The Present State of International Humanitarian Law

By K. J. Keith
Professor of law, Victoria University of Wellington*

My privilege in delivering this paper is daunting for at least three reasons

- the enormous scope of the topic even if it were limited to a description of the law;
- the impossibly difficult task of evaluating that law by reference to the facts, especially the facts about compliance with and breach of the law, for I should not limit myself to description of the law alone;
- the presence at the seminar of people who know much more of the law and the facts than I do.

I am reassured a little by the programme that follows. Much can be done in the week to fill the gaps that I leave. I see my task as highlighting some of the principal issues which have recently arisen both in practice and in the preparation in the 1970s of the two Protocols additional to the 1949 Conventions.[1] The recent practice is at once horrifying and full of hope — horrifying in terms of the "tragic inflation"[2] in deaths and suffering in armed conflicts, but hopeful in terms of those who are respected, protected and humanely treated even in the midst of wanton destruction and humanity. The 1974-1977 diplomatic conference and associated expert and diplomatic activity do not, of course, have the immediacy in terms of humanity and horror that the operation of the law has.

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*Leader of the New Zealand Delegation to the second and third sessions of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. The views expressed here are not to be attributed to the New Zealand Government.

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1. The Conventions and Protocols are printed and distributed by the International Committee of the Red Cross. For other official sources of the Conventions see 75 UNTS, Aust TS 1958, No 21, NZTS 1963, No 3, UKTS 1958, No 39 and schedules to the Geneva Conventions Act 1957 (Com), 1958 (NZ) and 1957 (UK); for the protocols see vol 1 of the Official Records of the 1974–1977 Conference, UN Doc A/32/144, 16 ILM 1391, 72 AJIL 457 and UK Cmnd paper 6927.
2. I take the phrase from the ICRC Bulletin No 74 (1982). Consider just three pieces of evidence: the common estimate of 10 to 20 million deaths in armed conflict since 1945 (the lack of precision in the figure is significant), the fact that a very large proportion of them were civilians, and the fact that most were killed in internal armed conflicts (those which are less regulated by the law). Consider also the growth in ICRC missions: from 16 countries in 1972 to 27 (including 7 in Asia) in 1982.

But it is one of the major attempts which have occurred about once in each generation over the past 120 years[3] to identify the issues and provide answers for the world community as a whole to accept and develop.

From that practice and the diplomatic conference and taking account of the subject matter of the other papers I select five topics for discussion.

1. The general principles. Here I draw on the 1978 statement of fundamental rules of International Humanitarian Law applicable in armed conflicts.[4] I will say something as well about the various sources of the law.
2. The categories of armed conflict. Recent practice — for instance in Africa and Asia — and the Diplomatic Conference, in which the law of Geneva was brought face to face with the law of New York, show that the definition of the various categories of conflict and their application in particular situations can present major difficulties. These are of critical importance to the effective application of the law.
3. The protection of the civilian population against the effects of hostilities. A major feature of warfare this century is the increasingly large number of civilians who are killed or injured in the course of the conflict, especially by aerial bombardment. The set of rules on this topic in the Protocols are seen by some as the major achievement of the conference. In this area the law of the Hague was brought at last into contact with the law of Geneva.
4. Combatant status. The distinction between combatants and civilians is crucial for the rules I have just mentioned. The position of guerillas and mercenaries continues to be the subject of dispute.
5. The enforcement of the law. This topic brings us back even more rudely to the facts. What is the point of law that is not complied with? Aren't humanitarian rights violated — almost routinely? This topic also relates to a central concern of this seminar: the dissemination of the law.

The general principles

The law in the form of the hundreds of pages and articles of the Conventions and the Protocols appears complex and technical — something for a chancery lawyer to unravel, interpret and apply in lengthy leisurely proceedings in a series of courts. But that appearance, while in part accurate, is misleading. The central principles *are* clear and capable of application in the midst of conflict.

A statement of the principles — like that made in 1978 — has a number of other values, for instance:

- The principles show that war *is* subject to legal restraint; the Sherman doctrine that war is hell and later doctrines of "total war" are rejected.
- They show a close relationship to humanitarian, moral, religious and ethical principles.
- The principles appear as universal and irrefutable — at least so the world has said at the level of rhetoric.
- The detailed law makes more sense in the light of such statements.

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3. 1864, 1899, 1906, 1929, 1949 and 1974–77.
4. International Review of the Red Cross, No 206, September-October 1978, 247–249.

- The principles may provide or help provide answers in areas not specifically covered by the agreed treaty texts.

The treaties themselves indeed recognise that the principles underlie and run beyond them; they acknowledge the independent existence of "principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".[5]

A fascinating and courageous judgment of a Japanese Court[6] both shows the possible relevance and operation of such principles and illuminates the content of a number of them. The judgment also raises critical questions about the limits of the law in the face of the use in war of nuclear weapons — a matter arguably outside the scope of existing treaty law[7] — for the court was asked to rule on the legality of the atomic bombing of Hiroshima and Nagasaki. On one view of the law the case was easy: there was no treaty prohibiting the use of nuclear weapons; indeed there was not even a treaty dealing with aerial bombardment; accordingly it could not be said that the United States had acted unlawfully. Moreover, the "so-called total war" of the Second World War had not recognised the existence of any rules and had abolished any that existed at the outset of the war. The court did not however take this line.[8] The law was not limited to the existing agreed detailed rules. The interpretation and analogical application of existing law and even the principles underlying that existing law could be invoked.

What are those principles? The court uses at least three:

- attacks are to distinguish between defended and undefended cities
- indiscriminate aerial bombardment of defended cities is forbidden
- methods and means of warfare which cause unnecessary suffering are forbidden; the law relating to poisonous weapons was mentioned here.

In the court's opinion these principles required the finding that the bombings were illegal. These principles, which find their reflection in the Protocols,[9] are concerned with the battlefield. Other principles are more concerned with respect for, the protection of, and humane treatment of, persons who do not take a direct part in the conflict (even if they had earlier).[10] It is those principles which encapsulate the traditional Geneva law, the law which is of vital importance to

5. Additional Protocol I, Article 1 (2) and the preamble to Protocol II, See similarly the final paragraph of common article 63/62/142/158. The phrase is based on the Martens' preamble to the 1907 Hague Convention No IV.
6. *Shimoda* v *Japan* (1964) 8 Japanese AIL 212. The judgment was delivered on 7 December 1963. See also the use of principle in the note of protest prepared by the Foreign Ministry of Japan in respect of the Hiroshima bombing, pp 251–2.
7. See the statement made by the ICRC in a note to the draft protocols presented to the Conference as the basic working documents, and the declarations made by the United States, the United Kingdom and other states when the text were adopted, Official Records of the Diplomatic Conference III (1974-1977) (hereinafter CDDH), Vol VII, 295, 303.
8. It was one commonly adopted at the end of the World War II, eg Sir Arthur Harris *Bomber Offensive* (1974), 176–7 and see also the discussion in Johnson, *Rights in Air Space* (1965), ch IV.
9. Protocol I, Articles 35, 48 and 51. See also 6 and 7 of the fundamental rules.
10. See 1–5 of the fundamental rules.

the victims of armed conflict. That body of law continues to insist that people, single individuals, are important, even in the midst of the horrors of war.

I should mention two other features of the principles, the first positive, the second negative or at least restrictive. The positive feature is that the law is to be applied "without adverse distinction".[11] The alleged justness or legality of the war is declared to be of no consequence for the application of the law. This absolute separation — challenged in various statements early in the diplomatic conference[12] — is of great importance for the successful application of the law. If it were not made, the belligerents would never agree on the justness or legality of commencing the war; the law could not work if it bound only one side; and those who would lose the protection of the law, the members of the armed forces and affected civilians, are not those who committed the original breach — this being a violation of the strong emphasis on individual as opposed to group liability.[13]

The negative or restrictive feature of the principles is the reflection in this area of state sovereignty: military necessity. Practice and the treaties recognised this. So too did the Japanese Court: the inhumanity of the atomic bomb did not by itself make it illegal. That inhumanity was not the only matter to be considered:

> international law respecting war . . . has as its basis both military necessity and efficiency and humane feelings, and is formed by weighing these two factors.[14]

The striking of that balance is obviously difficult and crucial. On the one side humanitarian principle might be overwhelmed by military necessity; on the other some might say the latter has been inadequately recognised in the balance actually struck. I come back to aspects of this in my third section.

I should not leave the impression that the principles can carry the burden and that acceptance of the treaty texts are not important. That is plainly not so. The treaty texts have a specificity and authority which it is more difficult to question. They provide a firm base for calls for compliance made by the parties to the conflict, by other states, and by the ICRC. It is accordingly a matter for some concern that only 31 states have so far become parties to Protocol I and 25 to Protocol II.[15] About twice that number had accepted the 1949 Conventions within five years of their drafting.

The categories of armed conflict

The great body of law with which we are concerned operates during armed

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11. See also the preamble to Protocol I, Article 2 of Protocol II and the related provisions in the Conventions.
12. See also President Truman's address to the American people on 12 August 1945: "We have used [the bomb] against those who attacked us without warning at Pearl Harbour, against those who have starved and beaten and executed American prisoners of war, against those who have abandoned all pretense of obeying international laws of warfare. We have used it in order to shorten the agony of war . . ." Quoted by Walzer in his excellent *Just and Unjust Wars* (1977), 264.
13. See eg Protocol I, Article 72(2) (c) and (d), (4)(b), and Protocol II, Articles 4(2) (b) and (c) and 6(2) (b), and the rejection by the draftsmen of the 1945 London Agreement and even more by the Nuremburg Tribunal of the criminality of mere membership of organisations declared to be criminal.
14. 8 Japanese AIL at 240.
15. As at March 1983.

conflict. A humanitarian position — pressed for example by Norway at the last Diplomatic Conference[16] — would say that victims of all armed conflicts should be treated alike. The human values are the same whether the conflict is international or internal. The need for protection, humane treatment and relief is the same. Indeed if anything the threats to the human values may be greater in internal conflicts. But this argument has had to yield to the sovereignty of states. Indeed the application of any international rules to internal wars is a halting and recent thing. We are concerned then not just with "armed conflict" but with two categories — or at least two to begin — international armed conflicts and non-international armed conflicts. A brief reference to Articles 2 and 3 of the Conventions, Article 1 of Protocol I and Article 1 of Protocol II indicates that we are concerned with four categories. Indeed, to return to my previous heading, even that list based on the treaty texts is not exhaustive of the role of humanitarian principle: so the ICRC plays a most important part in the protection of political detainees even if the formal treaty categories can not be invoked.[17]

The clearest category — the first — is the armed conflict (rarely now a declared war) between two states such as the wars between Iran and Iraq or in the South Atlantic.[18]

The second — wars of national liberation — was the subject of a major and almost crippling debate and disagreement at the first session of the diplomatic conference. This debate which brought the law of New York — the United Nations — at last into direct contact and conflict with the law of Geneva was in some ways directed at the past or at least at the passing phenomenon of colonialism: the revolutionary change in Portugal later in 1974 and the independence of Zimbabwe have reduced the significance of the decision. Moreover, the provisions are unlikely to be technically applicable.[19]

The third and fourth categories relate to internal armed conflicts. The 1949 Conventions refer, without adornment, to armed conflict not of an international character occurring in the territory of a High Contracting Party. The applicability of this text and, as a consequence, of the limited body of law dependent on it was often disputed and denied. The conference accordingly had as one task the spelling out of a text which would reduce disputes about interpretation and application. Because of the importance of the law of internal armed conflicts — as noted, most wars have this character now — and because of the controversy which surrounded the drafting of the Protocol this matter calls for close attention.

According to the ICRC draft the Protocol was to apply to non-international armed conflicts "taking place between armed forces or other organised armed groups under responsible command." It was not to apply "to situations of internal disturbances and tensions, *inter alia* riots, isolated and sporadic acts of violence and other acts of a similar nature." Both paragraphs were amended following the negotiations which will be briefly discussed.

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16. CDDH, Vol VIII, pp 238 (quoting the ICRC) and 395.
17. See eg Moreillon, *La Comité Internationale de la Croix Rouge et la protection des detenus politiques* (1973).
18. Common Article 2 of the Conventions.
19. Protocol I, Articles 1(4) and 96(3). For a very critical review of these provisions see Dinstein, "The New Geneva Protocols", (1979) 33 YBWA 265.

The second paragraph was amended principally as a result of efforts to make it clear that the matters listed there also did not come within the scope of Article 3 common to the Conventions. That issue and the related process are of some interest, but much more significant were the changes made to the first paragraph and the related processes. That paragraph now reads:

> "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

Some have claimed that "this definition is so framed as to require a level of military organisation and sophistication that ensures its application only in the traditional type of civil war."[20] How accurate is this view? Is it the case that the threshold has been raised so high that conflicts such as those in Eritrea, Nicaragua or Chad would not be included? It is suggested that the answer is no. The article is not limited to civil wars of the traditional type. The reasons for this view are to be found in the text of the article, in the context of the Protocol as a whole, and in the drafting history of the provision.

1. *The text*

First, the article "develops and supplements" common Article 3. That provision has never been seen as limited in the way suggested. While it is the case that the new provision does not have a scope as wide as that of Article 3, the quoted phrase argues against a scope which is drastically different: it has never been considered that common Article 3 is limited to civil wars of the traditional type.[21] Secondly, the control over territory must be such as "to enable" the dissident forces to carry out sustained and concerted military operations and implement the Protocol. The requirement is not that they are *actually* carrying out such operations. Thirdly, while it is true that the article requires organisation, responsible command, territorial control and military and other capacity, it is difficult to see how such features could not be present given the substantive rules and obligations in the Protocol. This point will be principally developed in the next paragraph but two aspects can be mentioned here: (1) the capacity to "carry out sustained and concerted military operations" would appear to be required if

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20. Green (a member of the Canadian delegation), (1977) 15 Can YBIL at 13 (he gives no reasons). Compare the interpretation given by the Canadian delegation, CDDH, Vol VII, 77. For a similar opinion to Green's see Kalshoven (a member of the Dutch delegation), (1977) 8 Neth YIL at 112.
21. Eg Forsythe, (1978) 72 AJIL 272 at 275–276 (listing 30 conflicts from 1949 to 1975). At 276 he quotes Bond, *Rules of Riot* (1974), 60: "States do . . . accept some obligations to treat opposing forces humanely if the conflict drags on beyond several weeks or months".

there is to be an "armed conflict" to which the Protocol is to apply and which does not fall within the scope of the situations of "internal disturbances and tensions" excluded from the scope of the Protocol by paragraph (2) (and arguably falling outside the scope of common Article 3 as well). (The article's requirement of "armed forces" and "armed groups", as opposed, say, to police forces on the two sides is to be similarly explained.) (2) The groups must be so organised and be "subject to a sufficiently firm discipline that will ensure respect, in the conduct of the hostilities, of the provisions laid down in the Protocol. . . . 'Responsible command' means a commanding authority whose leadership is recognised by subordinates and who is able therefore to assume responsibility for their acts."[22]

2. *The context*

A treaty provision is to be interpreted in its context. That includes the other provisions of the treaty. And that rule is indeed enhanced here by the specific reference in Article 1 to the ability of the dissidents to implement the Protocol. It would hardly be responsible of those who prepared the Protocol to make it applicable (by Article 1) to conflicts one of the parties to which would have been unable to comply with their obligations. What are those obligations? This is not the place for a full scale examination, but some features of the obligations can be noted here. The first feature — a general one — is that with the reduction in the extent of the obligations which was effected late in the Conference the threshold was equally reduced.[23] Secondly, some of the obligations are of a *negative* kind, such as the prohibition of attacks on dams and other installations containing dangerous forces (Article 15, see also Articles 16 and 17). They cannot increase the threshold : any dissident group has the ability to implement such obligations. Thirdly, some of the obligations proceed on the plain basis of some territorial control : persons who are detained for reasons connected with the conflict are entitled to humane treatment (Article 5); so are those who are not involved in the conflict (Article 4), or who, because of injury, sickness or shipwreck, are no longer involved (Article 7). Fourthly, the effective meeting of such obligations including the battlefield rules of Part IV will require "organisation" and "responsible command". Fifthly, the quite substantial guarantees afforded to those prosecuted for their involvement in the conflict (Article 6) may well not be relevant until after the conflict is over. (The second feature of the obligations noted in this paragraph is also relevant here.) These obligations can be met once the conflict is over whatever the result (see Article 2(2) as to the temporal extent of the obligations).

3. *The legislative history*

Two features of the history are relevant: who was to decide whether the Protocol applied to a particular conflict, and what criteria were to be included in the article? Several delegations proposed that the state in question should have the sovereign right to decide. That proposal — which would have reduced the Protocol to a pious expression of concern without legal force — was firmly

22. An ICRC statement made in Working Group B of Committee I; see Bothe, op cit, 626.
23. Eg Canada CDDH, Vol VII, 77.

resisted. It was never included in any text adopted within the Conference. It was not indeed ever put to the vote — no doubt because had it been it would have been resoundingly defeated. So far as the criteria are concerned, proposals that the hostilities be of "some [or high] intensity", that they continue for "a reasonable period of time" or for "a prolonged period", that the dissidents occupy "a substantial part of the territory" of the State party, or that their control be "continuous and effective" and be over "a non-negligible part of the territory" — all were not adopted.[24] Had they been the threshold would have been much higher.

The foregoing does, however, have to be put in context. The scope of Protocol II is narrower than that of common Article 3. First, the latter provision can apply to conflicts between two groups neither of which is a State party. (The situation in Lebanon at various times and possibly in Zimbabwe until early in 1980 are such cases.) Such conflicts are outside the scope of Protocol II. Secondly, Protocol II cannot apply to urban guerilla activity: it requires *some* territorial control. It is at least arguable that such situations come within Article 3.

The principal cautionary point to be made about the scope of Protocol II does not however turn on the precise wording and such arguments as those made above. The Protocol operates in an area in which States are most sensitive. Many will often plead their sovereignty and reject international obligation and concern. This great sensitivity is to be seen in the statements made when the article was adopted,[25] in the vote on the adoption: 58–5 (Argentina, Cameroon, Chile, India, Syria) — 29, in the process followed in drafting the Protocol,[26] and in its substantive provisions. It will no doubt also be seen in the practical operation of the Protocol. It is some encouragement that all but six of the 31 States which have ratified or acceded to Protocol I have also accepted Protocol II.[27] Part of the reason for this acceptance and for some optimism about the future operation of the Protocol is to be seen in its substantive provisions. They build on the developing international law of human rights. They accordingly draw from that law the basic proposition that human rights issues can no longer be claimed to be solely within a state's domestic jurisdiction, free from international concern, obligation and supervision. They also draw from it much of the specific legal language of State obligation.

The Manila Red Cross Conference at the end of 1981 in effect called attention to the critical importance of these definitions and their proper application in practice. It deplored the fact that the ICRC was refused access to the captured combatants and detained civilians in the armed conflicts in the Western Sahara, Ogaden and Afghanistan.[28] A denial of the character of the conflict may in practice bring with it a denial of the humanitarian guarantees of the rules.

The protection of the civilian population against the effects of hostilities

We can begin with Sir Arthur Harris, Air Officer Commanding-in-Chief of

24. Eg CDDH Vol 4, 6–10.
25. Eg CDDH, Vol VIII, 311–21 and Vol VII, 68–84.
26. Particularly the last minute surgery on the text, CDDH, Vol VII, 85–164.
27. The six are Cyprus, Zaire, Vietnam, Mexico, Cuba and Mozambique.
28. International Review of the Red Cross, No 225, November-December 1981, 321.

Bomber Command in the Second World War. Having made a comparison with the deaths caused by the Allied blockade in the First World War (probably 800,000 as against 305,000 caused by Allied bombing) he concluded that "in this matter of the use of aircraft in war there is, it so happens, no international law at all".[29] He could draw support from the practice in the Second World War, from some commentators, from the fact that no one was prosecuted in the war crimes trials for illegal aerial bombardment and from the absence, as mentioned earlier, of any specific treaty texts. But the opposite position could be argued and was as we have seen, for instance, in the Japanese case. The opposite position was also increasingly adopted in United Nations and International Red Cross debates in the late 1960s and early 1970s. That position was based on the ghastly facts. According to Swedish research, civilian deaths as a result of war grew from 5% of total deaths in World War I, to 50% in World War II, to 60% in Korea and much higher in Vietnam.[30] Aerial bombardment was the major cause. The consequence is Articles 48–60 of Protocol I and Articles 13–16 of Protocol II. Is this a major achievement? Is it unrealistically idealistic? Has the correct balance been struck between humanitarian principle and military necessity? Do the treaty texts attempt to achieve the impossible in importing restraints on such uses of military force? It will be for history to answer these questions. Let me make a few summary points.[31] The first is that the text is based on and reasserts fundamental principles. War is to be directed only at the military forces of the enemy state, and not at the individuals who constitute that state.[32] Accordingly, in the words of Article 48, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and direct their operations only against military objectives in order to ensure respect for and protection of the civilian population.

My second point is to refer to the precautionary rules in Articles 57 and 58. Those planning and carrying out attacks are to do everything feasible to ensure the protection of civilian lives and compliance with the treaty rules. An important question about the viability of the rules is whether their requirements are realistic: is it likely that such steps will be followed? I cannot answer that question with any confidence, but I wonder whether a military command, concerned about the effective and efficient use of the forces at its disposal, will not in any event undertake such steps, no doubt in a wider military context.

This is my third point. Might it not be the fact that military and humanitarian considerations will often in this area run together? Lord Blackett provides just one of the many pieces of evidence against the area bombing carried out in the Second World War:[33]

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29. Note 8 above.
30. Hans Blix, "Area Bombardment: Rules and Reasons", (1978) 49 BYBIL 31.
31. For an excellent discussion by a major architect of the provisions see the article by Blix just cited.
32. See eg Rousseau *The Social Contract,* book 1, chapter IV (on slavery) and the preamble to the St Petersburg Declaration of 1868.
33. Quoted in Blix, op cit, who assembles other statements to the same effect; see somewhat similarly one of the authors of the United States Strategic Bombing Survey on Japan, Galbraith, *A Life in Our Times* (1981) 230–3.

> "The area bombing, which was originally adopted just because of the inability to do precision bombing, did little to help win the war and greatly increased our difficulties afterwards."

My fourth point is also related. It is that military advantage does play an express part in the Protocol provisions. Thus under Article 51(5) (b) an attack is not indiscriminate and accordingly is not unlawful if incidental civilian losses are not excessive in relation to the concrete and direct military advantage anticipated.[34] Some thought that in this case the balance had been tilted too far towards military necessity. The difficult calculation involved in such provisions also presents serious difficulties for enforcement. How can the judgment be made that such broadly stated texts have been violated? By contrast much of Humanitarian Law is precise in its requirements.

Finally, I note the prohibition in this set of articles of the use of reprisals. Again some argued that idealism had outrun realism. I come back to that in the last part of the paper.

Combatant status

The rules and principles about the protection of members of the civilian population which I have just mentioned depend in part on there being a clear distinction between civilians and combatants. Article 44(3) of Protocol I emphasises this in its opening words:

> "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population . . ."

Several questions arise. Combatants have the right — which others do not — to carry out acts of war.[35] Conversely they have no immunity from attacks. But, if captured, they are in general entitled to prisoner of war status.[36] Civilians do not have the rights of combatants — they can be prosecuted under the general criminal law for what for combatants would be acts of war — and they cannot claim POW status. Who is entitled to combatant status? What obligation does that status involve especially as to distinctiveness? And what is the sanction, if any, for violation of those obligations? Answers to these questions are provided by Articles 43–47 of Protocol I. The major area of difficulty was in respect of guerilla warfare. The balance has been moved substantially in favour of that warfare. The earlier law requires the military unit to have a fixed distinctive sign recognisable at a distance and to carry its arms openly.[37] Article 44(3) by contrast requires combatants to "distinguish themselves" from the civilian population only while they are "engaged in an attack or in a military operation preparatory to an attack". The provision is not specific as to the means of distinctiveness; there is nothing about "at a distance", and the time is brief. The requirements of the paragraph are even less stringent "in situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish

34. See also eg Articles 51(7), 54(3), 56(2) and (5).
35. Eg Protocol I, Article 43(2).
36. Ibid Article 44(1).
37. Eg common Article 13(2)/13(2)/4A(2) of the first three 1949 Conventions.

himself''. In that case the combatant retains his status as a combatant and his potential status as a prisoner of war only if he carries his arms openly:

(a) during each military engagement, and
(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

In general the sanction for breach of these rules is that the combatant can be prosecuted for war crimes, but he retains his POW status. This is subject to the limitation I have just mentioned, but even in that case Article 44 (4) requires the combatant to be given protections equivalent in all respects to those accorded to prisoners of war.

The preparation of these texts was very difficult. So too is their interpretation. What are the exceptional situations? Do they occur only in occupied territory or are all guerilla activities within them? How long is the period of open carrying of arms? Does the text go too far in the direction of protecting the guerilla fighter and thereby threaten the civilian population?[38] Do these provisions, when added to those on national liberation movements which I discussed earlier and those prohibiting reprisals which I am about to discuss, mean that the Conference has in fact provided for inhumanity? Again, history will provide the answers.[39]

One small piece of evidence suggesting that the Conference was keeping a cool head on at least some controversial contemporary issues is shown by the article on mercenaries. This provision — Article 47 — was included on the initiative of the Nigerian delegation and was debated in part while the mercenary trial in Angola was proceeding. Just what does the provision achieve? According to Article 43 it is only members of the armed forces who can be combatants and who are entitled to claim prisoner of war status if they are captured. According to the article on mercenaries, members of the armed forces of a party to the conflict cannot be mercenaries. The provision defining mercenaries is therefore concerned to isolate a category within a wider group who are not themselves combatants or entitled to POW status any way. It accordingly can have only a political purpose. It has no legal effect at all. That is of course not to denigrate the process that led to its inclusion. Such political compromises are sometimes necessary however much they might affront the legal purists.

Enforcement of the law

1. *Concern and means of enforcement*

The Conventions and Protocols contain a number of provisions directed at their implementation. Aspects of these matters, for instance those on dissemination and superior orders, will be dealt with in other papers. I would like to consider aspects of three questions: (1) Why is there so much concern about enforcement? (2) What national and international methods of enforcement are provided for? (3) What other forces are there for compliance with the law? We should not assume that the only forces are the formal, legal ones. I would not want by my selection

38. See eg Dinstein op cit, 269–272.
39. See also the interpretations already placed on the language by several major military powers, CDDH, Vol VI, 132, 136, 146, 150.

of topics, to distort the overall picture — obviously proper training in advance, secure command structures, and the unrelenting protective and relief work of the ICRC and the wider Red Cross movement are of critical importance as well.

The obligations to enforce and disseminate are imposed for very good reasons. The principles and rules established in the treaties are, for the most part, to be applied in the most difficult of situations: the basic principles of the international community — that force is not to be used and that disputes are to be resolved by peaceful means — have been violated; what prospect is there for compliance with this body of law; the rules benefit the enemy; they are to be applied in the confusion and disorder of warfare; they are to be applied by the many individuals who make up the armed and related forces of the two warring nations; often there will be no time for deliberation; there may be major advantages to be obtained in violation (or so it may seem); the usual channels of communication and dispute settlement will not be available; the consequences of violation are horrendous in human terms; in civil wars the pressures may be even greater and the consequences worse; the parties will be attempting to win or survive and not to play by the rules; the extension of the Protocols into the battlefield area (the Hague Law) increases the prospects of violation . . . It is accordingly not surprising that the Diplomatic Conference placed such emphasis on measures for implementation and for enforcement in general and on dissemination in particular. In a resolution adopted by consensus, it affirmed its conviction "that a sound knowledge of international humanitarian law is an essential factor for its effective application" and its confidence "that widespread knowledge of that law will contribute to the promotion of humanitarian ideals and a spirit of peace among nations". Inter alia, it invited signatory states to recommend that the appropriate authorities intensify the teaching of International Humanitarian Law in universities and that courses on the principles of International Humanitarian Law be introduced to secondary and similar schools. The National Red Cross Societies and the ICRC were seen as having a role in these two areas as well, of course, in relation to teaching in the armed forces.[40] The ICRC and the League of Red Cross Societies along with the Henry Dunant Institute have developed ambitious programmes. They sometimes take an immediate and practical form, as recently in El Salvador.[41] They are not just abstract exercises. They can save lives and prevent suffering.

While the conference placed a great deal of emphasis on methods of implementation, it also had great difficulty in settling some of them, especially the choice and role of the protecting power and the International Committee of the Red Cross, the prosecution of grave breaches (involving extradition, command responsibility, and superior orders), reprisals, and international inquiry. The issues arose in respect of both Protocols and in respect of the different parts of the law. We begin with the basic obligation of the parties to the Conventions and Protocols to comply with them and to take steps for their implementation. Article I common to the Conventions and Article 1(1) of Protocol I go beyond the regular *sunt servanda* principle:

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40. Resolution 21 adopted on 7 June 1977.
41. See "Dissemination and Information Campaign in El Salvador", ICRC Bulletin No 77 (1982).

> "The High Contracting Parties undertake to respect and to ensure respect for the present Convention [this Protocol] in all circumstances."

This provision has been generally interpreted as imposing an obligation extending beyond the parties to the conflict. All parties to the treaties have obligations in time of peace. They have obligations ("in all circumstances") of a unilateral, even legislative, and not merely of reciprocal, character nor of a character to be measured against military necessity.[42]

2. *National methods of implementation*

(a) Dissemination

As the dissemination provisions and the developing national, regional and international practice indicate, the draftsmen, the ICRC, the States parties, and national Red Cross Societies have taken the basic and important point that it is much better to have first time compliance at the national level than to have to resort to penalties after the event or international methods. It is better to get it right the first time.

The dissemination obligation exists at all times — in peace as well as in war. It is more substantial in the case of the armed forces than in that of the public at large, first, because it is more important that the armed forces are taught the law and, second, because of constitutional limitations. This obligation takes a more specific form for those members of the armed forces and of other state authorities who have responsibilities, for instance for prisoners of war or for people in occupied territory, and those in the armed forces who have command responsibilities. Those responsibilities may carry with them a penal sanction which is noted later.

(b) Legal advisers

The new obligation to have legal advisers available to military commanders[43] is to be seen as relevant not just to the dissemination and training obligation but also to the new battlefield rules discussed in the three sections above, dealing with protection of the civilian population. As we saw there those rules are accompanied by two new provisions designed to ensure that precautions are taken to spare the civilian population and civilian objects. The legal adviser should have a part to play in these areas.

(c) Prosecution

The 1949 Conventions introduced relatively extensive provisions for the prosecution of breaches. The conference accepted, in other words, that dissemination and training might not be enough. Breaches would still occur. States should then be obliged to take action against the individuals concerned. That obligation of the State party takes three main forms: (i) to take measures necessary for the supression of all acts contrary to the provisions of the Conventions other than the "grave breaches"; (ii) in respect of "grave

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42. See eg the limits on the power of denunciation: Articles 63/62/142/158; Protocol I, Article 99(1); Protocol II, Article 25; the limits on powers of renunciation and waiver of rights, Articles 6/6/6/7 and 7/7/7/8, Article 60(5) of the Vienna Convention on the Law of Treaties; and ICRC, *Commentary on the First Convention* (1952), 25.
43. Protocol I, Article 82.

breaches'' of the Conventions to enact legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed such breaches; and (iii) to search for such alleged offenders, to bring them, regardless of their nationality, before their courts or, if it prefers, and in accordance with the provisions of its own legislation, to hand over such persons to another party if a prima facie case has been made out. Alleged offenders are to have the benefit of the safeguards of proper trial and defence which are not less favourable than those available to prisoners of war. The ''grave breaches'' defined in the Conventions are limited, for the most part, to wilful killing and serious injury to body or health of those protected by the Conventions.[44] One of the matters of substantive dispute at the Diplomatic Conference was the possible extension of this system — of universal jurisdiction and extradition — to the new battlefield rules. Some delegations proposed to make no such extension. They argued that, in drafting penal provisions which were, moreover, tied to a system of universal jurisdiction and extradition, the Conference must proceed with extreme caution and be clear and precise; it must have regard to basic principles of penal law; ambiguity in the provisions, far from reinforcing humanitarian law, might be exploited for political purposes. Further, an approach which would fundamentally alter the 1949 system would result in a lengthy and difficult task. Again, those charged with battlefield offences would be in greater danger of being captured by the enemy than those charged under the 1949 provisions; this enhanced the domestic political significance of the provisions.

The contrary view was that the grave breaches concept should be extended to some or all violations of the battlefield rules. The Conference could not, on this view, fail to recognise the importance of these rules by marking at least some of them as grave breaches; and differentiation between the parts of the Protocol to the disadvantage of the battlefield rules (and those protected by them) could not be countenanced. Many delegations held views between the two extremes or pressed particular interests (e.g. apartheid, attacks on cultural objects, attacks on dams). The doctrinal and political differences were large, so was the amount of paper (at least 41 different breaches were before the relevant committees at one point), and the substantive battlefield rules were themselves the subject of some dispute. It was accordingly a significant success (and a mark of the broad wish of the conference to seek and reach agreement on controversial topics and of skilful chairmanship) that a text was adopted by consensus.[45] Its principal features were that

(1) a selection of the major battlefield rules was included;[46]
(2) some other new provisions of the Protocol were included;[47]
(3) the principles of the criminal law (including precision) are reflected by the requirements that
    (a) there be a breach of the Protocol,
    (b) the action be wilful and
    (c) it cause death or serious injury.

44. Common Articles 49/50/129/146 and 50/51/130/147 of the 1949 Conventions.
45. Protocol I, Article 85.
46. Ibid, Articles 85(3) and 85(4) (b).
47. Ibid, Articles 85(4) and 11(4).

The obligation to extradite in the 1949 Conventions was incomplete: "It may . . ., if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial . . .". The various attempts to strengthen this obligation failed.[48]

A full evaluation of these provisions would require

(1) consideration of the fact that *all* breaches of the laws of armed conflict are war crimes and subject if not to universal jurisdiction at least to the jurisdiction of the belligerents,
(2) consideration of the fact that apparently no-one has ever been prosecuted or extradited under the 1949 provisions,
(3) an evaluation of the detail of the provisions and of the problems of translating them into municipal law,
(4) an assessment of the broader military, political and psychological significance of singling out those provisions listed in the article, and
(5) some weighing of the provisions which were not included in the list.

The Conference had before it other provisions relating to penal responsibility: (1) failure to act; (2) superior orders; and (3) duty of commanders. The first and second were subject to much critical comment on their substance, form and need. The former was considerably altered, the latter, after extensive amendment, did not get sufficient support for adoption. The third arose directly from the United States experience in Vietnam. The articles, proposals and debates relate to, and at times illuminate, central questions of criminal responsibility — responsibility for the actions of subordinates; the limitation of national criminal responsibility by reference to international law (with possible dangers for the discipline of the armed forces); the non-limitation of international criminal responsibility by national law and orders (with possible claims of retroactive criminality; the superior orders question); the proof of intention in wartime situations which may involve duress or lack of knowledge. As with earlier attempts in this area the question can be (and was) asked whether they should have been made,[49] whether it was fortunate in the one case that no provision was adopted and whether the provisions that have been adopted will be of value: it was not essential that provisions be adopted and there are dangers, internationally as well as domestically, in legislating just for the sake of it.

3. *International methods of implementation*

(a) Reprisals

International law — like domestic systems of law — contains several manifestations of the claim to retaliate:

> Sometimes states will reserve the right to consider a treaty obligation at an end if other states violate it. So several of the parties to the 1925 Geneva Gas Protocol have reserved that option.

48. See ibid, Articles 88(2) and (3). These provisions can be compared with those included in the 1970 Hague and 1972 Montreal Conventions relating to civil aviation, the 1974 New York convention on internationally protected persons, the 1979 convention on hostages, and the 1979 convention on nuclear theft.
49. For an earlier asking of the question see Baxter, "The Effects of an ill conceived Codification and Development of International Law" in *Recueil d'Etudes de Droit International en hommage à Paul Guggenheim* (1969), 146.

> A serious breach of a treaty usually gives other parties the right to terminate or suspend it. It is unlikely that this right is available in the case of the Geneva Conventions and Protocols.[50]
>
> There is sometimes a right to take countermeasures on some limited basis. Such a right does not appear to have been claimed in war.[51]
>
> The law of war has long recognised the right of a belligerent state to take reprisals in the event of a violation of the laws by an enemy state.

It is important to recognise the nature and especially the limits of reprisals: (1) they are to be designed to bring the other party back to an attitude of respect for the law; (2) notice is to be given of the intention to resort to reprisals; (3) the reprisals are to be proportionate to the breach; (4) the reprisive action is to cease as soon as the original breach ceases; and (5) the decision is to be taken at the highest level, probably by the government rather than by the military. It is sometimes said that reprisals should be taken only as an unavoidable last resort.[52]

According to one eminent authority "Reprisals between belligerents cannot be dispensed with, for the effect of their use and of the fear of their being used cannot be denied".[53] The law has, however, moved forward from that view. So too has the practice of States.

The 1929 POW Convention prohibited reprisals against prisoners of war and that prohibition now protects all those subject to the four 1949 Conventions.[54] That prohibition essentially applies only outside the battlefield — particularly to those who have been wounded, shipwrecked, captured as POWs and to civilians in occupied territory. Even those prohibitions have at times been under pressure and have been violated. Should the prohibition be extended to other areas of the law — to the Hague area, for instance? The Conference did not extend it to the rules on the methods and means of warfare.[55] Indeed it was not really even asked to. Should the prohibition on reprisals be extended to support the other area of the Hague rules — those rules, considered in Part III, designed to protect the civilian population against the effects of hostilities? The Conference on the whole answered this question positively.[56] It made those decisions at different points in the long sessions. It did not adopt a single approach and was not able to adopt a general provision other than the thoroughly obscure provisions of article 89:

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

Has the Conference allowed idealism to outrun reality and military and political necessity in these prohibitions? Can a government whose cities and civilian population have been bombed really be restrained from striking back? If as a result of such pressures, the prohibition is breached, might not the whole

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50. See note 42 above.
51. For a recent case see France — United States Air Services Award (1978) 54 ILR 304, 337–341.
52. For an excellent study, see Kalshoven, *Belligerent Reprisals* (1971).
53. Oppenheim, *International Law*, Vol II 7th ed (1952), 561–2.
54. Articles 46/47/13/33.
55. Protocol I, Articles 32 to 45.
56. Ibid, Articles 51(6), 52(1), 53(c), 54(4), 55(2), 56(4); see also Article 20.

Geneva fabric be threatened? Will there not often be substantial military advantages in such reprisive attacks? Can it really be the case that the developed Geneva implementation system will be as effective in this area as with the traditional functions of protecting the victims?

There are, however, arguments to the contrary. Might not the rules disappear under a downward spiral of alleged reprisals and counter-reprisals which are subject only to vague restraints and which historically have often not proved effective? Does not history show that attacks on civilian populations and civilian objects are of very dubious military value? Would not an absolute prohibitory rule have a greater strength because of its clarity? Should not attention and weight be given to the new methods for enforcement that have been built up in the recent law? Is it not a major purpose of the law to provide protection to the individuals who are not directly involved in the conflict? Should not the threat or use of reprisals be reserved for the extreme case? And, in any event, a real threat, in such a case, of an *illegal* reprisal might well be effective. They certainly have been in recent history.

(b) *Protecting powers and substitutes; the role of the ICRC*

The Geneva system has long recognised the need for third party involvement — including Protecting Powers, the ICRC and national Red Cross Societies, and inquiry. The Conference considered proposals relating to all three.

"Protecting Powers" according to the Conventions[57] and Protocol I[58] have the duty of safeguarding the interests of the Parties to the conflict. For this purpose they are to appoint delegates from their own nationals and those of other neutral Powers. The Conventions go on to provide for substitutes for the protecting Power in cases in which no Protecting Power is operating. The substitutes can be another neutral Power or a humanitarian organisation such as the ICRC.[59]

This provision can be seen as providing for unilateral, automatic appointment without the consent of the receiving State. Accordingly, the Eastern European States had made reservations against it.

The purpose of the draft article submitted to the Conference was "to strengthen the system of Protecting Powers and their substitute set up by the Conventions in order to guarantee the impartial supervision of their application and facilitate that application".[60] The system was to be made more effective by making it more likely that Protecting Powers or their substitutes were appointed. The system had not worked well since 1949. Thus its only operation in the Middle East had been in the Suez conflict.

Most were prepared to accept in a general way the purpose of strengthening the system although there were some (such as France) who thought that the existing provisions were satisfactory. The two major points on which the debate focussed were the requirement of the consent of the parties to the conflict to the appointment of Protecting Powers and substitutes, and the possibility of the UN having a role if no Protecting Power or substitute was appointed.

57. Article 8/8/8/9.
58. Article 5(1).
59. Article 10/10/10/11.
60. ICRC Commentary to the Draft Protocols, p 11.

There was widespread — if in some cases grudging — acceptance of the view that consent was basic to the initiating of the system of protection. As Shabtai Rosenne put it: "The control body must be effective and impartial. Its effectiveness did not depend solely on its means and staff; the real consent of the Parties to the conflict was essential".[61] Relevant to this acceptance by Western delegations was the fact that the provision could not, under the draft as it was then, be subject to reservation and that the whole Protocol could be jeopardised by the forcing through of a text which the Eastern European and quite a large number of other delegations could not accept. The matter was therefore one of the structuring of the article and of its process of appointment to make it more or less difficult — depending on one's point of view — to refuse consent. In the end the protagonists of the two positions could each claim some success. Thus those who wanted to increase the pressure could point to the first sentences of para 1 and of para 4 and to the quite detailed procedure designed to ensure that appointments are made. Those on the other side could point to the references to consent in para 2, para 3 and the second sentence of para 4 (as well as to Article 2(d)). The latter group could also point to reiterated statements by the ICRC that it would not act as a substitute without consent, and to the rejection by the relevant Committee of the proposal relating to the UN which might in some circumstances have avoided the requirement of consent. One possibly regressive aspect of the text is the relating of consent not just to the designation of a substitute but also to its functioning (para (4), second sentence); the possibility of day to day obstruction is thereby introduced.

Several Arab States and Norway introduced a proposal to the effect that if part or all of the functions of a Protecting Power were not being exercised the UN could name a body to exercise those functions. There was extremely determined opposition to this proposal from both Western and Eastern Europe. Its main supporters argued that there was a gap in the system provided in draft Article 5, that the UN could play this role, and that its standing in this area should be explicitly recognised. The opposition stressed that the draft article was a delicate compromise which the proposal might destroy (with detrimental effects for the Protocol as a whole), that the consent of the parties was not expressly provided for and might not indeed be required, that it was doubtful whether the UN had power to act in the capacity proposed, and that its general political orientation made it an inappropriate body to be involved in humanitarian activities. (The argument about the legal powers of the UN was based on a remarkable statement of a Secretariat representative which asserted that the Charter is the one and sole source of UN power and that it was difficult to find the legal link between the Charter and the proposal. It was surprising to find Western delegations supporting this extraordinary view which, apart from anything else, directly contradicted statements previously made by the UN Secretary-General.) The proposal was defeated 27-32-16.

The role of the ICRC is recognised in a general way in Article 9/9/9/10 of the Conventions:

> "The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross

61. CDDH, Vol VIII 169.

> or any other impartial humanitarian organisation may, subject to the consent of the Parties to the conflict concerned, undertake for the protection [of those protected by each Convention]."

There are also several particular references to the ICRC in the Conventions, in connection, for instance, with visiting and providing relief and assistance to prisoners of war and civilian internees and the provision of information and a tracing agency. Protocol I gives further emphasis to the general function:[62]

> "The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to 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 International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned."

The provision contains paragraphs relating to national Red Cross Societies, the League of Red Cross Societies and other humanitarian organisations.

The activities in these areas are many and varied. They overlap those of Protecting Powers but at least in part are distinguishable: so the ICRC has an independent role; it is usually not an agent; the task is often the performance of humanitarian functions rather than supervision; and it will often operate, with the concurrence of the States involved, without the particular legal base or character of its actions being articulated. It certainly does not see its initiative as limited to the specific areas identified in the treaty texts. So the latest published two monthly report of the external activities of the ICRC briefly describes activities in 22 countries in all parts of the world.

The activities are very diverse: e.g. protection activities in the war between Iran and Iraq (prisoners of war — possible repatriation, displaced persons — tracing), protection of civilians in occupied territory, and visits to and repatriation of prisoners in the Middle East, assistance to refugees in Thailand and Pakistan, transfer of Soviet soldiers captured in Afghanistan to internment in Switzerland, humanitarian assistance and visits to prisoners of war in Chad, and visits to persons detained in Indonesia and Poland. Further reports related to Angola and Ethiopia (in both of which humanitarian action had recently been reinstated), Namibia, Mozambique, Lesotho, Zambia, Zaire, El Salvador, Surinam, Philippines and the USSR.[63] The powers of initiative of the ICRC are clearly very significant in protecting human values. Again it will be seen that the operations and the principles relevant to them run beyond the agreed treaty law.

(c) *Inquiry*

The 1949 Conventions provide for an inquiry procedure.[64] At the request of a party to the conflict an inquiry is to be instituted. Once a violation has been established the parties are to put an end to it. This apparently broad acceptance of third party decision making is, however, heavily qualified: the manner of the inquiry is to be agreed between the parties; and if they cannot agree on the

62. Protocol I, article 81(1). See the other paragraphs of that provision and articles 6,8(c) and 70.
63. International Review of the Red Cross, No 233, March-April 1983, 85–97.
64. Article 52/53/132/149.

procedure, they "should" agree on an umpire who is to decide. The procedure has never been used. An attempt was made at the Diplomatic Conferences to strengthen these provisions. A permanent independent commission with an adequate procedure and effective jurisdiction in advance of the conflicts and disputes. But "once again, the sovereignty reflex of the States, especially the high and the mighty, prevailed over the humanitarian ideal".[65] The competence of the Commission was made optional; it is not to be established until 20 parties have made a declaration — based on the system provided for in Article 36 (2) of the Statute of the International Court — accepting competence; the complications and delays of that system appear to be quite inappropriate in the present context; and the parties to a particular inquiry are to bear the costs.[66] The same reluctance to provide for a more effective system of protecting powers and substitutes has reappeared. It is not surprising that the revised provision received only limited support — much of it luke warm; and that six of the 31 parties to Protocol I have accepted it. Once again both the general arguments and the technical detail are of wider interest. So delegations debated the balance between sovereignty and third party inquiry, the difference between the fact and possibly fault finding function of the Commission and the functions of the protecting powers and ICRC, the role of publicity, the composition of the Commission, its procedure, and the influence of the Parties to the conflict over the process in a particular case.

The overall result is discouraging: state sovereignty prevailed.

(d) *State responsibility*

The draft submitted to the Conference contained no relevant provision. The Vietnamese delegation very late in the process, in April 1977, proposed that Protocol I oblige States which violate the Conventions or the Protocol to pay compensation; they would also be responsible for acts of members of their armed forces. The proposal — which was co-sponsored by Algeria and Yugoslavia — was adopted by consensus. The Vietnamese might be seen, of course, as having a special interest. They did indeed refer to that interest.[67] But whether that is so or not the origin and wording of this provision is interesting: Article 3 of the 1907 Hague Convention on the Laws and Customs of War on Land. Some of the traditional law remains acceptable to even the most "progressive" of States. But the question can, of course, be asked in the light of the history of reparations after the First World War and the very different attitude after the Second whether this law has any real significance. At least it is most unlikely to influence government action during wartime.

(e) *Miscellaneous*

Protocol I contains a number of other provisions relevant to the implementation of the treaty provisions:

(i) Meetings of the parties: The Swiss Government, as depository of the Protocol, is to convene a meeting of the High Contracting Parties, at the request of one or more of them and upon the approval of a majority, to

65. Abi-Saab G, CDDH, Vol IX, 442.
66. Quentin-Baxter R., ibid 451–2.
67. Ibid 355–6.

consider general problems concerning the application of the Conventions and Protocol.[68] It is not clear how this provision relates to that for amendment and to the other supervision provisions already considered. It may be significant that the Conference voted to retain the word "general": thus the meetings would probably not be concerned with particular complaints. The meetings, on the other hand, are not restricted to the Protocol.

(ii) Dead persons: the Parties to the conflict are to endeavour to agree on arrangements for search, identification and recovery of dead persons. They are to include agreements relating to grave sites.[69] Such agreements should facilitate the achieving of the purposes of these provisions.

(iii) Cooperation: Article 89 (quoted above) can be given a reading wider than the reprisal context from which it arose. Questions of compliance with the treaties can be raised in relevant international organisations such as the United Nations. Indeed they have been.

(iv) The International Court: The Court is not expressly referred to in the Protocols. In that sense this reference is out of place. But it is relevant to recall that the 1949 Conference recommended that disputes about the interpretation of the Conventions that cannot be resolved by other means be submitted by agreement to the Court, and that Pakistan did indeed take its prisoner of war dispute against India to the Court.[70]

4. *Other forces for compliance with the law*

People comply with the law for reasons other than the prospect of the invocation of formal methods for implementation. A full examination of these reasons in the area of the law of war would require a major inquiry which in part would remain speculative and subjective. I do no more than note some of them.

(a) *Basic humanitarianism*

As we have already seen the Protocol carried forward the emphasis of the de Martens clause on the principles of humanity and the dictates of public conscience.[71] A central aspect of humanitarianism is, of course, that those not directly involved in the conflict should be respected and protected, and should not be made the object of an attack. A distinction is drawn between the State and its agents on the one hand and individual humans on the other. Rousseau in the *Social Contract* (1762) developed the distinction by reference to "the established maxims of all ages and to the invariable practice of all civilised nations".[72] The distinction sometimes confers wider protection than that required by law. So George Orwell, in the Spanish Civil War, refrained from shooting a man who jumped from a trench and ran along the top of the parapet in full view:

> "He was half dressed and was holding up his trousers with both hands as he ran . . . I did not shoot partly because of that detail about the trousers. I had

68. Article 7.
69. Articles 33 and 34.
70. *Case concerning trial of Pakistani Prisoners of War* (1973), ICJ Pleadings, 328, 347.
71. See Note 5 above.
72. See Note 32 above.

come here to shoot at 'Fascists'; but a man who is holding up his trousers isn't a 'Fascist', he is visibly a fellow-creature, similar to yourself and you don't feel like shooting at him.''[73]

(b) *Military advantage*

Any army complying with the rules is a well-disciplined army, more likely to carry out military orders and to achieve military objectives. Napoleon once remarked that nothing would ''disorganise an army more or ruin it more completely than pillaging''.[74] One of his biographers, writing of his brilliantly successful Italian campaign, assessed the qualities contributing to that success:[75]

> ''The first quality was discipline. Napoleon with his legal forbears was a great person for law and order. He insisted that officers issue a receipt for everything requisitioned . . . If his soldiers stole or damaged, he arranged compensation. He forbade looting and he ordered a grenadier who stole a chalice in the Papal States to be shot in front of the army.''

Furthermore, many of the rules can promote, at one and the same time, both military advantage and humanitarian values: history suggests that attacks directed at civilians can be counterproductive (see Article 48); if personnel, equipment and munitions are limited they are usually better directed at military objectives.

(c) *Political advantage*

The belligerents will at some point probably be living in peace together in a small planet. History suggests that they may even become close allies. Their future relations may be enhanced by compliance. This consideration can be even more persuasive in the civil war context. Mao recognised it in his ''Eight Points for Attention''.[76] It is also to be found in some of the United States rules of engagement in Vietnam:

> ''The use of unnecessary force resulting in non-combatant casualties and property loss will embitter the population and make the long term goal of pacification more difficult and costly.
> The VC/NVA exploit incidents of non-combatant casualties and destruction of property . . . to foster resentment and to alienate the people against the government.''[77]

(d) *Economic advantage*

The victor will not want to occupy a devastated land in economic ruin. Even if it does not expect to occupy, it may be concerned about the restoration and

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73. Walzer, op cit, 140.
74. 1964 Proceedings ASIL 91–2. See generally the other contributions to that discussion, especially Baxter at 82.
75. Cronin, *Napoleon Bonaparte* (1972, Dell ed 1973), 139.
76. See Walzer, op cit, 181.
77. Quoted in *The U.S. Rules of Engagement in Vietnam as they relate to the use of certain specific weapons: a brief survey and analysis* SIPRI (April 1976), 14–15. It is beyond the scope of this paper to inquire whether practice adhered to this purpose.

development of trade. Churchill recognised this very clearly in a famous minute following the Dresden bombing:[78]

> "It seems to me that the moment has come when the question of so-called 'area bombing' of German cities should be reviewed from the point of view of our own interests. If we come into control of an entirely ruined land, there will be a great shortage of accommodation for ourselves and our Allies: and we shall be unable to get housing materials out of Germany for our own needs because some temporary provision would have to be made for the Germans themselves. We must see to it that our attacks do not do more harm to ourselves in the long run than they do to the enemy's immediate war effort."

(e) *Reciprocity*

This is a de facto element which cannot be ignored. Sometimes it will back rules of law. Sometimes it supports rules which do not necessarily have the force of law such as the prohibition in World War II on the use of gas warfare. But as was noted earlier in the discussion of reprisals there is a real danger of a downward spiral of reciprocal action. History does however show that the careful use of the *threat* of retaliation can play a role in maintaining the rules.

(f) *Public opinion*

This factor works very unevenly and, if at all, probably belatedly. But again, there is some recent evidence of its significance. Recent debates about weaponry and targetry restraints have plainly been affected by public opinion which has been greatly influenced by the onset of wars on television.[79]

The present state of the world does not allow optimism. Humanitarian values are often ignored and violated. But there is a great and vital body of law and principle founded on humanitarianism which we neglect at our peril. Indeed we are obliged to reaffirm and strengthen it.

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78. Minute of 1 April 1945 to Chiefs of Staff Committee quoted in Webster and Frankland, *The Strategic Air Offensive against Germany 1939–1945*, Vol III (1965), 117. This replaced a minute in which he had referred to the bombing as being simply for the sake of increasing terror, ibid 112. See the discussion in Johnson, *Rights in Air Space* (1965), 51–3.
79. For a chastening account of the role of the press in war see Knightly, *The First Casualty: From the Crimea to Vietnam: The War Correspondent as Hero, Propagandist, and Myth Maker* (1975) and his article "BBC — War and Truth" on the reporting of the Falklands War, *Sunday Times*, 16 May 1982.