, military pundits were quick to predict the demise of the gravity or so-called dumb bomb. These predictions were quickly dashed six months later, as adverse weather forced planners to resort to use of gravity bombs to

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(3) Electronic warfare support measures: That division of EW involving actions taken under direct control of an operational commander to search for, intercept, identify, and locate sources of radiated electromagnetic energy for the purpose of threat recognition. Thus, EW support measures provide a source of information required for immediate decisions involving ECM, ECCM, avoidance, targeting, and other tactical employment of forces. Electronic warfare support measures data can be used to produce signals intelligence (SIGINT), communications intelligence (COMINT) and electronics intelligence (ELINT).

Joint Chiefs of Staff Publication 1, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 128–29 (1 June 1987). As Stephen Counts states in his novel THE MINOTAUR (1989), "Quick change is the rule in electronic warfare." S. COUNTS, THE MINOTAUR 390 (1989). The unique thing about EW with respect to the 1977 Protocols is not its dynamic nature, but the fact that the delegates to the Diplomatic Conference were totally ignorant of its existence and its potential effect on the battlefield, particularly with regard to collateral civilian casualties.

572. A. PRICE, THE HISTORY OF US ELECTRONIC WARFARE, *supra* note 110, at 4–5; and A. HEZLET, ELECTRONICS AND SEA POWER 44 (London, 1975). The reader also is referred to the incident involving the Luftwaffe bombing of Dublin during the *Battle of the Beams*, as discussed *supra* note 110 for another example of the potential effect of EW.

573. The photograph is contained in Parks, *supra* note 5, at 106.

accomplish the purposes of Linebacker II, as previously described.[574] But other factors affected the accurate employment of PGMs, and as with all advances in warfare, countermeasures were and are being developed. For example:

(1) By the time of Linebacker II, the North Vietnamese had determined that electro-optical guided bombs (EOGB) and laser-guided bombs (LGB) could be neutralized through the denial of contrast for the former and through the use of smoke to obscure the target from the latter. Key targets were painted to blend with local features to prevent the contrast required for EOGB, while smoke pots were placed around other targets to defend them against LGB. Some collateral damage and casualties doubtless can be attributed to these legitimate defensive measures by the North Vietnamese, which in all probability caused the errant LGB that struck the French Embassy in Hanoi on 11 October 1972.[575]

(2) On 21 December 1972, four Air Force F–4 Phantom II aircraft carrying LGB were dispatched to attack the Hanoi Railway Station. The first two aircraft put their bombs right on target. However, the bomb of the third missed, apparently because of the smoke from the previous strikes, instead striking the *excusado* at the Cuban chancellery across the street from the Hanoi Hilton.[576]

(3) During the 1986 Libyan airstrike, smoke from the bombs of the first aircraft apparently obscured the target for a following aircraft's LGB, causing one of them to strike the French Embassy some distance away from the target.[577]

(4) In light of increased focus on the use of PGMs by land, sea and air forces, there has been a similar increase in attention to the use of obscurants on the battlefield.[578] Obscurants have one purpose: to defeat the accuracy of precision-guided munitions by blinding the seeker head of a PGM, thereby causing it to miss the target. If the defender using an obscurant is successful, and the military objectives selected for attack are surrounded by or adjacent to civilian population centers, a likely result will be collateral civilian casualties. But because of the intervening (though legitimate) act of the defender in his use of obscurants to protect his military objective(s), those casualties are not attributable to the attacker.

To summarize, a brief scenario will be offered to suggest not only the effect of intervening acts on the most precise attacks, but the difficulty that exists in totaling up collateral civilian casualties at the end of an attack:

An attacker has launched an airstrike at a military objective located in an enemy city. Warnings have been issued by the attacker that military objectives in populated areas will not be regarded as immune from attack, thereby encouraging the defender to evacuate civilians from the vicinity of legitimate targets. The defender has carried out a limited evacuation of nonessential civilians, but continues to employ civilians at military bases and other legitimate targets, including the one selected for attack on this day. He also has upgraded his defenses, employing antiaircraft guns (AAA), some of which are manned by civilians within the military objectives on the sound of the air raid sirens; large, radar-guided SA–2 Guideline surface-to-air missiles; smaller

574. *See* the discussion *supra* note 563.

575. *See* H. KISSINGER, YEARS OF UPHEAVAL 24–25 (1982).

576. Parks, *supra* note 109, at 28, n.15.

577. The bomb strike on the French Embassy was reported in news accounts at the time and confirmed by official postmission studies.

578. *See* Bulger, *Obscurants: Countermeasures to Modern Weapons*, 62 MIL. REV. 45–53 (May 1982), and Anderson, *Army Studying Device to Blind Enemy Homing in on Target*, Wash. Post, 17 Aug. 1985, at 7. Modern obscurants are multispectral; anthracene, a standard smokepot fill, is effective at defeating visible and near infrared portions of the spectrum.

SA–6 Gainful low-to-medium altitude surface-to-air missiles; small, shoulder-fired SA–14 Gremlin surface-to-air infrared (IR) heat-seeking missiles, some of which are issued to civilian workers within military objectives; small arms, some of which are issued to civilian workers within military objectives; and smoke pots and other obscurants.

The target selected for attack is located between a school and a hospital. Because of its location, the defender has concluded that it is shielded from attack and has not evacuated either the school or the hospital. Yet the items manufactured within the target are critical to the defender's war effort, and for this reason the attacker has concluded that the target must be attacked. In order to be as precise as possible, however, the actual attack will be carried out by four aircraft carrying LGB. In order to protect them, the strike force commander has assembled a large support force of airborne jammers and air-defense suppression aircraft, the latter known as Wild Weasels. The work of the support force also will minimize the effectiveness of the air defenses, thereby enhancing the probability that the mission will be executed as successfully and precisely as possible, minimizing collateral civilian casualties.

Weather forecast is for clear skies, but with a slight change of local showers in the target area. Notwithstanding their best efforts at achieving surprise, the strike force is detected and air raid warnings are sounded in the target area. Some civilians make their way to air raid shelters, but others are drawn by the curiosity of watching a battle first-hand, and decide to remain outside. Civilian workers within the target remain at their positions, with the exception of those assigned to man their AAA guns or take defensive positions after being issued their small arms or shoulder-fired IR missiles.

The Wild Weasel aircraft precede the attack force in order to defeat those surface-to-air missile (SAM) sites along the approach corridor. As one Wild Weasel detects an activated SAM site whose radar is in the tracking phase that precedes a missile launch, he launches two high-speed anti-radiation missiles (HARM) at the radar. If the radar remains on, the HARM will fly the radar's own beam back to the radar and destroy it. The radar operator realizes this and, on detecting the HARM launch, quickly fires one SA–2 missile before shutting down his radar. The track of the HARM is broken. One HARM detects another activated SA–2 radar, acquires its track, and destroys it. The blast destroys a nearby automobile garage, killing the three mechanics within it. The second HARM's track remains broken, and the missile slams into a private residence near the original enemy radar, killing its four occupants when it explodes.

Because the radar operator shut down his radar, the SA–2 he launched receives no command guidance, and its semi-active radar homing capability has been defeated by the attack force jamming. It goes out of control after its launching, and crashes into a high-rise civilian apartment building. Because of its short flight it remains full of solid liquid rocket fuel, which explodes when the 286-pound warhead detonates on impact. Thirty civilians in the apartment building are killed immediately, and another seventeen die from smoke inhalation before the building is evacuated and the resulting fire is brought under control.

The air defenses have been fully activated as the full strike force approaches the target area. The defender has launched a number of SA–2 and SA–6 missiles at the force. The missiles are unsuccessful in striking any of the aircraft, however, due to the attacker's jamming. Some of the missiles fall back into civilian areas, killing another thirty civilians. Because the attacker's jamming has defeated the radar guidance of the defender's antiaircraft guns, the crews manning the guns resort to barrage fire. As the AAA rounds reach the end of their ascent, they detonate or

continue on their trajectory, exploding on impact with the ground; in either case, they rain deadly fragments onto the civilians who remained outside to watch, and another thirty are killed by this debris.

Wild Weasel aircraft immediately precede the strike aircraft over the target area, dropping antipersonnel munitions on the AAA guns and civilian employees standing outside firing small arms and launching SA–14 missiles at the Wild Weasels. Only with such suppression can the attack be as accurate as possible. The Wild Weasel attack kills twenty-seven "civilians" engaged in their various, assigned air defense missions, and most of the remaining "civilians" run back into the target building to evade the effects of the antipersonnel munitions. Some remain, however, to launch SA–6 and SA–14 missiles at the strike aircraft. The Wild Weasels and attack aircraft launch chaff and flares to defeat the guidance of these missiles, which in turn land in neighboring civilian areas, where another nine civilians are killed.

At last the strike aircraft begin to deliver their laser-guided bombs. Anticipating this, the defender has lighted smoke pots around the target and employed other obscurants. The bombs from the first attacking aircraft are right on target, however, destroying much of the target and killing fifty-seven "civilian" scientists working on the defending nation's most important weapons research within the building. All but one of the LGB from the remaining strike aircraft miss, either because of smoke from the first strike, the smoke and obscurants used by the defender, or a light rain squall that drifts through the target area just as the weapons are being delivered. One of the strike aircraft is struck by AAA fire just as it has launched its LGB; its guidance equipment is destroyed, causing its bombs to fall out of control, and the aircraft crashes shortly thereafter. The defender's actions have decreased the damage to the target, but the missed LGB and the crashing aircraft fall on the adjacent school and hospital, resulting in another sixty-three deaths.

The strike force fights its way out of the target area. Its duel with enemy defenses is not over, and in the ensuing give and take, another aircraft is lost. Its crash in a residential area and errant defender missiles and antiaircraft munitions cause another twenty-two civilian losses before the airstrike is completed.

Total civilian casualties from the airstrike are 292. How many of these individuals are in fact civilians? Those who died as the result of the strike of the defender's missiles and antiaircraft munitions certainly are not the responsibility of the attacker, nor are those who died as a result of intervening actions by the defender that caused the attacker's bombs or missiles to go awry, or his aircraft to crash. In the end, none of the casualties can be attributed to any illegal action of the attacker. If there was any action that may be regarded as illegal, it was the defender's failure to separate a military objective from his civilian population. His actions in defense of the target were otherwise lawful, but affected by the intervening, lawful actions of the attacker.

Were there an impartial observer in the midst of this carnage, he would not see any of the intervening factors that led to civilian deaths, except for the flares dispensed by the attacking aircraft to draw off infrared missiles. He might see the attacking aircraft, the bomb and/or missile release, and the damage and casualties that would appear to have occurred as a result of "indiscriminate" bombing on the part of the attacker. If he were to visit the emergency room of the hospital, or the morgue, he would see 292 persons in civilian clothing; their precise status at the time of the attack would not be known to him. No defender could avoid the propaganda opportunity offered him by this airstrike, the invisible characteristics of modern warfare, and the ambiguities regarding responsibility for these casualties presented by the language of Protocol I. It is difficult enough to find any humanitarian gain presented to potential civilian victims by this ambiguity. It is substantially less than

humanitarian to think of the risk to which aircrews will be exposed due to spurious allegations of war crimes as a result of this ambiguity.

The foregoing illustrates some of the problems facing an aircrew endeavoring to accomplish its mission in the most accurate manner possible. Wars essentially are "come as you are" affairs which must be fought by the forces at hand, regardless of their training or equipment. But even where it is the best—though few commanders ever feel it as good as it should have been—those aircrews still must contend with the efforts of the enemy to defeat their placing munitions on target, as well as the myriad factors that affect bombing accuracy, including human error. The forms of enemy defenses are in themselves intervening factors that must be taken into account when raising questions about civilian casualties ostensibly caused by an airstrike. Protocol I fails to consider the give and take of warfare, instead freeze-framing the action to look at the results at the end of a mission or at another particular instance.

Any proposal to guarantee proportionality by mandating prior estimation of military advantage and civilian losses before an attack is launched is inappropriate for several reasons. First, it fails to take into account the failure of a defender to separate his civilian population from a military objective, as required by customary international law and articles 48, 51(7), and 58 of Protocol I. Second, it asks a question no commander can anticipate, in part because the attacking commander will not know where the defender's civilians are, and has a right to assume that a defender will carry out his responsibility to separate civilians from military objectives, particularly where a warning has been provided. Moreover, the same strike might have been carried out with no civilian casualties, had (for example) surprise been complete—and the conclusion is reached that individuals employed within the target are not regarded as civilians protected by the law of war while employed within that a military objective. Third, as the preceding scenario indicates, it is possible that none of the civilian deaths can be attributed to any actions of the attacker, which in and of themselves were entirely lawful. Finally, even if all of the civilian casualties could be attributed to the attacker—and under the circumstances described in the scenario, they could not—there remains a question of the value of that particular target to the defender's overall war effort. While few targets can be regarded as "panacea" targets or "war stoppers," the possibility that such a target may be struck and prompt the defender to call for a ceasefire and negotiations, thereby preventing further deaths, cannot be dismissed out of hand.

The idea of tallying up the results at the end of an airstrike or any other military operation to determine its success based upon the number of civilian deaths that occurred as a result of actions beyond the control of the attacker smacks of a return to a portion of the Just War doctrine. That provision, renounced by article 1 common to the 1949 Geneva Conventions, was that for example, combatants may be denied prisoner of war protection if their cause is not regarded as just by its opponent—or, as in this case, if the end result of a day's combat activities suggests that an opponent is employing means that are illegal.[579] No action employed by the attacker in the

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579. Common article 1 states that "The High Contracting Parties undertake to respect and ensure respect for the present Convention *in all circumstances*." SCHINDLER & TOMAN, *supra* note 27, at 429 (emphasis added). ICRC commentator Jean S. Pictet has stated that:

> The words "in all circumstances" refer to all situations in which the Convention has to be applied, and these are defined in article 2. It is clear . . . that the application of the Convention does not depend on whether the conflict is just or unjust. Whether or not it is a war of aggression, prisoners of war belonging to either party are entitled to the protection afforded by the Convention.

scenario constituted an illegal act, and ideas that there must be some accountability for each civilian casualty, or that intervening acts by an opponent may be ignored, are fundamentally flawed.

Human factor. As complex as the picture at this point in time may be, there is still one more factor that enters into this equation—the human factor. The earlier reference to the comments by Clausewitz on friction and uncertainty offer a peek at the potential for problems caused by the human factor. In the confusion of war, mistakes are made. In addition to collateral civilian casualties, the history of warfare has recorded countless instances in which friendly forces have caused casualties within their own ranks. A few examples will serve to illustrate the human factor in war:

— 6 September 1939: In an episode known as the Battle of Barking Creek, Royal Air Force (RAF) Spitfires intercepted and shot down at close range RAF Hurricanes over the English Channel.[580]

— 28 June 1940: Italian antiaircraft guns at Tobruk shot down the Savio-Marchetti 79 piloted by Italo Balbo, Italian aviation hero and Supreme Commander of Italian Forces in North Africa.[581]

— February or March 1941: German Bf–109 fighters dispatched to strafe the RAF base at Ramsgate in England attacked Galland field (a Luftwaffe base) in Calais-Mark, France.[582]

— 15 March 1944: U.S. Army Air Force heavy bombers supporting Allied operations against Cassino caused 140 civilian casualties in a town fifteen miles away from the fighting, with one stick of bombs straddling an Allied corps headquarters. The official investigation concluded that the errant bombing was caused by "poor air discipline on the part of two new groups, malfunction of bomb-racks in one formation, lack of specific aiming points, and the heavy pall of smoke and dust which obscured the target after the first few attacks."[583]

In further description of the incident, another historian stated that:

> Some heavy bomber pilots were unable to identify the target, and twenty-three returned to their bases with their bombs intact; two jettisoned their loads in the sea. Rack failure on the leading

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COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 18 (Geneva, 1960); Pictet's discussion of article 2 in his COMMENTARY on each of the other three 1949 Geneva Conventions is similar. During the United States air campaigns over North Vietnam, one basis for North Vietnamese denial of POW protection to captured American aircrews was that inasmuch as civilians had been killed in the course of the United States airstrikes (regardless of cause of death), the captured aircrews were not entitled to POW protection. The interpretation of Protocol I being applied by the ICRC and others to the issue of collateral civilian casualties repeats the North Vietnamese philosophy, and takes it to its next illogical step by suggesting criminal responsibility for collateral civilian casualties that are caused by actions not within the control of the attacker.

580. F. MASON, *supra* note 81, at 93, n.2; D. FISHER, *supra* note 389, at 84–94; and R. HOUGH & D. RICHARDS, *supra* note 342, at 66–67. The author is indebted to Sebastian Cox of the British Ministry of Defence's Air Historical Branch for first bringing this incident to the author's attention.

581. C. SEGRE, ITALO BALBO: A FASCIST LIFE 392–401 (1987).

582. Letter to author from Generalleutnant D. Walter Krupinski (28 Aug. 1989), who took part in the mission. General Krupinski ended the war with 197 victories, as a pilot in Adolf Galland's JV–44 *Squadron of Experts*, flying the Me–262 jet fighter. He subsequently served in the postwar Luftwaffe, rising to the rank indicated. *See* A. GALLAND, *supra* note 188, at 353, and J. STEINHOFF, THE FINAL HOURS 183–84 (1985).

583. J. TERRAINE, *supra* note 171, at 591.

plane of one formation sent forty bombs into Allied-held areas, killing and wounding civilians and troops. These short bombs and others inflicted about 142 casualties—28 were killed—among the allied units in the Cassino area. Ten air miles away, several planes bombed Venafro by mistake, killing 17 soldiers and 40 civilians, and wounding 79 soldiers and 100 civilians. The bombing errors were an 'appalling' tragedy that [Lieutenant] General [Mark W.] Clark attributed to 'poor training and inadequate briefing of crews.'[584]

— 24–25 June 1944: In the use of Allied heavy bombers to support the Allied breakout from the Normandy beachhead, a total of 136 American soldiers were killed and 621 wounded through errant bombing.[585]

— 24 July 1944: Eighth Air Force heavy bombers killed between 101 and 118 American soldiers while wounding approximately 500 others in support operations for Operation Cobra, the attack that led to the breakout across France. One historian provides an explanation for the casualties which illustrates the nature of human error in war:

The friendly casualties occurred in three instances. A bombardier accidently toggled his bomb load on an Allied airstrip when another plane in the formation was destroyed by [German] flak . . . , destroying planes and equipment; a lead bombardier experienced 'difficulty with the bomb release mechanism' and part of his load dropped, causing eleven other bombers to drop thinking they were over the target; and, finally, a formation of five medium bombers from the Ninth Air Force dropped seven miles north of the target, amid the 30th Infantry Division. . . . The next day, in better weather, Cobra was undertaken, again with three unfortunate friendly bombings, by B–24's. In the first case, a lead bombardier failed to synchronize his bombsight properly, so that when he dropped—and eleven other bombers dropped on his signal—a total of 470 100-lb high-explosive bombs fell behind the lines. The second occurred when a lead bombardier failed to properly identify the target and took the easy way out—bombing on the flashes of preceding bombs. A total of 352 260-lb fragmentation bombs fell in friendly lines. In the third case, a command pilot overrode his bombardier and dropped on previous bomb flashes; previous bombs had been off target but within a safe 'withdrawal' zone. The pilot's bombs fell within friendly territory.[586]

— 19 August 1944: RAF Bomber Command, attacking in daylight, caused nearly 400 British casualties, including 65 killed. It appears that someone had omitted to inform Bomber Command that the Army's standard color for marking its position was yellow; this was also Bomber Command's target-indicating color, and 77 aircraft which had gone astray proceeded to bomb on yellow marks—"the more the troops burnt yellow flares to show their position the more the errant aircraft bombed them."[587]

— 1 January 1945: During Operation Bodenplatte, a major operation employing 875 Luftwaffe fighters to attack Allied airbases in Europe, a substantial portion of the more than 200 Luftwaffe losses have been attributed to German antiaircraft guns.[588]

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584. M. BLUMENSON, *supra* note 215, at 441.
585. J. TERRAINE, *supra* note 171, at 658.
586. R. HALLION, STRIKE FROM THE SKY: THE HISTORY OF BATTLEFIELD AIR ATTACK, 1911–1945 206–10 (1989).
587. J. TERRAINE, *supra* note 171, at 661; B. HORROCKS, with E. BELFIELD & H. ESSAME, CORPS COMMANDER 44–45 (London, 1977); and L. ELLIS, I VICTORY IN THE WEST, THE BATTLE OF NORMANDY 430–31 (London, 1962).
588. W. GIRBIG, SIX MONTHS TO OBLIVION: THE ECLIPSE OF THE LUFTWAFFE FIGHTER FORCE 73–114 (London, 1975); Krupinski letter, *supra* note 582.

— 8 January 1973: Two U.S. Navy A–7 Corsair II aircraft and two U.S. Marine A–6 Intruders rendezvoused with a Thailand-based U.S. Air Force Phantom II for a LORAN-guided bombing mission, only to bomb the American air base at Da Nang, Republic of Vietnam, wounding nine American servicemen and one Vietnamese, due to entry of erroneous data into their computers.[589]

— 8 October 1973: In their first day of combined operations, four Iraqi MiG–21 aircraft were shot down by the Syrian air defense barrier.[590]

— October 1973: Of 514 Egyptian and Syrian aircraft lost in the Yom Kippur War, fifty-eight were shot down by their own forces.[591]

— 1 May 1982: Captain Garcia Cuerro, flying an Argentine Mirage III, was shot down over Port Stanley by Argentine antiaircraft fire while attempting to land his damaged aircraft. His was the first of three Argentine aircraft lost to Argentine antiaircraft fire during the Falklands/Malvinas War.[592]

— 8 June 1982: The civilian tanker *Hercules*, sailing 500 miles from the Falklands/Malvinas, and 600 miles from Argentina, despite regular notifications to British and Argentine authorities of the ship's name, international call sign, registry, position, course, speed and voyage destination, was attacked repeatedly over a period of three hours by Argentine fighter aircraft. Severely damaged, she eventually was scuttled.[593]

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589. Whitney, *Da Nang Bombing Error Embarrasses U.S. Aides*, N. Y. Times, Jan. 9, 1973, at 12.
590. E. O'BALLANCE, NO VICTOR, NO VANQUISHED, *supra* note 226, at 294–95.
591. C. HERZOG, THE WAR OF ATONEMENT, *supra* note 226, at 260.
592. Letter to author from Sebastian Cox, Ministry of Defence Air Historical Branch (27 Sept. 1988), with enclosures.
593. The circumstances of the attack are discussed in detail in Argentine Republic v. Amerada Hess Shipping Corporation, 57 US LAW WEEK 4121 (Jan. 23, 1989), ____ U.S. ____(1989). Paragraph 4 of article 57 of Protocol I provides that:

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

SCHINDLER & TOMAN, *supra* note 27, at 655. The author has elected not to discuss this particular provision, the 1 September 1983 Soviet downing of Korean Air Lines flight 007, the 3 July 1988 downing of Iran Air flight 655 by the U.S.S. *Vincennes* or similiar incidents such as the equally mistaken 21 October 1989 downing of a Turkish civilian survey aircraft twelve miles within Turkish territory by two Syrian MiG–21s, because this article's topic is aerial bombardment rather than air warfare in general. While some of the examples in the body of the article do not involve aerial bombardment, they are used to illustrate the immediate point rather than broaden the overall scope of the article. For discussion of the Soviet downing of KAL 007, *see* S. HERSH, THE TARGET IS DESTROYED (1985); for the *Vincennes* incident, *see* U.S. Department of Defense, Investigation Report, Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988 (28 July 1988); and Friedmann, *The Vincennes Incident*, 115 U.S. NAVAL INST. PROC. 72–75, 76, 78–79 (May 1989). The Syrian downing of the Turkish survey plane is reported in *Syria Apologizes for Downing Plane*, Wash. Times, Oct. 23, 1989, at 2.

The author would note that the standard used in paragraph 4 of article 57 of "reasonable precautions," which the author believes is the customary law standard for all military operations, is less stringent than the "all feasible precautions" standard that Protocol I applies to land-based operations. The brief discussion of paragraph 4 of article 57 in the ICRC COMMENTARY, *supra* note 247, at 687–88, reinforces the author's view that the ICRC lacks the expertise to address matters related to the use of force. That discussion states in part that

> one could conceive that hostilities between adverse fleets could endanger the civilian population . . . because missiles could miss their target. . . . Similarly, fighting between adverse military

— 11 April 1989: Syrian helicopter gunships attacked two small Soviet vessels in international waters near the Syrian port of Taurus, wounding seven Soviet sailors.[594]

— 22 April 1989: An Egyptian Alpha jet on final approach (wheels down) to the Baghdad International Airport for the Iraqi-sponsored International Military Fair was shot down by Iraqi air defenses.[595]

These incidents are but a brief glimpse at the human factor and its effect in modern war.[596] The overall effect of the explanation contained in the preceding pages is to emphasize the point made by Clausewitz at the outset: that war is a world of uncertainty and confusion in which even the best efforts to place bombs on target may be thwarted by myriad factors, and in particular by the efforts of a defender to cause an attacker's munitions to strike *anywhere but on the target.* If the defender has failed to separate the civilian population from military objectives, he has made a conscious decision to leave them at risk.

Customary law requires that an attacker exercise ordinary care to minimize collateral civilian casualties. The provisions contained in articles 48 to 58 of Protocol I clearly were intended to raise the standard of care for the attacker while lowering it

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aircraft could have incidental repercussions on the civilian population—for example, when a crippled aircraft crashes.

The ICRC's comments indicate rather clearly that whatever good the organization may do with regard to the protection of war victims protected by the 1949 Geneva Conventions, its members have no competency with regard to the give and take of modern combat operations. The last phrase in the quoted passage bears a vague resemblance to the comment of the Congresswoman contained *supra* note 531. With regard to the ICRC statement that some "missiles could miss their target," the reader need only note that inasmuch as the North Vietnamese fired in excess of 1000 SA–2 Guideline missiles at U.S. aircraft during the 1972 Linebacker II operations, downing only 15 B–52s, a very large number of missiles missed their target. The Guideline, which measures 35.4 feet in length, carries a 286-pound warhead, and when fully loaded with its solid liquid rocket fuel weighs 5070 pounds at time of launch, obviously could cause considerable damage or death if it or any major part thereof were to descend upon an area in which civilians are present. JANE'S BATTLEFIELD AIR DEFENCE 1988–89 187 (T. Cullen & C. Foss eds., London, 1988).

In a rather notable incident during the Vietnam War, in July 1972 actress Jane Fonda visited Hanoi in support of the North Vietnamese war effort against the United States Linebacker I campaign. In addition to photographs taken of her sitting on a North Vietnamese antiaircraft gun, gazing skyward through its gunsights, other photographs were taken of her outside Hanoi, standing in a huge crater allegedly caused by a bomb from a United States B–52 bomber. The intended inference was that the blast had done considerable damage in a civilian residential area. As B–52s up to that time had not operated further north than Vinh, American intelligence analysts were asked to examine the photograph in order to ascertain the source of the crater. They determined conclusively that it had been caused by a SA–2 Guideline missile.

On the modern electronic battlefield, the likelihood that missiles will miss their intended target is substantially greater than the possibility that they will hit that target. *See also* the discussion *supra* note 208 regarding the damage to Bach Mai Hospital caused by the bombs of a crashing aircraft that had been struck by two SA–2 missiles, as well as the subsequent text discussion of the difficulty of accounting for the 1318 Hanoi dead from the Linebacker II operations and assigning responsibility for their deaths. The ICRC remarks are a classic example of the adage that "fools rush in where angels fear to tread." The ICRC is singularly unqualified to offer intelligent comments on battlefield matters; its conduct during the 1982 Israeli incursion into Lebanon, as discussed *supra* note 494, also not only is a manifestation of its ignorance of military matters, but raises serious doubts about its neutrality. Had the political leadership of the United States expressed a desire to recommend Protocol I for ratification, the American military would have insisted on the strongest reservation to article 81(1) disavowing the ICRC of any role relating to operational matters.

594. Remnick, *Syrian Copters Fire in Error at Soviet Ships; 7 Wounded*, Wash. Post, Apr. 14, 1989, at A22.

595. Wilson, *Iraq Downs a Visiting Egyptian Jet*, Wash. Post, Apr. 28, 1989, at 33.

596. A rather comprehensive study of the problem is contained in Shrader, *Amicicide: The Problem of Friendly Fire in Modern War* (Fort Leavenworth, Kansas: Combat Studies Institute Research Survey No. 1, Dec. 1982).

for the defender, thereby shifting the burden for minimization of collateral civilian casualties to the party to the conflict with the least control over the civilian population that may be near military objectives. Protocol I exacerbates the problem by confusing the status of persons working within military objectives, commingling them with innocent civilians who have no connection whatever to the military effort of the defender. Its attempt to establish an unrealistic form of accountability for civilian casualties that occur incidental to legitimate military operations is useful only as a propaganda tool. It serves no humanitarian purpose, and endangers the already-tenuous credibility of the law of war.

C. Article 56: Dams, Dikes, and Nuclear Electrical Generating Stations

Recognizing a potential risk to the surrounding population from the breach of dams, dikes, or nuclear electrical generating plants, article 56 creates a new, special standard for this limited class of objects under certain circumstances. Article 56 does not prohibit the attack of this limited class of objects in all circumstances, but only if the attack may cause the release of a target's "dangerous forces" and result in "severe" losses among the civilian population. Also protected from attack are any military objectives located at or in the vicinity of these specially protected facilities if their attack may cause the release of the dangerous forces of those facilities, and severe losses among the civilian population. Most radically, however, article 56 provides protection from attack for military forces and equipment assigned to the protection of these facilities.[597]

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597. In its entirety, article 56 states:

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

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

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

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

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

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

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

5. The Parties to the conflict shall endeavor to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected

It was clear in the course of the American military review of Protocols I and II that the U.S. military shares the concerns of others with regard to the unwarranted release of "dangerous forces." If anything, with revelations of the 2 December 1984 release of toxic chemicals into the atmosphere at Bhopal, India, the 26 April 1986 incident at the Soviet nuclear power plant at Chernobyl, in which radioactive material was released into the air, and the 1988 discharge of toxic chemicals into the Rhine River by several major Swiss industrial companies, it would appear that article 56 perhaps did not go far enough. Military commanders are particularly alert to the fact that their units may have to operate in the vicinity of such facilities, and, therefore, would be at risk from the release of any form of dangerous forces. The reviewers also felt that any unnecessary loss of life in any combat operation should be avoided, whether the lives of the civilian population of the nation in which a conflict is being engaged or of American combatants. The question was whether a proper balance had been made between military necessity and unnecessary suffering, and whether the provisions in article 56 were balanced between attacker and defender.[598] As was true of most of the language contained in articles 48 to 58, article 56 was found to be balanced against the former in favor of the latter, particularly where the latter is operating on its own territory. Any humanitarian gain, which was slight, was lost when compared to the tactical advantage provided a defender and the risk to American military personnel from enemy air or ground defense systems that (under article 56) would be protected from attack. There also was concern, based upon the experience of the air campaigns over North Vietnam, that the article's language would provide the basis for spurious allegations of war crimes against captured American personnel.

Historically, dams and dikes have been legitimate military targets where military necessity required their destruction. The *ICRC Commentary* offers the following historical explanation for article 56:

> [I]t will be remembered that in the seventeenth century the Dutch, despite protests from the peasants, did not hesitate to flood part of their cultivated land by breaching the dikes in order to

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for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile actions against the protected works or installations.

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

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

SCHINDLER & TOMAN, *supra* note 27, at 653–54.

598. An adage frequently cited by international lawyers is that military commanders may not consider *military necessity* when weighing the requirements of a law of war treaty provision, as military necessity already was considered in the negotiation of the treaty provision. This certainly is true with regard to certain provisions. Thus, a commander may not consider military necessity as a basis for execution of prisoners of war, in violation of articles 13 and 130 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. SCHINDLER & TOMAN, *supra* note 27, at 435, 476. It is not so clear with regard to treaties that attempt to regulate war fighting. Thus of the 1907 Hague Convention IV and its annexed regulations, Michael Glover has said that "absent from the Hague Rules was any acknowledgment of military necessity." M. GLOVER, *supra* note 87, at 14. It was equally clear throughout the United States military review of Protocols I and II that military necessity was given little consideration in the negotiation of Protocol I, and particularly articles 48 to 58.

prevent the advance of adverse troops. In 1938 the Chinese authorities breached the dikes of the Yellow River near Chang-Chow to stop the Japanese troops, resulting in extensive losses and widespread damage. In 1944, again in the Netherlands, German troops flooded many thousands of hectares of agricultural land with sea water to prevent the advance of the enemy.

It was also during the Second World War that deliberate attacks were mounted against hydro-electric dams. The best known are those which destroyed the dams in the Eder and the Mohne in Germany in May 1943. These operations resulted in considerable damage: 125 factories were destroyed or seriously damaged and in addition 3,000 hectares of cultivated land were lost for the harvest of that year, 1,300 persons were killed, including some deported persons and allied prisoners, and finally, 6,500 head of livestock were lost.

During the war in Korea aircraft attacked dams used for irrigation in the north of the country. In the Viet Nam War attacks were mounted against dams and dikes, though the United States declared that the damage caused, insofar as this was established, was accidental or secondary. According to the delegate from the Democratic Republic of Viet Nam at the Diplomatic Conference, 661 sections of dike had been either damaged or destroyed during the course of the war.[599]

Care must be exercised in reading the *ICRC Commentary* text. The damage listed is not inconsistent with lawful military operations. The fact that 125 factories in the Rhine Valley were destroyed by water incidental to the 1943 RAF Bomber Com-

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599. ICRC COMMENTARY, *supra* note 247, at 667. The precise number of persons who died in the 1943 RAF dams raid is 1,294, most of whom were near the Mohne dam at the time of its breach. THE BOMBER COMMAND WAR DIARIES 386–88 (M. Middlebrook & C. Everitt, eds. London, 1985). As the Middlebrook/Everitt book explains,

> The town of Neheim-Husten, which was situated five miles downstream of the Mohne Dam, took the full impact of the flood and at least 859 people died there. By one of those tragedies which periodically struck foreign [forced] workers and prisoners of war whose camps were near targets in Germany, 493 foreigners—mostly Ukranian women landworkers—died near their camp at Neheim-Husten.

Id. at 388. To place this in today's context, it should be noted that the Ukranian women would be considered civilian internees, and that article 83 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that:

> The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.
>
> The Detaining Power shall give the enemy Powers, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of places of internment.
>
> Whenever military considerations permit, internment camps shall be indicated by the letters IC, placed so as to be clearly visible in the daytime from the air. The Powers concerned may, however, agree upon any other system of marking.

SCHINDLER & TOMAN, *supra* note 27, at 526. With respect to the POWs who died as a result of flooding caused by the RAF dams raid, article 9 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War states in part that, "No prisoner may at any time be sent to an area where he would be exposed to the fire of the fighting zone, or be employed to render by his presence certain points or areas immune from bombardment." *Id.* at 343. That the Germans had emplaced and manned antiaircraft guns on the Mohne dam makes it clear that the possibility of its attack by aircraft was contemplated, and they in turn were obligated to remove POWs from areas downstream. The situation is clouded, however, by the fact that the POWs apparently were Russian, and the Union of Soviet Socialist Republics was not a party to the 1929 Geneva Conventions. The antagonism that existed between Nazi Germany and the Soviet Union over this particular point led to the loss of life of thousands of German and Russian POWs during World War II.

A fundamental point of the preceding discussion is that the ICRC COMMENTARY, *supra* note 247, again is misleading in stating that *x* lives were lost as a result of the RAF airstrike against the Rhine dams without discussing the concomitant responsibilities a defender has to remove protected persons from harm's way, particularly when a defender has anticipated an attack through emplacing air defense equipment around a particular target.

mand dams raid is an indication of success of the mission rather than an illegal act, because the factories were engaged in war-supporting manufacture. The fact that 1300 persons were killed is of little informational value, until it can be ascertained whether those persons were civilians or combatants and, if the former, whether they died while working in the factories producing the war materials or otherwise were carrying out tasks that might have made them susceptible to attack. Finally, what would have been the value of a successful attack on the dams if the German capability to continue production had been damaged to a degree that the war ended sooner, at a savings of far more lives than were lost?[600] The same is true with respect to the attacks on dams and dikes during the Korean and Vietnam wars; none involved any great loss of civilian life and, as will be shown, they were completely consistent with lawful military operations. Thus while the *ICRC Commentary* states that "661 sections of [the North Vietnamese dike system] had been either damaged or destroyed during the course of the war," a study by a highly-respected historian of the Vietnam War found that, "Reconnaissance photographs showed bomb craters on several dikes, but these were all in close proximity to other targets of high military value; no major dike was breached or significantly damaged and the high-water season [in 1972] passed without significant flooding. . . ."[601]

A statement such as found in the *ICRC Commentary* that destruction has occurred must be placed in proper context, for war is about destruction and loss of life. The distinction that must be made is with regard to *unnecessary* destruction that would be regarded as prohibited. The *ICRC Commentary* fails to make this distinction in its discussion of article 56 or, for that matter, in its discussion of most of the prohibitions contained in articles 48 to 58 of Protocol I.

In addition to the fact that the text is misleading, the *ICRC Commentary* also is

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600. Which apparently almost was the case. Alfred Speer, German wartime Minister of Armaments and Munitions, writing after the war, in commenting on the RAF dams raid stated that, "employing just a few bombers, the British came close to a success which would have been greater than anything they had achieved hitherto with a commitment of thousands of bombers." A. SPEER, INSIDE THE THIRD REICH 281 (1970). The Middlebrook/Everitt book states that

> The German view is that, if the aircraft which were allocated to the Eder had been switched to the Sorpe dam, the effect upon the Ruhr's industrial production would have been extremely serious, but the Sorpe's construction was of a nature which made it a difficult target for the Wallis bomb, hence its low priority in the raid. The Sorpe dam just managed to keep the Ruhr supplied with water until the Mohne dam was repaired.

THE BOMBER COMMAND WAR DIARIES, *supra* note 599, at 386–87. The United States Strategic Bombing Survey notes that:

> The German electric-utilities system was vulnerable to bombing because of the continuous critical shortage of electric energy, the lack of reserve capacity, the relative ease with which the electric generating and transmission equipment can be seriously damaged, much of it being of a fragile nature, the relative difficulty of repairing bomb damage or replacing destroyed facilities, the inability to transfer any appreciable amount of current, and thus to shift power losses, and the absolute dependence of industry on electric energy for its operation.
>
> . . . In the state of critical shortage in which industry found itself, any loss of production would have directly affected essential war production, and the destruction of any substantial amount would have had serious results. The Germans themselves admit this and Speer has stated that a loss of forty percent would have been dangerous and a loss of sixty percent would have caused the collapse of the war economy.

UNITED STATES STRATEGIC BOMBING SURVEY, OVERALL REPORT, EUROPEAN WAR 84–85 (30 Sept. 1945). However, the German power system, except for isolated raids such as the 1943 RAF dams raid, was never a target as such during the Allied strategic air offensive. *Id.* at 14.

601. G. LEWY, *supra* note 300, at 411.

historically incomplete. The following list of attacks on dams and dikes, though not entirely complete, is more extensive than that offered by the *ICRC Commentary*, and provides additional details regarding the basis for the attacks from past conflicts:

Dates/Footnote	Target	Summary
16/17 May 1943[602]	Mohne, Eder, Sorpe Schwelme dams in Ruhr Valley	Attacked by RAF 617 Sqdn. Purpose: loss of hydroelectric power for major German industrial area. Mohne and Eder breached; attacks on Schwelme and Sorpe were unsuccessful.
23/24 Sep 1943, 4 and 21 Nov 1944, 1 Jan 1945	Banks of parallel branches of Dortmund-Ems Canal (DEK)	Six-mile stretch of canal was drained as breaches were made in banks of both branches at a point near Ladbergen, N of Munster.
26 Oct 1944, 6 Nov 1944, 21 Nov 1944, 6 Dec 1944, 1 Jan 1945[603]	Mittleland Canal (MLK)	Like DEK, major transportation artery, particularly for coal for war manufacturing and energy demands. Attacked by 8th AF B–24s at Minden; breach drained canal, unleashing water that created sandbar in Weser River. Re-attacks by 8th AF (6 Nov, 6 Dec 44) were unsuccessful, but RAF Bomber Command attacks at Gravenhorst near the junction with DEK succeeded in draining about 30 kilometers on each occasion. Impassable from 21 Nov–11 Dec 44 and 1 Jan 45 to V-E Day.
3 Oct 1944[604]	Walcheren Island/ Westkapelle sea wall	Coastal gun batteries dominated port of Antwerp. Breach of sea wall would submerge some of guns and hamper German defense against ground attack. Sea wall breached (100 yards).

602. *See* cites contained *supra* note 204 and H. RUMPF, *supra* note 1, at 64–77; C. WEBSTER & N. FRANKLAND, *supra* note 81 Vol. I, at 168–78, 289–92, and Vol. IV, at 375, 392; earlier but less detailed volumes on the raid are G. GIBSON ENEMY COAST AHEAD (London, 1943), and P. BRICKHILL, THE DAM BUSTERS (London, 1952).

603. The best discussion of the attacks on the DEK and MLK canals is contained in UNITED STATES STRATEGIC BOMBING SURVEY, 200 THE EFFECTS OF STRATEGIC BOMBING ON GERMAN TRANSPORTATION, 1–5, 17–31 (2d ed. Jan. 1947); *see also* THE BOMBER COMMAND WAR DIARIES, *supra* note 599, at 430–31, 588, and A. COOPER, BEYOND THE DAMS TO THE TIRPITZ 20, 124–26 (London, 1984).

604. The attack on the seawall at Walcheren Island is discussed in the Official History of the Canadian Army in the Second World War by C. STACEY, III THE VICTORY CAMPAIGN: THE OPERATIONS IN NORTH-WEST EUROPE, 1944–1945 301–422 (Ottawa, 1960), and in the official British series by L. ELLIS, II VICTORY IN THE WEST, THE DEFENSE OF GERMANY 10, 23, 59, 81–82, 109–23 (London, 1968); and A. COOPER, *supra* note 603, at 126. Each official history contains an excellent discussion of the balancing of competing requirements with which a commander is faced, with regard to the protection of the lives of his own forces while accomplishing the mission *vis-à-vis* the degree of destruction that may occur in that operation. Thus, STACEY, *supra* at 374–75 states that:

> The project of flooding Walcheren by bombing the dikes . . . had to be examined from two points of view: its practical feasibility and its political desirability. . . . It is ironical that we subsequently

Dates/Footnote	Target	Summary
7 Oct 1944[605]	Kembs Dam (on Rhine, north of Basle)	Held back quantity of water that German defenders could release to defeat Allied advance. RAF 617 Sqdn. bombed dam gates, releasing water.
20 Oct 1944[606]	Etang de Lindre Dam, France	Constructed in 17th Century as part of Vauban system for defense of Metz. German breach would flood valley, cutting off U.S. forward units. USAAF P–47s, using 1,000-lb bombs, breached the dam, removing the threat.
8, 11 Dec 1944	Urft Dam	At the head of Roer Valley, in German hands. Same concern as Kembs and Etang de Lindre. Two attacks by RAF failed to breach. Germans permitted to fall into U.S. hands without breach, for reasons related to Schwammenauel Dam (below)
9 Feb 1945[607]	Schwammenauel Dam	At the head of Roer Valley, in German hands. Same concern as Urft Dam. During U.S. ground assault, German defenders partially breached in order to release no major cascade of water but to create a long-lasting flood in the Roer Valley to slow Allied advance.
30 Apr 1951[608]	Hwachon Dam	Dam and reservoir located 50 miles NE of Seoul; as U.N. forces advanced towards Seoul, Communist-held dam

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brought this calamity upon the Dutch. We did so, not for a fleeting purpose, but to accelerate an operation designed to shorten the war and, thereby, the ordeal of the Dutch themselves. Flooding Walcheren offered the prospect of an earlier opening of Antwerp and the saving of Allied soldiers' lives; these were decisive weights in the balance in favor of the admittedly terrible device of letting the salt sea into the island and thereby ruining its rich farmlands and orchards for years to come.

This discussion must be placed in the context of many World War II operations, in that the degree of consideration given the matter undoubtedly was higher because the objective under consideration was in the Netherlands and not in Nazi Germany.

605. A. COOPER, *supra* note 603, at 126–27; THE BOMBER COMMAND WAR DIARIES, *supra* note 599, at 597.

606. H. COLE, THE LORRAINE CAMPAIGN, 295–97 (1950).

607. The Urft and Schwammenauel dams are discussed at length in C. MACDONALD, THE SIEGFRIED LINE CAMPAIGN 323–28, 596–615 (1963), and C. MACDONALD, THE LAST OFFENSIVE 70–84 (1973); *see also* A. COOPER, *supra* note 603, at 160, and THE BOMBER COMMAND WAR DIARIES, *supra* note 599, at 629.

608. M. CAGLE & F. MANSON, THE SEA WAR IN KOREA 241–42 (1957); J. FIELD, JR., HISTORY OF UNITED STATES NAVAL OPERATIONS—KOREA 347 (1962); R. RAUSA, SKYRAIDER 38–39 (1982); and Tillman & Handelman, *The Hwachon Dam and Carlson's Canyon: Air Group 19's Princeton Deployment of 1950–51*, 12 THE HOOK 32–38 (Spring 1984).

Dates/Footnote	Target	Summary
		could flood roads, destroy roads and bridges. Gates of dam destroyed by torpedo attack by VA–195 and VC–35 AD–4 Skyraiders from USS *Princeton* (CV–37).
23–24 June 1951[609]	Suiho hydroelectric facility	Major power source for Manchurian industry, and to run North Korean radar network and factories. U.S. Navy airstrike from USS *Boxer* (CV–21), *Princeton* and *Philippine Sea* (CV–47) destroyed two of five primary transformers while damaging a third. Dam was untouched.
24–27 June 1950[610]	Kyosen, Fusen, and Choshin power plants	Hydroelectric systems providing power to eastern portion of North Korea. As war-related industry was dispersed into North Korean homes, power plants became viable alternative target in lieu of attack of dispersed war industries. Fusen and Choshin attacked by 5th AF and USMC TACAIR; reattacked on 24, 26 June; Choshin again on 27 June.
13 May 1953[611]	Toksan, Chasan, Kuwonga, Kusong, and Toksang irrigation dams	Major irrigation dams in North Korea attacked by USAF F–84 fighter-bombers. Destruction intended to apply military pressure to North Korea in stalemated peace talks, while waters released would destroy principal military supply routes and rice crops being grown by North Korea for export to finance war. Air attacks successful in execution and accomplishment of intended purposes; Korean War armsistice signed less

609. M. CAGLE & F. MANSON, *supra* note 608, at 441–50; J. FIELD, *supra* note 608, at 436–39; R. FUTRELL, THE UNITED STATES AIR FORCE IN KOREA, 1950–1953 481–89 (1953); AIRPOWER: THE DECISIVE FORCE IN KOREA 119–39 (J. Stewart ed. 1957); P. MEID & J. YINGLING, V U.S. MARINE OPERATIONS IN KOREA, 1950–1953, OPERATIONS IN WEST KOREA 64–65 (1972); Cressman, *The Fighting Phil Sea: An Operational History of USS Philippine Sea (CV–47), 1946–1971*, THE HOOK 32, 35 (Fall 1988).

610. R. FUTRELL, *supra* note 609; J. STEWART, *supra* note 609.

611. R. FUTRELL, *supra* note 609, at 666–72; J. STEWART, *supra* note 609, at 166–88. The latter contains a number of excellent maps and aerial photographs to illustrate the nature of damage caused by the air strikes.

Dates/Footnote	Target	Summary
		than one month later, with terms North Koreans had adamantly refused to accept [including voluntary repatriation of POWs] during preceding two years of negotiations.
10 Jun 1972[612]	Lang Chi	122.5 megawatt hydroelectric plant 63 miles up Red River Valley from Hanoi. Attacked by 7th AF F–4s using LGBs, destroying plant's turbines and generators without breach of dam.
May–Dec 1972[613]	Red River Valley dikes and dams	Major, comprehensive earthwork dike and dam system to contain water in Red River Valley area surrounding Hanoi and Haiphong, North Vietnam. Antiaircraft guns and ground-control intercept (GCI) radar were placed on top of the dams and dikes, and dispersed POL stored adjacent to dikes. AAA and GCI only were attacked to suppress fire against U.S. strike forces, using antipersonnel munitions that would cause no structural damage.

Examination of the events listed above offers some degree of explanation for previous attacks on facilities that contained "dangerous forces." At no time has a dam or dike been attacked for the purpose of injuring the civilian population. Each target has been attacked because its destruction or breach was of legitimate military value, with the exception of the Red River Valley dams and dikes, where special care was exercised not to breach the dams or dikes while attacking antiaircraft guns and GCI radar equipment that had been placed on top of the dams or dikes to shield them from attack. In several instances dams were breached to pre-empt the defender's use of the dangerous forces to impede an attacker's advance. The latter suggests a return of the dilemma posed earlier with regard to the rules contained in Protocol I: a defender may argue that the language contained in article 56 is superseded by his sovereign rights to defend his own territory, thereby placing an attacker at an immediate disadvantage *vis-à-vis* a defender with his finger on the trigger for the release of dangerous forces. Finally, in none of the attacks listed above were civilian casualties "severe" though, as will be seen, the term eludes definition or translation into a standard that can be used effectively by battlefield commanders or national

612. Author's conversations with General Vogt and Admiral Moorer, *supra* note 500, and M. Porter, *supra* note 501.
613. Parks, *supra* note 208, at 12–16.

decision makers. The inability of the participants at the Diplomatic Conference to maintain a distinction between fact and hysteria seriously affected the ultimate language in article 56.

In the course of the negotiations, a number of nations, including fifteen Arab states, sought a total ban on the attack of any facility containing dangerous materials, including oil production installations.[614] Although such facilities can be attacked by ground forces, the intent of some delegations clearly was to limit the use of air power against targets critical to a nation's war effort. While the more extreme proposals did not meet with success, the language finally accepted by the delegations has much the same effect with regard to the facilities protected.

The American military review had four specific concerns with article 56. Before discussing each, it is important to indicate what article 56 does not protect. It does not protect any of the facilities listed therein unless the civilian population is at risk from its breach. Virtually any breach of a nuclear reactor would have this potential, but the breach of a dam or dike that causes the release of the water it contains would not necessarily be precluded unless it would result in severe losses to the civilian population.[615] Neither would it preclude the attack of a nuclear electrical generating station that is not yet in operation. Article 56 does not protect nuclear facilities being used for any purpose other than the generation of power, such as for the manufacture of materials for nuclear weapons. For both reasons, the 7 June 1981 Israeli Air Force attack on Iraq's Osirak reactor would not have been prohibited by article 56.[616] Nor would article 56 have protected the facility at Vermork, in Nazi-occupied Norway, which was being used by the Germans to produce the heavy water required for development of their atomic bomb, and which was the subject of several attacks in the course of World War II.[617]

The U.S. military review was concerned with the standard of "severe" civilian casualties. "Severe" obviously was less than the "excessive" standard contained in article 51(5)(b), article 57(2)(a)(iii), article 57(2)(b), and article 85(3)(b). Indeed, no grave breach occurred unless an attack was launched against one of the facilities so protected *in the knowledge* that the attack would cause *excessive* (rather than "severe") loss of life.[618] But the term otherwise is undefined, and is subject to a variety of interpretations. Thus while the *ICRC Commentary* describes "severe" as meaning "important" or "heavy,"[619] the commentary prepared by three former members of the American and West German delegations defines the term as meaning "massive."[620] While the *ICRC Commentary* states that the standard of "common sense" must be "applied in good faith,"[621] the second reference states that the

614. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 351, and ICRC COMMENTARY, *supra* note 247, at 668.

615. Article 56, paragraph 1.

616. The purpose of the IAF airstrike was to pre-empt Iraqi acquisition of the materials necessary to develop a nuclear weapon capability. In this regard, *see* S. WEISSMAN & H. KROSNEY, THE ISLAMIC BOMB 3–21, 227–91 (1981). Although the Iraqis have denied that the Osirak reactor was to be used for this purpose, Israeli intelligence was to the contrary. In any case, the IAF attack would not have been prohibited inasmuch as the reactor was not operable at the time of its attack. *See* D. MCKINNON, BULLSEYE—ONE REACTOR (1987), and S. NAKDIMON, FIRST STRIKE (1987).

617. D. IRVING, THE GERMAN ATOMIC BOMB: THE HISTORY OF NUCLEAR RESEARCH IN NAZI GERMANY 125–70 (1967); T. GALLAGHER, ASSAULT IN NORWAY: SABOTAGING THE NAZI NUCLEAR BOMB (1975); and R. WIGGAN, OPERATION FRESHMAN: THE RJUKAN HEAVY WATER RAID 1942 (London, 1986).

618. Article 85(3)(c) of Protocol I, as contained in SCHINDLER & TOMAN, *supra* note 27, at 671.

619. ICRC COMMENTARY, *supra* note 247, at 669.

620. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 353.

621. ICRC COMMENTARY, *supra* note 247, at 669.

standard is absolute rather than relational.[622] The term has not been clarified and, contrary to the statement contained in the second reference, the concept of "severe" civilian losses can be viewed in relative terms in a good faith interpretation of the provision by commanders tasked with the mission to attack such a facility.

Thus, would the 1943 breach of the Mohne dam have been prohibited had article 56 been in effect at the time? The decision would have been a relational one in weighing the potential civilian casualties, however severe, against the possibility that the war might be concluded sooner, and the lives that would have saved.

And yet that raises a second problem that has plagued Protocol I at every turn. The party carrying out the attack would not be able to ascertain in all cases whether his attack would lead to "severe" civilian casualties, in that the attacking party has no control over or knowledge of the location of the civilian population that might be endangered by a breach of a facility such as those protected by article 56. He might be able to issue warnings, as was done prior to the attack of Walcheren Island in 1944.[623] Even were he to do so, however, experience teaches that his warning could lead to one of several results: (a) the civilians could be evacuated, (b) they could be left in place, or (c) additional civilians, refugees, civilian internees, or prisoners of war could be moved into the area to raise the "cost" of attacking the target. However one may argue that this would violate various provisions of the 1949 Geneva Conventions and Protocol I of 1977, it is a cold hard fact that the latter has occurred in the past and is likely to occur in the future. The language of article 56 is an invitation for some nations to use its civilian population to shield high-value targets from attack. Ambiguity of terms such as "severe" also increases the risk of spurious war crimes charges for United States personnel captured while carrying out an attack on such a protected facility, notwithstanding the more restrictive language contained in article 85 with regard to the attack of such facilities.

The second objection to the language contained in article 56 is that it prohibits the attack of such facilities or military objectives in the vicinity of such facilities if an attack *may* cause the release of dangerous forces and consequent severe losses among the civilian population. While some delegations supported use of the words "is likely to," the word "may" was chosen. The *ICRC Commentary* explains use of the term in conjunction with the attack of military objectives in the vicinity of a protected facility:

> As an example, the Rapporteur cites a hydroelectric power station incorporated in a dam or located in the immediate vicinity. If such an installation has become a military objective under the terms of article 52 . . . as a result of the circumstances of the conflict, *it cannot be attacked if such an attack could lead to the destruction of the dam.*[624]

622. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 353.

623. C. STACEY, *supra* note 604, at 376, states that:

> on 27 September, Field-Marshal Montgomery's headquarters has requested SHAEF [Supreme Headquarters Allied Expeditionary Forces] to drop leaflets warning the population of the Scheldt islands of the imminence of heavy bombardment, [the message stating that] 'Leaflets should stress danger of flooding and urge immediate evacuation of islands or if this not possible of military objectives and low lying ground.'

624. ICRC COMMENTARY, *supra* note 247, at 670. The COMMENTARY continues:

> It is conceivable that a dam, dike, or nuclear electrical generating station is situated in the immediate vicinity of some civil engineering works, for example, a bridge or railway line, and that, in the circumstances of conflict, that bridge or a section of that line could become an important military objective. In this case too, no attack may be undertaken against such a bridge or railway line if the attack could affect the dam, dike or nuclear electrical generating station, and in this way cause the release of the dangerous forces.

Id. at 670.

With the use of the term *may*, the total prohibition on the attack of any such facility sought by many delegates has been accomplished. As General Vogt stated to Admiral Moorer prior to the successful attack on the Lang Chi hydroelectric facility in June 1972, nothing is certain in combat; earlier pages of this article illustrate the truth of this statement. Recalling the facts describing the attack on the Lang Chi plant, it is clear that if that attack had been required to meet the test of article 56 of Protocol I, it would have been prohibited. Article 56 gave pause to the American military review because it demanded the unrealistic assurance of 100% certainty in combat operations, something that cannot be achieved.

The protected facilities may lose the special protection provided them by article 56 if they (or military objectives situated near them) are used in "regular, significant and direct support of military operations" and if a military attack is the only feasible way to terminate such support.[625]

Regarding the use of any of the protected facilities in the "regular, significant and direct support of military operations," it was recognized at the time that due to the complexity of modern power grids this was a standard that would be virtually impossible to prove.[626] Most such protected facilities in all likelihood would never be used in direct support of military operations, because power for equipment used in military operations generally is provided by portable generator.[627] Thus an enemy's use of such a facility to shield military equipment from attack could legally be accomplished until and unless it was exposed by a prospective attacker as equipment that was being used for military operations. The first sentence of paragraph 5 of article 56 merely admonishes a defender from storing military equipment adjacent to such protected facilities, rather than prohibiting it.[628]

Examination of historic attacks, such as those carried out against the Mohne dam in 1943, the attacks in Korea, and the attack of the Lang Chi hydroelectric facility, indicates that seldom have such facilities been attacked because of their influence on military operations. Their value lies more at the level of war support, as was the case with regard to the Mohne dam and the branches of the Dortmund-Ems and Mittleland Canals, or in their political value, as was the case with regard to the attack of the irrigation dams in North Korea. Certainly they also can be of value in military operations, as was the case in the attack of the Westkappelle sea wall on Walcheren Island, breach of the Etang de Lindre Dam, the attack of the Roer Valley dams, and the torpedoing of the gates of the Hwachon Dam in Korea.

With regard to the latter basis for attack, however, the defender is left with a distinct military advantage, because the provisions of article 56 purposely use the word "attack" rather than "destroy" (as was contained in the original ICRC proposal) in order to preserve the right of a defender to release dangerous forces to repel an attacker, regardless of the consequences of the attack with respect to the civilian population.[629] As is true of other portions of Protocol I, sovereignty took precedence

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625. SCHINDLER & TOMAN, *supra* note 27, at 653–54.

626. *See* NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 355.

627. One member of the U.S military review group, noting that military schools teach blocks of instruction on "the infantry platoon in the offense," "the artillery battalion in the defensive," "armor in the night attack," *etc.*, facetiously suggested that these same schools would have to add periods of instruction on the "nuclear power plant in the offensive," *etc.*, if a party to the conflict ever could establish that his opponent was using protected facilities to support military operations.

628. SCHINDLER & TOMAN, *supra* note 27, at 654.

629. Article 49 of the original ICRC draft rules prohibited the attack or destruction of such facilities. The word destroy was deleted at the insistence of the Dutch and Belgian delegations. ICRC COMMENTARY, *supra* note 247, at 668, n.6, and NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 353.

over humanitarian concerns. In the process, however, it compounded the problems of a military commander engaged in offensive operations in a foreign nation. The breaching operations by U.S. and Allied forces carried out against the Etang de Lindre Dam, the Roer Valley dams, and the Hwachon Dam would be prohibited, leaving a defender with a potentially devastating trump card. This was not regarded as militarily acceptable.

Perhaps the greatest objection to the language contained in article 56 is that in paragraph 5, which states in part that:

> [Military] installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.[630]

The protection provided combatants and military equipment is unprecendented, notwithstanding claims by some experts to the contrary.[631] Providing protection to combatants and combatant equipment raises (at a minimum) two serious questions.

The prohibition contained in article 56 restricts attacks of this special property, even if it is a military objective, "if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population." Assume the national leadership has decided that a particular facility must be attacked, but it wants to take every measure to ensure that its dangerous forces are not released in the course of the attack. The decision is made that a special operations (commando) team will be employed, because there is no chance that its weapons (small arms) can release the dangerous forces. After assaulting and securing the objective, the team will destroy portions of the facility that will put the facility out of action indefinitely without releasing the dangerous forces.[632]

The special operations team is confronted with two problems, however. Under article 56(5), the defender is entitled to employ forces with more than small arms to defend the facility, which means that it may be facing a heavily-armed force equipped with crew-served weapons. Worse, however, under article 56(5), the persons and equipment defending the targeted facility are protected from attack. Assume the attack is launched, and the American special operations force is defeated and captured after performing gallantly. In the course of battle, a number of soldiers in the defending force are killed or wounded. Could the captured American soldiers be charged with a violation of the law of war, to wit, paragraph 5 of article 56? The answer rather conclusively is yes.

There is another but equally dangerous problem with article 56(5) in that it places no range or limitation on the weapons to be used in defense of a facility, a problem

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630. SCHINDLER & TOMAN, *supra* note 27, at 654.

631. Thus in NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 356, an analogy is made to the authority provided in article 22, paragraphs 1 and 2 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for armed sentries protecting a medical facility from marauders or bandits. These personnel are provided for internal and local security only, and generally are authorized to carry small arms only; such medical facilities also are subject to search by enemy forces, which is not the case with the facilities protected by article 56. As is conceded by both the NEW RULES FOR VICTIMS OF ARMED CONFLICTS and the ICRC COMMENTARY there is a qualitative difference in the defensive arms permitted sentries around medical facilities and units and the weapons that are likely to surround a facility provided special protection by article 56.

632. In the case of a nuclear power plant, for example, this could be accomplished through destruction of the turbine building (which is outside containment), the switchyards, and the transmission lines.

which both the *ICRC Commentary* and that of the former U.S. and West German delegation members conceded is ripe for controversy.[633] The problem is a rather simple one: a defender employs a sophisticated, integrated air defense system to protect his principal industrial and military areas. Within that area is a single protected facility (dam, dike, or nuclear power plant). Under article 56, he is entitled to claim that the entire air defense system is intended for the protection of that single facility. He is entitled to fire upon any aircraft approaching any target within that area because he may feel that the intended target is the protected facility. And the attacker is not entitled to attack any portion of that integrated air defense system, because he cannot prove that the intention of the defender was or is other than to protect that single protected facility.[634] If a portion of a strike force attacking another target were fired upon by any portion of that integrated defense system, and aircraft tasked with suppression of enemy air defense (SEAD) responded by attacking those portions of the air defense system that posed a threat to the strike force mission, the aircrew of a downed SEAD-mission aircraft would be faced with credible war crimes charges.

Examining article 56 in an historical context can be done through a look at the dams and dikes of the Red River Valley in North Vietnam. The Red River Valley is that part of what (at the time of the U.S. conflict) was then North Vietnam in which the major industrial areas of North Vietnam are located, including its capital of Hanoi and the major port city of Haiphong. The terrain of the Red River Valley running from the northwest to southeast has been described as a giant drainboard as the water from the monsoon seasons rushes to the Gulf of Tonkin. To meet the floodwater, which usually crests between July and September, the North Vietnamese over the centuries have constructed a complex system of almost 2500 miles of earthen dikes, dams, and sluice gates. Other dikes prevent seepage of sea water into crop-growing areas, while many primary dikes are backed up by a second line of dikes. The system was expanded by fifty percent between 1953 and 1972, with many previous dikes growing in width and height. The increase vastly complicated

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633. Thus the ICRC COMMENTARY states that:

> If the works or installations are at a distance from the combat area, it is mainly a matter of defending them against attacks mounted by combatants who have been infiltrated or parachuted, or against attacks by guided missiles or projectiles dropped from aircraft. Thus there will be needed, on the one hand, a military guard equipped with light individual weapons, and on the other hand, anti-aircraft artillery. In the second case such artillery may only be used against aircraft which are out to attack the protected works or installations, but not against aircraft flying over the works or installations on their way to attacking another military objective. *It cannot be denied that this would pose serious difficulties of judgment.*

Supra note 247, at 674 (emphasis added). Similarly, the NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 356 states with regard to the language of article 51(5) that:

> It is apparent . . . that the present provision extends to the defense against hostile aircraft and raises some practical problems as to how the crews of anti-aircraft installations will be able to distinguish approaching enemy aircraft merely intending to pass the protected object en route to another military objective, from those intending unlawfully to attack the protected installation.

634. The NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 257, at 356–57 states that, "If they [the defender] launch surface to air missiles against such aircraft by mistake, a protective reaction by the adverse Party's aircraft may be expected and would be justified." This response is questionable. Paragraph five makes no distinction regarding the protection for forces defending any specially protected property, and the defender could (and undoubtedly would) argue that he was entitled to fire to defend himself against the attack. As is brought out in the body of this article, the NEW RULES answer doubtless would be of little comfort to a pilot who was downed and captured by the defender's forces while flying the "justified" protective reaction strike.

maintenance, already a constant preoccupation of the North Vietnamese Government and its people.

In 1971, a year during which the United States carried out no bombing operations over the Hanoi/Haiphong/Red River Valley area,[635] the Red River Valley suffered its worst flooding in three decades. One thirty-mile section of the dike system was breached. The force of water unleashed through this and other breaches on the primary dikes caused wide-spread erosion, cut long stretches of irrigation canals, and washed out many pumping stations. Prolonged inundation undermined both its primary and secondary dike systems. More than one million acres of riceland were flooded and the crops destroyed, forcing North Vietnam to import food from the Soviet Union and China.[636]

Because much of the effort of the civilian population normally dedicated to dike maintenance had been diverted to support the war effort, the Government of North Vietnam faced the 1972 flood season with ill-maintained dikes and the possibility of residual stress from the 1971 floods. Partly in the attempt to rally international public opinion against the Linebacker I bombing campaign that began on 9 May 1972, but primarily to increase the efforts of its people to maintain the dikes and to absolve itself of responsibility for failure to repair the system since the 1971 floods, the North Vietnamese commenced a major propaganda campaign in June 1972 alleging the intentional attack of the Red River Valley dams and dikes by American air forces.

Attack of the North Vietnam dam and dike system never was seriously contemplated during American operations against that nation. In a memorandum dated 18 January 1966, Assistant Secretary of Defense for International Security Affairs John T. McNaughton proposed destruction of the Red River Valley dams and dikes to shallow flood the rice fields, thereby leading to "widespread starvation" of the civilian population of North Vietnam, which the United States could offer to rectify "at the conference table."[637] Secretary of Defense Robert S. McNamara rejected the McNaughton recommendation.

There were legitimate reasons for attacking the dike system. The country's major transportation waterways—the Red River, the Thai Binh River, and the connecting Canal des Rapides and Canal des Bambons—were vital lines of communication between the major urban centers of Hanoi and Haiphong and lesser cities. Raw materials, such as coal from the Cam Pha and Mao Khe mines for use in the nation's thermal power plants, were moved by waterborne logistics craft (called WBLC, or "wiblix" by United States personnel during the Linebacker campaigns) along the waterways. As the northwest and northeast rail lines with China were cut by American bombing operations, military use of the waterways increased. Breach of the dams or dikes outside of populated areas would have been one way to attack this vital line of communications, just as allied heavy bombers had attacked the Dortmund-Ems and Mittleland canals in Germany during World War II. American national decision makers rejected this option, however, choosing instead to employ air-delivered bottom-laid mines and armed reconnaissance missions against the WBLC.

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635. The United States Rolling Thunder bombing campaign ended on October 31, 1968. Until the Linebacker campaigns began on May 9, 1972, American air forces flew only reconnaissance missions over the southernmost portions of North Vietnam, in accordance with the informal agreement reached between North Vietnamese and U.S. authorities. Protective reaction strikes were flown to protect the reconnaissance aircraft.

636. Hersh, *Dikes in Hanoi Represent 2,000-Year Effort to Tame Rivers*, N.Y. Times, July 14, 1972, at 6.

637. IV PENTAGON PAPERS 43 (Gravel Edition 1971).

This program, begun in the final year of the Rolling Thunder campaign and renewed during Linebacker I, was effective for military and law of war reasons. Sunk WBLC blocked waterways and required more effort to salvage than that necessary to repair breaks in the dikes while minimizing the likelihood of collateral injury to the civilian population of North Vietnam.

Initial allegations of the bombing of the Red River Valley dikes and dams had been made at the beginning of the Rolling Thunder campaign in 1965. The United States conveyed diplomatic messages through intermediaries to assure the Government of North Vietnam that the United States would not bomb the dams and dikes. The North Vietnamese responded by storing critical war material, such as dispersed petroleum, oil, and lubricants (POL) in containers on or immediately adjacent to the dikes,[638] and by placing ground-control intercept (GCI) radar and antiaircraft guns on top of or adjacent to the dikes.[639] In addition, many of the dikes or dams also were a part of major lines of communications moving military supplies by rail or truck into the Hanoi area, then south to the battlefields in the Republic of Vietnam.

There is no doubt that under customary international law, as evidenced by the practice of nations in the wars of this century, the dams, dikes, rail lines and roads of North Vietnam were legitimate targets. There also is no doubt that the North Vietnamese brilliantly exploited the American decision not to attack the dams and dikes of the Red River Valley. Damage did occur to the dams and dikes incidental to the lawful attack of legitimate military objectives in the vicinity of the dams and dikes, including attacks using antipersonnel munitions against antiaircraft guns positioned on the dikes and dams. This damage was acknowledged by American officials in the course of the Linebacker campaigns in response to the North Vietnamese allegations.[640]

Herein lies a fundamental consideration of the United States with regard to whether it should ratify Protocol I. The restraint in attack on the North Vietnamese dikes and dams exercised by U.S. national authorities was a policy decision, based upon the limited nature of the conflict in Vietnam as it was viewed by the national leadership. Article 56 has taken an American policy decision in a limited conflict and made it into a legally binding prohibition for all future wars, regardless of the level of the conflict. Just as North Vietnam exploited to its military advantage the restraint exercised by the United States—at a cost of hundreds of American lives and aircraft, if not the war—article 56 offers an avenue of exploitation which few, if any, future opponents would be likely to ignore.

In the course of such exploitation, the United States would not have any recourse. Any attack to induce the enemy to cease using his dams, dikes, and nuclear power plants as a shield for military objectives would be characterized by the defender as a reprisal. And reprisals against such facilities and the military objectives protected by article 56 are prohibited by paragraph 4 of that article.[641]

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638. An aerial photograph of one such storage site is contained in Parks, *supra* note 109, at 15.

639. Aerial photographs of which can be found in Parks, *id.* at 18.

640. Gwertzman, *U.S. Issues Report to Rebut Charges of Dike Bombings*, N.Y. Times, July 29, 1972, at 1, and *Text of Intelligence Report on Bombing of Dikes in North Vietnam*, N.Y. Times, July 29, 1972, at 2, which states in part:

> All identified points of dike damage are located within close range of specific targets of military value. Of the twelve locations where damage has occurred, ten are close to identified individual targets such as petroleum storage facilities, and the other two are adjacent to road and river transport lines. Because a large number of North Vietnamese dikes serve as bases for roadways, the maze they create throughout the delta makes it almost inevitable that air attacks directed against transportation targets cause scattered damage to dikes.

641. SCHINDLER & TOMAN, *supra* note 27, at 654.

However, the greatest difficulty lies in the ambiguity of paragraph 5, which (as indicated above) both major commentaries on the Protocols acknowledge. Returning to the context of the Rolling Thunder and Linebacker I and II campaigns against military targets in North Vietnam, figure 3 is a map of Southeast Asia, particularly North Vietnam. The irregular-shaped area encompassing the cities of Hanoi, Vinh, and Haiphong is the range of the SA–2 Guideline missile envelope for missiles sited around those cities. This is the area in which existed the most important military objectives; this also is the area of the Red River Valley delta, with its earthwork dikes and dams. It also houses most of the North Vietnamese MiG airfields. The air defense envelope would be substantially larger if the North Vietnamese had been provided with SA–5 Gammon missiles, whose range is substantially greater than that of the SA–2 Guideline.[642]

Suppression of enemy air defenses (SEAD) is critical to the bombing accuracy of any air strike. Yet a reasonable interpretation of paragraph 5 of article 56 would prohibit any SEAD mission against any of the surface-to-air missile sites, antiaircraft guns, or the MiG airfields because the North Vietnamese could have claimed

SOUTHEAST ASIA

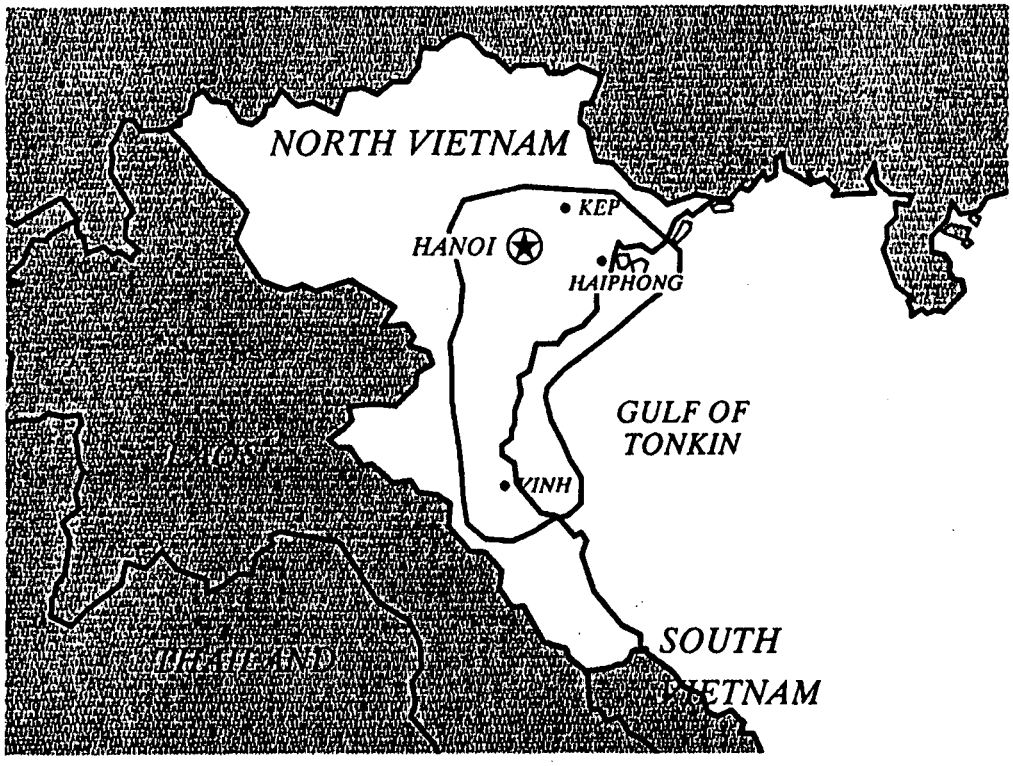

Figure 3.

642. Sources differ in describing the range of each missile. The SA–2 is credited with a range of 80 kilometers (48 miles), while the SA–5 is claimed to have a range of 240–300 kilometers (144–180). JANE'S BATTLEFIELD AIR DEFENCE 1988–1989, *supra* note 593, at 187, 190. Another source credits the SA–5 with a maximum effective range of 100 nautical miles. I WORLD WEAPON DATA BASE, SOVIET MISSILES 548, 570 (B. Wright, ed. 1986).

(assuming that Protocol I had existed at the time of the American bombing campaigns over North Vietnam) that all of its air defense net existed to protect its fragile dam and dike system. All other military objectives near the dams and dikes likewise would have been protected from attack. In essence, there could have been no bombing campaigns against North Vietnam because of the prohibitions contained in article 56. The language of article 56, which one independent analysis has described as a mixture of "ambiguity and contradiction,"[643] illustrates not only a serious problem the American military review found with article 56, but with the entire tenor of Protocol I. It favors the defender while placing U.S. aircrews at risk for alleged violation of the law of war in the execution of what previously had been lawful missions.

D. Protocol I: Conclusion

During the course of the Diplomatic Conference that produced Protocols I and II, the delegate from Togo proposed a rule that in a war between a nation with an air force and a nation without an air force, the nation with an air force would be prohibited from using it.[644] Although its proposal died in committee, Togo's attempt to use a law of war treaty to protect its economic and national security interests differed from the practice of many of the other nations present at the conference only in degree. In particular, it is characteristic of the effort made by many delegations to use Protocol I to restrict the range and nature of lawful offensive air operations. Cloaked in a humanitarian guise, the articles of Protocol I were drafted with a view to off-setting any military advantage a superior enemy force might have—particularly an air power—in attacking another nation within that other nation's territory.

In doing so, Protocol I endeavors to shift responsibility for minimizing collateral civilian casualties from the defender (where it traditionally has reposed) to the attacker, regardless of any action taken by the defender. Humanitarian concern of a defender for the lives of innocent civilians evidently ceased where (a) those civilians could be used as a shield for a military objective or their lives could be sacrificed for propaganda purposes in the course of the defense of a nation, or (b) a regime was threatened by internal conflict.

Protocol I also suffers from the intentional ambiguities of its language, which places combatants carrying out lawful combat operations at an increased risk from spurious allegations of violations of the law of war if captured. This in turn could result in a repetition of the American experience in Korea and Vietnam where United States military men were denied the fundamental prisoner of war protections to which they were legally entitled. The experiences of American aircrews in World

643. Ramberg, *Nuclear Plants—Military Hostages?*, BULL. ATOMIC SCIENTISTS 17–25, at 19 (Mar. 1986). Subsequent to the United States military review, General Rafael del Pino, formerly a senior Cuban air force officer who defected to the United States, disclosed that had the United States commenced a blockade of Cuba in the course of the 1983 Grenada rescue operation, President Fidel Castro intended to launch Cuban fighter bombers to attack nuclear power plants in Florida, presumably those at Turkey Point, twenty-four miles south of Miami. *Cuban Defector Says Castro Weighed Airstrike Against U.S.*, Wash. Post, Dec. 29, 1989, at A9. Cuba became a party to Protocol I on 25 November 1982.

644. At the time of the Diplomatic Conference, Togo's Force Aerienne Togolaise was obsolete to the point of being virtually nonexistent. As with many proposals made during the Diplomatic Conference, Togo's was driven by economic rather than humanitarian concerns. Following the decade of law of war negotiations in the 1970s, Togo rebuilt its air force's combat capability, acquiring six Embracer EMB–326 Xavantes and five Dassault Alphajets. 1987 WORLD MILITARY AIRCRAFT FORECAST 1101 (P. Sanna, ed. 1986). The size of its air force further suggests the rationale behind Togo's proposal.

War II, Korea and Vietnam serve as a fair indication that some opponents will undertake such illegal actions regardless of the state of the law of war. The ambiguities of Protocol I will greatly facilitate similar illicit efforts in future conflicts, while its limitations on reprisals will undermine a nation's ability to ensure respect for the law of war where breaches occur or are threatened. United States ratification of Protocol I would have provided unwarranted credence for the ambiguities and contradictions of that treaty, while severely hampering the already limited options for enforcement of the law of war.

Although the ICRC has been criticized in the preceding pages for some of its actions in conjunction with Protocol I, this criticism does not diminish the author's very high regard for that organization's work in implementation of the 1949 Geneva Conventions, and for its unflagging efforts to modernize the law of war. But just as a military commander may be critiqued by historians for his tactical or strategic decisions, the ICRC's efforts with regard to Protocol I are open to question.

As the preceding pages have illustrated, the ICRC is unqualified to draft provisions regarding the regulation of modern war. And while some of the "experts" who attended its preparatory conferences in 1971 and 1972 may have known something about the law of war, their knowledge of modern warfighting was weak. The draft provisions bring to mind John Galsworthy's statement that, "Idealism increases in direct proportion to one's distance from the problem." The distance of the ICRC and its "experts" was substantial, both in terms of space and time. Many of the provisions in the ICRC's draft rules and the subsequent Protocol I fail to take into consideration the myriad revolutionary and evolutionary changes in doctrine, strategy, and the institution of war as such, many of which have been heavily influenced by changes in the ability of nation-states to mobilize manpower and industry in their defense. Not only did Protocol I fail to stay abreast of technology, but it erred in endeavoring to develop rules that apply at the tactical, operational, and strategic levels of war, across the entire spectrum of conflict. In truth, it is unlikely that its provisions can be followed whatever the level of conflict, even if each party to the conflict believes in *pacta sunt servanda*.

In this respect the ICRC's composition (as a private organization of private citizens in a neutral nation) betrayed it, through lack of knowledge of modern warfighting, and through the ICRC's alliance throughout the drafting and negotiating process with the governments (though not the military) of Switzerland and Sweden. The latter nation had its own agenda during this time, reflected in the choice of the word "attack" in article 49(1) and in the language described and analyzed on the preceding pages that favors a defender over a force engaged in offensive operations. Notwithstanding claims to the contrary, Protocol I was not intended to protect the innocent civilian so much as it was developed as a vehicle for providing maximum psychological advantage to a defending nation in the arena of world public opinion.

Finally, the ICRC undertook a major and commendable step—though a calculated risk—to introduce the law of war to the Third World. Its effort failed miserably, for instead of requiring the nations of the Third World to rise to certain minimum standards of conduct in combat, the law of war succumbed to the tyranny of the majority. The old law of war—including the 1949 Geneva Conventions—largely had been ignored within the Third World for a variety of reasons, mainly for convenience, but with the excuse that it was a Christian, Western European phenomenon. The new law of war contained in Protocols I and II regrettably takes a step back by reverting to concepts regarding the justness of one's cause that were expressly rejected by the 1949 Geneva Conventions, rather than judging a nation's

or combatant's conduct on the battlefield. This unfortunate mixture of *jus ad bellum* and *jus in bello* is a significant failure in the ICRC's effort to introduce the law of war into the Third World.

The Third World's insistence upon a high threshold for application of the very limited rules of Protocol II—substantially higher than that for common article 3 of the four 1949 Geneva Conventions—is testimony to the ICRC's failed effort, for which the innocent civilian suffers daily in the myriad internal conflicts being waged around the world. While the ICRC likes to note that there are more nations party to the 1949 Geneva Conventions than there are members of the United Nations, and while its efforts over the past decade have run up a lengthy list of parties to Protocols I and II, ratification or accession to a treaty is of little value if there is no implementation of or respect for that treaty. The record within the Third World with regard to implementation of and respect for the 1949 Geneva Conventions, much less the more complex provisions of Protocols I and II, is not impressive.

The American military review of Protocols I and II was the most comprehensive of any nation. During the time of the review the ICRC heavily lobbied senior United States officials to abandon the military review and ratify as quickly as possible.[645] The civilian leadership, which had serious objections to the Protocol I politicization of what previously had been an apolitical subject, patiently permitted the military review to continue unimpeded. For a number of military reasons, many of which have been discussed in the preceding pages, the JCS unanimously recommended that the United States not become a party to Protocol I.[646] The senior civilian leadership of the United States—including the Secretaries of State and Defense, and the Attorney General—agreed with the analysis of the JCS and joined in their recommendation against submission of Protocol I to the Senate for its advice and consent to ratification, and in favor of submission of Protocol II for Senate advice and consent. On January 29, 1987, President Ronald Reagan forwarded Protocol II to the United States Senate for that purpose.[647] Describing Protocol I as "fundamentally and irreconcilably flawed," President Reagan also requested an expression of the sense of the Senate that it shares the view that the United States should not ratify Protocol I.[648] Documents accompanying President Reagan's transmittal letter reaffirmed the American belief in and support for the law of war by expanding the application of Protocol II, beyond the very limited scope demanded by Third World delegations at the Diplomatic Conference, to any conflict in which common article 3 of the 1949 Geneva Conventions would be applicable.[649]

There were several reactions to the American decision against ratification of Protocol I. Former U.S. delegation members who were protective of their work product could articulate reasons why an objectionable provision could be interpreted in a way that placed it in its most favorable light, often referring to a statement made by a member of the American delegation during the course of the Diplomatic Conference. But this is not a record of trial that is being argued before a domestic appellate court. Reference to the negotiating record may occur only where the

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645. Personal knowledge of author.

646. L. Gelb, *War Law Pact Faces Objection of Joint Chiefs*, N.Y. Times, July 22, 1985, at 1.

647. MESSAGE OF THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON JUNE 10, 1977, 100TH CONG., 1ST SESS., (1987) [hereinafter PRESIDENT'S TRANSMITTAL].

648. PRESIDENT'S TRANSMITTAL, *id.* at iv–v.

649. Letter of Submittal to the President of Secretary of State George P. Schultz, in PRESIDENT'S TRANSMITTAL, *id.* at vii–viii.

ordinary meaning is ambiguous or obscure, or leads to a result which is manifestly absurd or obscure.[650] The problem was slightly different in that much of the language of Protocol I was made purposely vague and subject to several interpretations, including those of an opponent. In the case of war crimes allegations against captured American personnel, few prisoners of war will be afforded the right to review the seventeen volumes of the negotiating record of the Diplomatic Conference to suggest differences in interpretation of the articles they are charged with violating. The assurances of former U.S. delegation members were neither reassuring nor convincing.

Officials of the ICRC and other proponents of American ratification argued that any concerns regarding the language of Protocol I could be remedied with appropriate reservations or statements of understanding.[651] These suggestions apparently were made without an appreciation for the extent of the concerns raised by the military review, in that the military objections are not fully explained in the documents forwarding Protocol II to the Senate.[652]

Discussion of many of the military concerns with former members of the American delegation who favored ratification of Protocol I, as well as with representatives of the ICRC, revealed that the foundation for their suggestion was political rather than legal. Proponents of ratification argued against specific reservations (a) because agreement on the objectionable article or provision purportedly had been critical to the entire treaty negotiation, and thus would constitute a breach of trust with the other delegations,[653] (b) the reservation would be incompatible with the object and purpose of the treaty,[654] or (c) the reservation would violate the language of article

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650. Vienna Convention on the Law of Treaties, articles 31 and 32.

651. Gasser, *supra* note 274, at 923; and Aldrich, *supra* note 259, at 719. Ambassador Aldrich stated: "None of the defects in the Protocol should deter the United States from ratification, as they are curable by means of understandings or reservations, as both the State and Defense Departments recognized prior to the Reagan Administration." As previously stated, the last phrase is fundamentally false. Even in the years preceding the Reagan Administration, there had been no agreement as to ratification of Protocols I and II or on the statements of understanding or reservations that would be required for American ratification. The decision on ratification was subject to the military review promised the JCS in getting their agreement to United States signature of the Protocols on December 12, 1977. There was a serious difference of opinion between Ambassador Aldrich and DOD officials (including the JCS) with regard to the need for a reservation to some of the prohibitions on reprisals contained in Protocol I. However, that had not been raised to the highest levels of each department at the time the Carter Administration left office.

652. *See, e.g.*, Gasser, *supra* note 274, at 923.

653. Thus proponents of ratification objected to the American military recommendation that the United States reject articles 1(4), 44(3) and 47 on the basis that each had been agreed to only after Group of 77 compromises on other provisions. But none could provide a *quid pro quo* in the form of humanitarian or other gains in return for American acceptance of the objectionable language found in those provisions.

654. Article 19 of the Vienna Convention on the Law of Treaties prohibits a reservation to a treaty if: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

The original draft Protocol I contained a provision (article 85) prohibiting any reservation to certain listed articles. However, during the fourth and final session of the Diplomatic Conference it became clear that consensus would not be possible unless this provision was eliminated, leaving the issue of reservations to article 19(c) of the Vienna Convention. A provision that would have prohibited reservations to twenty-two specific articles was defeated in Committee I by a majority vote. A subsequent proposal to prohibit reservations to articles dealing with wars of national liberation (such as articles 1(4) and 44(3)) was defeated in the Conference plenary session. U.S. Dep't. of State, Report of the United States Delegation to the International Humanitarian Law Applicable in Armed Conflicts, 4th Sess., Geneva, Switzerland, Mar. 17–June 10, 1977 at 7–8 (1977). The foregoing serves as further illustration of the fact that consensus acceptance of the text of Protocol I by the delegations participating in the Diplomatic Conference was merely acceptance *ad referendum*, *i.e.*, subject to approval by national governments, rather than endorsement *per se* by nations, as some have inferred. *See*, e.g., Gasser, *supra* note 274, at 915, 924.

60, paragraph 5 of the Vienna Convention on the Law of Treaties, which protects "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."[655] Public writings by proponents of ratification of Protocol I were contradicted by their private statements. No solution could be found to address the myriad military and humanitarian concerns expressed by the JCS as a result of their comprehensive military review.

The question then is raised concerning the effect of Protocol I in light of the many ratifications by other nations to date. A partial response is that many nations ratified for other than humanitarian reasons, with little or no knowledge of the contents of Protocol I, and have done little, if anything, to implement their obligations.[656] Some nations party to Protocol I, including some within the NATO alliance, have begun to face the harsh realities of the requirements of Protocol I that were not considered prior to ratification. In bilateral or multilateral discussions with American officials they have stated that the provisions of Protocol I will be inapplicable to them or their allies in defense of their own territory.

War games conducted during the past decade have proved repeatedly that Protocol I will be one of the first casualties in a mid-to high-intensity conflict; it will be ignored. In joint war games conducted by Australia and the United States in 1986 and 1987 specifically to evaluate Protocol I, its provisions were found to be a "war stopper" if followed scrupulously by a party to the conflict. That is, any military commander or force adhering to the requirements of Protocol I would be defeated by an opponent not following them. For this and other reasons, Australia in 1989 postponed its decision as to ratification of Protocol I.

Because of its decision against ratification of Protocol I, the United States has undertaken a two-track program to ensure and enhance continued respect for the law of war. The comprehensive military review identified a need to update and significantly expand American military law of war manuals. A new Navy manual was published in 1987,[657] and the new Army law of war manual will be completed in 1990.[658] In preparation of the latter, discussions have been held with other nations in

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655. Thus the American military recommendation of a reservation to the prohibition on reprisals against civilian objects contained in article 52 (in order to protect U.S. POWs in enemy hands) would be prohibited by the provision quoted.

656. Thus the Arab nations were quick to ratify Protocol I because of its recognition of the PLO, while many African nations became parties to Protocol I because of its recognition of the ANC and the PLO. Few have taken any steps to implement their obligations under the 1949 Geneva Conventions or the 1977 Protocol I.

In a Pentagon meeting with ICRC officials on May 30, 1986, Jacques Moreillon, then Director of the Department of Principles and Law of the ICRC, laughingly told the story of how one African national leader had decided to ratify Protocol I after ICRC officials pointed out the language of article 1(4) and 44(3), without further consideration of the contexts of Protocol I or its contents. That nation deposited its instrument of ratification within the month. Another African nation reached the same decision after the article on mercenaries (article 47) was brought to the attention of its leaders. And the Republic of Korea ratified Protocol I after ICRC representatives advised South Korean government officials that ratification of Protocol I would enhance its human rights image before it hosted the 1988 Summer Olympics.

In his 1986 meeting with DOD officials, Mr. Moreillon acknowledged that most Third World nations had no appreciation of the concept of *pacta sunt servanda*, and looked upon treaties (particularly Protocol I) as nothing more than political acts, expedient for the moment. The ICRC was exploiting this to enroll as many parties to Protocol I as possible so as to pressure Western nations to ratify.

657. THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Naval Warfare Publication 9).

658. The revised U.S. Army Field Manual 27–10 will be entitled THE LAW OF WAR. The author of this article is its author as well.

an effort to reach common agreement on many aspects of the law of war that were beclouded by Protocol I.[659]

On a complementary but separate track, the United States and other governments have undertaken the preparation of a separate statement of principles. This would identify those provisions in Protocol I that are regarded as a codification of customary international law, and otherwise articulate what constitutes the customary law of war where the language of Protocol I is inadequate. This program, begun in 1986, continues.

The 1977 Protocols were the product of many long years of complex negotiations. The products of those negotiations leave much to be desired. Certain political organizations and groups came to the Diplomatic Conference specifically to alter the law of war to serve politics rather than for any humanitarian gain. They were successful, at great cost to the war victims whom the law of war is intended to protect—specifically, the innocent civilian *and* the combatant who has fallen into enemy hands. The very high threshold of Protocol II establishes that most nations, particularly those from the Third World, placed national security interests above humanitarian concerns.

For the most part the differences at the Diplomatic Conference were expressed along North-South rather than East-West lines. The narrowing of political differences between East and West in recent months has served to re-emphasize the differences between developed and developing nations. Considering that most wars today are internal rather than international armed conflicts, the failure of the Diplomatic Conference to develop effective rules for these lesser but equally deadly conflicts looms all the larger.

In the slightly more than two dozen "big" wars (that is, wars that claim more than 1000 civilian lives per year) currently being waged around the world, more than three million people, mostly civilians, have died. While any civilian death is unfortunate, the deaths attributed to aerial bombardment during the total war of 1939–1945 pale in comparison; the figures also suggest the lack of proper focus that befell the Diplomatic Conference.

Two points emerge from this. As one experienced military analyst has correctly concluded, "If the United States (and, for that matter, the Soviet Union as well) disappeared from the face of the earth tomorrow, most of these [internal] wars would continue unabated."[660] Second, the products of the 1974–1977 Diplomatic Confer-

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659. As previously noted, meetings have been held with senior military judge advocates from the United Kingdom, Canada, New Zealand and Australia. New Zealand is a party to Protocol I, and Canada has stated its intention to become a party. Thus participants have been doing their utmost to narrow the differences between those governments party to Protocol I and those not, in the process clarifying the vague and contradictory language of Protocol I. This process is not a complete remedy, however, as the discussions have been among friends of a common heritage and culture.

660. Summers, *Wars and Rumors of Wars*, Wash. Times, Apr. 7, 1988, at F3. Two brief examples illustrate this point:

— During the decade of civil war within Lebanon, more than 100,000 persons, mostly civilians have died.

— In suppression of internal dissent within Liberia in January 1990, more than 500 civilians were rounded up by Liberian forces and machinegunned to death.

With regard to the former, since conclusion of the Diplomatic Conference, the ICRC has "discovered" a form of conflict falling between international armed conflict and internal armed conflict: the "internationalized non-international armed conflict" in which an internal conflict is receiving direct, external support. *See, e.g.*, Gasser, *Internationalized Non-International Armed Conflict*, 33 THE AMERICAN U. L. REV. 145–59 (1983).

ence produced nothing that might bring some hope of amelioration of the suffering to the victims and potential victims of these conflicts. As with many law of war conventions, Protocol I in many respects addressed a war of the past. With respect to Protocol I and aerial bombardment, its language looked to an experience of total war which the world has not witnessed for almost a half century.

What, then, will become of Protocol I? A legal scholar, endeavoring to describe the law of war as it applied to aerial bombardment in the years immediately preceding the Diplomatic Conference, provided some hint as to the likely effect of Protocol I on the law of war:

> International law . . . has for its principal source the actual practice of nations. . . . It is significant that the Hague [Air] Rules of 1923 were never ratified by a single power. For this a number of reasons may be advanced. First, the Rules would have restricted the potency of a formidable weapon against the general trend which, ever since the unsuccessful attempt of the medieval Popes and Councils to ban the cross-bow, has been to confine prohibitions to methods of war which were either obsolete or not yet fully developed, but were in any case ineffective in addition to being cruel. Secondly, if mere indiscriminateness were to be made the criterion of an unlawful raid, it would be difficult to measure the degree of lack of discrimination involved and thus to decide whether the responsibility (if any) should be laid at the door of the planners of the raid or of the airmen charged with its execution—a matter of critical importance should one of the latter be shot down and accused of a war crime. Third, there was the point made by Lord Trenchard, and never really answered, that, if a belligerent could secure immunity for his war industries by locating them in a city, it would be equivalent to making such city neutral territory—a position the other belligerent could not possibly accept.[661]

Protocol I has been ratified by a number of nations, but it will be the actual practice of nations that determines its fate. Its contradictions of the practice of nations over the past century are not accidental, in that the drafters of Protocol I mistakenly endeavored to resurrect the failed provisions of the 1923 Hague Air Rules. For the reasons stated in this article, it is unlikely that its efforts to regulate the conduct of hostilities will meet with any greater degree of success than did the 1923 Hague Air Rules.[662]

XVII. CONCLUSION

For as long as there have been aircraft, there have been efforts to regulate their effect in war. Some efforts have been carried out because of the aversion to that which is new to war, which has been the case with virtually every innovation in weaponry. Some have been attempted because of the military advantage an airpower

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This form of conflict existed before the Diplomatic Conference. Thus, the United States and Allied military assistance to the Government of the Republic of Vietnam created such a conflict with regard to some of the activities of the National Liberation Front (the Viet Cong), although the North Vietnamese invasion of South Vietnam simultaneously made the conflict international in character. The problem of the "internationalized non-international armed conflict" is best illustrated by the regrettable incident that occurred at My Lai on March 16, 1968, when American Army soldiers murdered several hundred unarmed, unresisting South Vietnamese civilians of all ages. The murder of civilians of an ally suggests a gap in the law of war. That gap was not closed by Protocols I and II, but was covered with regard to U.S. forces by their liability to prosecution for violations of article 118 of the Uniform Code of Military Justice (murder).

661. Johnson, *The Legality of Modern Forms of Aerial Warfare*, 72 THE AERONAUTICAL JOURNAL OF THE ROYAL AERONAUTICAL SOC. 685–92, at 688–89 (Aug. 1968).

662. This article has been concerned with aerial bombardment only. As Professor M. W. Royse explained more than sixty years ago, in most cases the accuracy of bombing aircraft will be greater than alternative means, such as surface-to-surface missiles or indirect artillery fire. *See* Royse, *supra* note 156, at 167–73. This article should not be interpreted as suggesting otherwise merely because of its limited focus.

gained over a nation that had not developed (or did not have the economic and technical resources to develop) a matching or superior capability. Some have been genuinely humane. These legislative attempts have been successful to the extent that they have not permitted one nation to gain an advantage over another, or to offset an opponent's military advantage, and to the degree that they have followed common sense. Regrettably, the latter has been missing far more often than it has been present.

The purpose of the law of war is to protect innocent persons from intentional or incidental injury to the extent they can be avoided. Responsibility for the latter, in the order of priority, historically has rested (a) with the nation exercising control over the civilian population, (b) the individual civilian, and (c) with the force attacking legitimate military objectives, to the extent that an attacker reasonably can ascertain where the civilian population is located and can influence its removal from the proximity of the military objective to be attacked. He cannot be expected to do more.

With regard to the nature of war in general and the use of air power in particular, myriad factors beyond the control of the attacking force influence or affect its ability to attack its target(s) accurately. Not the least of these are the actions of the defending force, which is making every effort to cause the attacker's munitions to miss their intended target. Many of these actions by the defender are intervening factors over which the attacker has no control and, in some cases, over which neither party has control. Proposals to "count civilian casualties" at the end of an airstrike or air campaign are of no value because of the various factors that influence an attack, and the fact that it is impossible to attribute a particular casualty to a particular act, especially within the unseen world of electronic warfare on the modern battlefield.

The employment of airpower will continue because of its military value; it is a classic example of *military necessity*. Air crews will always desire to bomb accurately because they represent the end product in the tremendous investment their nation has made in the development and acquisition of an airpower capability. The attempts at legislation of airpower over the past ninety years have been unsuccessful because each has failed to recognize this. Protocol I of 1977 was the last effort to regulate airpower as such;[663] its shortcomings have been discussed in detail in the preceding pages. It is the last word, and is likely to be for some time, in a century-long evolution. As in the beginning of aviation, the story of its regulation in war remains as vague, complex, and perplexing as warfare itself. The future codification of the law of war as it relates to aerial bombardment will succeed only where proper expertise is employed and the subject approached in a balanced matter. As this article has illustrated, this is far easier said than done.

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663. Because of the extended length of the present article, the author regrettably has elected to forego discussion of the United Nations Conventional Weapons Conference that took place from 1978 to 1980 and in which the author participated as a member of the United States delegation.