THE GENEVA PROTOCOLS OF 1977 ON THE HUMANITARIAN LAW OF ARMED CONFLICT AND CUSTOMARY INTERNATIONAL LAW

Antonio Cassese*

TABLE OF CONTENTS

* Professor of International Law, University of Florence, Italy.

I. INTRODUCTION

My purpose in this essay is to ascertain which provisions of the two 1977 Protocols Additional to the Geneva Conventions of 1949,[1] reflect customary international law, and which are only applicable *qua* treaty rules and therefore become binding on States only insofar as the Protocols are ratified. The task is hard, for it is always difficult to extricate unwritten rules from the mass of pronouncements, attitudes, views and written rules posed by States.[2] The danger of rashly asserting the existence of customary rules is particularly evident in the laws of warfare, where there exists such a great admixture of treaty provisions and unwritten norms.[3]

1. Protocol Additional to the Geneva Convention Relative to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, Annex I (1977), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter cited as Geneva Protocol I]; Protocol Additional to the Geneva Convention Relative to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, Annex II (1977), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter cited as Geneva Protocol II].

2. One should always keep in mind the warning given as early as 1908 by Oppenheim when, after pointing out that textbooks differed widely with regard to rules they laid down as customary, he remarked that "[m]any of these book rules are mere fancies, the outcome either of what the respective authors consider the law of nature, or of patriotic prejudice, or of misunderstood authority, and the like." Oppenheim, *The Science of International Law, Its Task and Method*, 2 AM. J. INT'L L. 334 (1908).

3. Even a diplomatic conference, the London Naval Conference of 1908-09, which produced the unratified Declaration of London Concerning the Laws of Naval Warfare, February 26, 1909, was reproached for confusing the two legal planes. The conferees had intended "to define, where needful to complete what might be considered as customary law," General Report to the Naval Conference, British Parliamentary Paper, Cmd. 5, No. 4555, at 344 (1909), *reprinted in* THE DECLARATION OF LONDON, OFFICIAL DOCUMENTS 130, 135 (J. Scott ed. 1919), and a preliminary provision of the Dec-

To avoid misunderstandings, before analysing the principal provisions of the 1977 Protocols,[4] I shall set out the theoretical framework upon which the analysis is based, by pointing out out the principal relationships that may arise between treaty rules and customary law, more precisely, the ways treaty rules may embody or generate norms belonging to the body of international custom.

A. Relationship of Treaties to Customary Law

There exist five ways treaties have a bearing on the formation of general rules of international law.

1. Treaties as Evidence of Customary Rules

This is the simplest relationship. It has been dealt with in several international judgments and has formed the subject of searching analysis by such leading jurists as Shihata, Baxter and D'Amato.[5] Both bilateral and multilateral treaties sometimes give expression to a legal conviction held by States; they testify to the views of States concerning a certain matter in just the same way as other pronouncements such as unilateral declarations, diplomatic correspondence, or actions taken in specific instances. In these instances, treaties have a significance transcending their value as contractual undertakings, for they are indicative of a practice attended by a legal conviction as to its binding force.

2. Treaties that Codify International Customary Rules

A treaty can be declaratory of customary law, restating and codifying it. This was shown by the 1969 Vienna Convention on the Law of Treaties:[6] Article 38 provides that nothing ". . . precludes a rule set forth in a treaty from becoming binding on a third

---

laration itself stated that the rules laid down therein "correspond in substance with the generally recognized principles of international law," Declaration Concerning the Laws of Maritime War, British Parliamentary Paper, Cmd. 5, No. 4555, at 381 (1909), *reprinted in* THE DECLARATION OF LONDON, OFFICIAL DOCUMENTS 112 (J. Scott ed. 1919). This view was however assailed by such prominent jurists as the British T.E. Holland, who argued that on the contrary the Declaration was "revolutionary" and contained "a good many undesirable novelties." T. HOLLAND, LETTERS TO THE TIMES UPON WAR AND NEUTRALITY 90, 204 (1929). *See generally* F. GROB, THE RELATIVITY OF WAR AND PEACE 166 (1949).

4. Geneva Protocol I and Geneva Protocol II, *supra* note 1.

5. *See* Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 69 (1970); D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892 (1970); and Shihata, *The Treaty as a Law-Declaring and Custom-Making Instrument*, 22 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 51 (1966) [hereinafter cited as Shihata (1966)]. *See also* Shihata, *International Conferences and the Declaration of General Rules of International Law*, 5 REVUE AL-ULUM ALQUANUNIYA WAL-IQTISADIYA (REVUE DES SCIENCES JURIDIQUES ET ECONOMIQUES) 13 (1963).

6. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969,

State as a customary rule of international law, recognized as such." Article 43 goes on to state that the termination of a treaty ". . . shall not in any way impair the duty of any State to fulfil [sic] any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

It would be naive and improper to believe that treaties, when they "declare" customary law, merely put into writing unwritten rules. Indeed, treaties seldom merely restate existing customary rules; they usually spell them out, give them precision, clarify issues over which there may be controversy, or even improve upon existing rules.[7]

3. Treaties that Develop and Supplement Customary Rules in a Way Binding Upon All States Irrespective of Ratification

A new and more interesting relationship between treaties and custom can be pinpointed: some multilateral treaties, in addition to restating and spelling out customary rules, develop and specify their regulations. Thus, at one and the same time, they reaffirm and codify the preexisting law and make significant additions to it. Or else, besides restating the law in areas where State practice is inconsistent, scattered and fragmentary, or the subject of conflicting interpretations, treaty provisions enact a regulation that clarifies the issue and authoritatively enunciates the rules governing the matter. In these two instances, subject to certain conditions,[8] treaty provisions, although not merely declaratory of customary rules, may reflect the formation of a general consensus such that they embody regulations having binding effects on all States, regardless of whether or not these become parties to the treaty. In other words, treaty stipulations acquire a status different from that of contractual undertakings: the status of generally binding rules. Three illustrations help clarify the matter.

In the famous judgment of the International Court of Justice (I.C.J.) in the *North Sea Continental Shelf* case, the Court held that Articles 1 through 3 of the 1958 Geneva Convention on the Continental Shelf[9] ". . . were then [i.e., at the time of the Geneva Confer-

1969 U.N. JURIDICAL Y.B. 140, arts. 38 & 43, U.N. Doc. A/Conf. 39/27, *reprinted in* 8 I.L.M. 679 (1969) [hereinafter cited as Vienna Convention].

7. *See, e.g.*, The Statute of the International Law Commission, art. 15, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982) ("The expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there are already had been extensive State practice, precedent and doctrine.")

8. *See infra* text accompanying notes 40 & 41.

9. Convention of the Continental Shelf, April 29, 1958, 499 U.N.T.S. 311, 1964 Gr. Brit. L.S. No. 39 (Cmd. 2422), 52 AM. J. INT'L L. 858 (1958).

ence] regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf."[10] The view of the Court is no doubt correct. To grasp its import and wide implications, one should recall that in 1958, at the time the Conference met in Geneva, no general consensus had yet emerged as to rights over the continental shelf.[11] The definition of the continental shelf and the rights pertaining thereto in the Convention, did not therefore simply codify a customary rule. They took account of a major tendency of the international community to uphold the "rights" of a coastal State over its shelf, rallied to this tendency those States which previously were opposed to it or had refrained from taking a stand, and "recorded" the birth of a new rule which was at the same time conventional provision and norm belonging to the corpus of general international law.

The birth of the new customary rule can be accounted for by a previous practice of States and by the consensus that emerged within the Conference about the legally binding character of the rule *qua* general norm of the international community. Proof of such general agreement should not be seen primarily in the fact to which the Court drew attention—that the Convention itself disallows reservations to Articles 1 through 3.[12] A more influential and significant clue to the formation of a general conviction is to be seen in the *scope and tenor of the rules* as well as in the fact that the rules and indeed the whole Convention were adopted without any major opposition.[13]

It is noteworthy that a key element of the definition of shelf, the exploitability criterion,[14] was in fact created in the course of the Conference, for it was not the subject of previous practice. In spite of its novelty and although Belgium and West Germany opposed it,[15] the Court held that the criterion was a constitutive element of the customary rules on the shelf crystallized in the Convention. The court was right, although it did not give any reasons for its holding. In my view, the Court believed that, although the exploitability criterion constituted an innovation, it was closely related to an emergent customary rule and indeed specified and

10. North Sea Continental Shelf Cases, 1969 I.C.J. 4, 22.

11. *Id.* at 39.

12. Indeed, both Baxter and D'Amato have convincingly demonstrated that no great significance should be attached to clauses allowing or prohibiting reservations. *See generally* Baxter and D'Amato, supra note 5.

13. The Convention was carried by 57 votes against three (Belgium, F.R.G., and Japan) with 8 abstentions, but the three opposing States explained that they had cast negative votes for reasons not related to the concept of exclusive rights of coastal States over the continental shelf. *See* 2 U.N. Conference on the Law of the Sea, Official Records (18th mtg.) paras. 35 & 36 (1958).

14. Convention on the Continental Shelf, *supra* note 9, art. 1(a).

15. U.N. Conference on the Law of the Sea, Official Records, *supra* note 13.

rendered the rule more precise. Moreover, it clearly appears from the proceedings of the Conference that the criterion was part of the package deal made by States in enacting rules on the shelf; the criterion constituted an element of the legal conviction that took shape in 1958 about the existence of a general rule on the shelf.[16]

A second instance of this norm-creating process can be seen in the *Namibia*[17] and *Fisheries Jurisdiction*[18] cases. In its Advisory Opinion on Namibia, the Court held that Article 60 paragraph 3 of the Vienna Convention[19] (at that time not yet entered into force) codified existing law.[20] In *Fisheries Jurisdiction*, the Court held that "there can be little doubt, as implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void."[21] The Court also said that Article 62 of the Vienna Convention regarding the right to terminate a treaty in light of changed circumstances,[22] was "a codification of existing customary law on the subject."[23]

Two points deserve attention. First, the rule of the Vienna Convention on termination of treaties as a result of a material breach by another party[24] mainly codified customary law, dispelling the doubts previously entertained by State and the legal literature on the matter.[25] By contrast, the provisions of the Vienna Convention on the invalidity of treaties following from the threat or use of force[26] and the "fundamental change of circumstances"[27] were to a

16. What is also missing from the Court's judgement is consideration of the position taken by Belgium and West Germany; since they voted against the Convention partly on the grounds of the criterion in question, *see supra* note 13, in order to maintain that they too became bound by the whole of the regulation embodied in articles 1-3 it should be proved that they subsequently forewent their opposition and gradually came to accept the criterion as well.

17. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 47 [hereinafter cited as Namibia].

18. Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3 [hereinafter cited as Fisheries Jurisdiction].

19. Vienna Convention, *supra* note 6, art. 60.

20. Namibia, *supra* note 17 ("The rules laid down by the Vienna Convention on the Law of Treaties concerning the termination of a treaty relationship on account of breach [article 90] (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject.")

21. Fisheries Jurisdiction, *supra* note 18, at 14.

22. Vienna Convention, *supra* note 6.

23. The Court dismissed the claim that in an exchange of notes between contending States, the position of Iceland had been taken under the threat of force. Fisheries Jurisdiction, *supra* note 18, at 20.

24. Vienna Convention, *supra* note 6, art. 60.

25. *See, e.g.*, L. OPPENHEIM & H. LAUTERPACHT, *International Law*, I PEACE 947 (7th ed. 1955).

26. Vienna Convention, *supra* note 6, art. 52.

great extent *innovative.*

The prohibition of threat or use of force against States as such unquestionably represented a complete innovation in the law of treaties:[28] until then this branch of international law had only considered coercion of the *State representative* negotiating or concluding the treaty as grounds for invalidity.[29] The contention can be made that Article 52 neither codified customary law nor constituted a complete departure from existing rules; rather, it applied a general principle to a specific field of law. The Court was right in holding that Article 52 has entered the corpus general international law although it was not merely declaratory of pre-existing law.

While the "fundamental change of circumstances" provision to a great extent restated and clarified previous law, it also contained some considerable novelties.[30] Yet the Court seemed to consider the provision as a unitary body of rules, thereby implying that there may be instances where normative innovations become an integral part of the international regulation forming the subject of general consent. It follows that since Article 62 was adopted by the Vienna Convention, no State invoking the *rebus sic stantibus* clause can any longer claim that it has a content other than that laid down in Article 62. This provision definitively establishes the scope and import of the clause for all member States of the international community.

The second interesting element of the Court's pronouncements is the short reference contained in the Opinion on Namibia[31] to the fact that Article 60 of the Vienna Convention was adopted without a dissenting vote.[32] This remark provides a useful test for the detection of treaty rules reflecting general law: one of the elements to be taken into account (so the Court seems to have argued) is whether or not a provision has aroused general consent at the time of its adoption by the relevant diplomatic conference. Although this is of course not a sufficient condition, it numbers among the factors to be considered when appraising the formal status of treaty rules.

A third illustration can be drawn from Judge Baxter's[33] essay "Treaties and Custom." In dealing with the way treaties incorporate rules of customary law, he mentions as a clear-cut instance the

---

27. *Id.* art. 62.

28. *See, e.g.*, I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 612 (3d ed. 1979).

29. *See, e.g.*, L. OPPENHEIM & H. LAUTERPACHT, *supra* note 25, at 891.

30. *E.g.* it excluded treaties establishing boundaries for the operation of the rule. Vienna Convention, *supra* note 6, art. 62.

31. Namibia, *supra* note 17.

32. *See supra* note 20.

33. Judge Baxter sat on the International Court of Justice and was Professor of Law at Harvard University. He also served as Editor in Chief of the American Journal of International Law, and as Vice President of the American branch of the International Law Society.

Genocide Convention of 1948.[34] He correctly maintains the customary character of Articles I through IV of the Convention; however, he dose not stress sufficiently that in many respects Articles II through IV did not codify existing law, but broke new ground.[35]

The London agreement on the Charter of the International Military Tribunal for the Punishment of War Criminals, of August 8, 1945, as well as the judgment itself, merely defined in loose terms what was later called the crime of genocide, without adding any specification about the various categories of acts likely to come within the scope of the crime. Nor did they indicate whether, for example, incitement or attempt to commit genocide or complicity in its perpetration were also punishable acts. The General Assembly resolution of 1946[36] merely stated that "genocide is a crime under international law which the civilized world condemns," adding that "both principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds" were to be punished. Thus, although the resolution carried the previous pronouncements somewhat forward in that it elaborated on the concepts of persons responsible for the crime and of complicity, it did not exhaust the matter. Consequently, when the Convention, in Article II, enumerated the various forms of genocide,[37] and in Article III listed the various categories of punishable acts in addition to actual genocide,[38] it did go well beyond existing law. It did more than "give precision" to the general ban on genocide: it developed and supplemented the ban with a set of specific provisions that made the loose prohibition laid down in customary law concrete and operational in all circumstances.

---

34. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 1970 Gr. Brit. L.S. No. 58 (Cmd. 4421), 45 AM. J. INT'L L. Supp. 7 (1951) [hereinafter cited as Genocide Convention].

35. The outstanding jurist emphasizes that article 1 of the Convention stipulates that "it confirms that genocide . . . is a crime under international law" and that the preamble of the Convention referred to a General Assembly resolution on genocide unanimously adopted in 1946. He then goes on to say:

> Articles II through IV, defining the conduct constituting genocide and establishing the principle of individual responsibility, give precision to the general norm, purportedly declaratory of international law, in the first article. The remaining articles of the Convention establish the procedure for the punishment of the crime and do not purport to reflect the law already in existence. There can be no question that the rules incorporated in this last group of articles are binding only on the parties to the Genocide Convention.

Baxter, *supra* note 5, at 39.

36. G.A. Res. 96, U.N. Doc. A/64/Add. 1, at 188 (1946).

37. Genocide Convention, *supra* note 34, art. 2 (including the fact of "imposing measures intended to prevent births among the group" and forcibly transferring children of the group to another group").

38. Genocide Convention, *supra* note 34.

Based on the illustrations above, it may be concluded that there are cases where treaty provisions partly restate customary law and partly develop it. Nevertheless, these provisions may reflect the formation of general rules corresponding to their content even in the part where they tread new ground. The test for ascertaining whether or not this is the case is complex and tricky. One must first consider the *content* and *wording* of a given provision: neither a minutely detailed rule nor a rule which merely confers a legal faculty in an area where States have been and remain free to do or not to do something, is not a provision susceptible of turning into customary law. One must also ascertain whether a rule, at least in part, takes up previous customary law, and whether States, in the conference which produced the rule, manifested by their declarations and votes the view that the provision was not merely a conventional rule but embodied general norms binding upon all States regardless of explicit ratification.[39]

In appraising the conduct of States and their declarations in a diplomatic conference, one should never lose sight of three things. First, if a customary rule evolves among the States participating in a conference, the rule as such cannot be held to be binding upon States that did not participate. Those States become involved in the custom-making process only if, by their behavior or their pronouncements, they show themselves willing to be bound by the rule.

Secondly, if States within the conference clearly dissociate themselves from the norm-creating process by putting on record their opposition, the rule cannot be regarded as binding upon them. By showing their opposition they take on the role of "persistent objector," a role which allows States to hold themselves aloof from the formation of a customary rule when it is *in statu nascenti*. If a State later changes its attitude and comes to accept the rule, acceptance must be demonstrated by conclusive acts or declarations; otherwise it should be presumed that opposition manifested when the rule was incipient continues in time.

Thirdly, the adoption of treaty rules in international conferences often is attended by declarations and statements of State representatives propounding interpretations and "understandings" of the rules. States aim at anticipating what they will normally declare at ratification when they will enter official reservations. To my mind, the formulation of understandings and interpretative declarations does not prevent conventional obligations from taking on the nature of *general* duties. In the usual customary process where new

39. As was rightly stressed by D'Amato and Baxter, great care should however be taken in evaluation of the preparatory work, for often States may find it convenient to claim that a certain proposal is declaratory of customary law, to facilitate its acceptance. Baxter and D'Amato, *supra* note 5.

rules come into being through protests, declarations, diplomatic correspondence or other concrete acts and attitudes of States, there may emerge differing views about the proper content or interpretation of an incipient rule. This, however, does not detract from the custom-making process. The emergent rule is from its inception, open to differing interpretations; indeed, this may be the very condition for its birth. It may happen that one of these interpretations eventually gets the upper hand, or it may also happen that none of them takes pride of place. The rule is no doubt unsatisfactory; it is nevertheless a legally binding rule.

Similarly, in the norm-creating process that sometimes takes place in diplomatic conferences, the placing of divergent interpretations on some provisions of a rule is frequently the condition for its adoption. For the sake of compromise and in the interest of normative progress, States are sometimes willing to make the law advance despite differences on some points of its interpretation. If, however, divergences are so extensive as actually to impair the normative value of the rule, the enactment of a new rule is more apparent than real. No rule has in fact been created, neither a conventional provision nor, and for even more compelling reasons, a customary rule.[40] The existence of a modicum of interpretative reservations, however, has no direct bearing on the *nature* of the rule and, in particular, does not prevent its acquiring the status of a customary norm. The declarations have an impact only on the *quality* of the rule.[41]

4. Treaty Provisions Embodying Customary Rules Evolved within a Diplomatic Conference on the Occasion of the Negotiations

Sometimes negotiations conducted within a diplomatic conference offer States the opportunity of agreeing upon generally binding rules in areas previously unregulated or where State practice was very fragmentary and contradictory. This phenomenon is typical of

40. This happened in the case of article 25 of the Hague Regulations prohibiting attacks on "undefended localities." From the outset, the treaty rule was given contradictory interpretations by States; this however did not prevent it from passing into the corpus of general international law, with all its flaws and deficiencies. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 25, 1 BEVANS 631, 36 Stat. 2295.

41. What are the *legal* consequences of the declarations? First, if the rule to which they refer acquires the status of general law, they take effect regardless of whether the treaty is ratified. They bind the "reserving" State only with regard to the general rule. However, if on ratifying the treaty the State gives up the "reservations," a case can be made out in favor of the "reservations" being dropped with respect to the general rule as well. Secondly, the declarations in question do not produce the reciprocal effects typical of reservations *stricto sensu*; in other words, as a result of them the "reserving" State is bound by the general rule to the extent set forth in the declaration; the other States which have accepted the rule as such are bound by it and cannot benefit from the"reservations" vis-a-vis the "reserving" State.

modern diplomatic conferences. In negotiating new provisions or the codification of previous law, States attain a trade-off that enables them to settle issues previously unregulated due to strongly conflicting demands. The need to arrive at a general agreement on a number of matters provides States the opportunity of reaching agreement on outstanding issues. It may happen that such an agreement forms the subject of a generally binding regulation, for it becomes apparent from the attitudes and views of States that, whatever the fate of the treaty, the provisions embodying the agreed regulation have a force going beyond the conventional bonds.

This happened in the Third Conference on the Law of the Sea in at least two areas: the determination of the breadth of the territorial sea and the breadth of the exclusive economic zone.[42] In rewriting the law of the sea between 1973 and 1982 in the third Law of the Sea Conference, States have gradually come to adhere to the concept that their territorial sea should not exceed twelve nautical miles. What previously was unacceptable to many States has now become agreeable owing to the need to strike a balance between conflicting requirements and to take account of the regulation of the various issues of the law of the sea laid down in the Convention. It is therefore apparent that the Law of the Sea proceedings have allowed States to settle by mutual consent and in a binding way an issue long unsettled.

The situation is slightly different with regard to the breadth of the exclusive economic zone. Here, there was already a well established practice of a number of States which had proclaimed that their economic and fishing zone extended as far as 200 natuical miles.[43] The Law of the Sea Conference gradually made it clear that the existence of the zone would become one of the key points of the new regulation. Thus the Conference indirectly prompted other States unilaterally to proclaim their own zones, and in addition allowed general consent to emerge on the 200 mile extension of the zone.[44] The role of the Conference in eliciting the birth of the rule was twofold: it crystallized and consolidated existing practice, and it prompted opposing States to accept the rule as part of the package deal agreed upon within the Conference.

5. Treaty Provisions that Generate Customary Rules

The ICJ in *North Sea Continental Shelf Cases* rightly emphasized the possibility that treaty provisions constitute the foundation of corresponding rules of customary law that emerge after the treaty

42. U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/Conf. 62/122 (with corrigenda); *reprinted in* 21 I.L.M. 1261 (1982).

43. *See* I. BROWNLIE, *supra* note 28, at 218.

44. *Id.* at 220-21.

comes into force.[45] This happens when conventional norms are supported by subsequent practice of States which turns them into generally binding norms. The Court elaborated a set of criteria for testing in specific instances whether the custom-making process takes place, and concluded in the case at issue that Article 6 of the 1958 Convention on the Continental Shelf,[46] relative to the equidistance principle, remained a purely conventional provision. The test used by the Court was criticized by various jurists.[47]

A better course seems to be that one should in each specific instance, determine on the basis of a wide spectrum of elements whether or not a treaty rule has passed into the corpus of general international law. The formulation of the treaty rule may be important; ratification by a considerable number of States can be of great consequence; pronouncements by third States may prove significant. None of these factors taken in isolation may turn out to be decisive, but concurrently, they can lead to one solution or the other.

An illustration of the custom-making process is the gradual transformation of the main provisions of the four 1949 Geneva Conventions on War Victims[48] into customary rules. In 1969, in the Vienna Diplomatic Conference on the Law of Treaties, the Swiss representative stated that the Conventions, "which were virtually universal, . . . in his delegation's view formed part of the general law of nations."[49] A few States went so far as to claim that the whole of the Conventions or at least the bulk of their provisions had come to acquire the status of *jus cogens.*[50]

---

45. *See supra* text accompanying note 10.

46. *Id.*

47. *See, e.g.*, Baxter and D'Amato, *supra* note 5.

48. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter cited as Geneva Convention I]; The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 135 [hereinafter cited as Geneva Convention II]; The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter cited as Geneva Convention III]; The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter cited as Geneva Convention IV].

49. Official Records of the U.N. Conference on the Law of Treaties, 1st Session, Summary Records of the Plenary Meetings and of the Committee of the Whole 12 (1969), U.N. Doc. A/CONF. 39/11, U.N. Sales No. E.68.V.7.

50. This view was taken in the first session of the Conference by Lebanon, which stated that "the norms generally regarded as being part of jus cogens" comprised those on "the wartime treatment of prisoners and wounded and of the civil population," by Poland, which referred to "some of the rules of warfare," by Italy, which expressly referred to the four Conventions, and by Switzerland, which included among "the best settled rules of *jus cogens* . . . the rules set out in the Geneva Conventions." *Id.*

There is no denying that Article 3, which is common to the four Geneva Conventions[51] has passed into customary law. It was apparent from the declarations made by the various participants in the 1947-1977 Geneva diplomatic conference that all States considered Article 3 as embodying a set of rules belonging to the corpus of general international law.[52]

B. Limits of the Present Inquiry

The foregoing general considerations form the basis for the present analysis. A twofold caveat is necessary, however, before proceeding. First, I shall confine myself to dealing with those provisions of the 1977 Geneva Protocols[53] that appear to me to be the most significant. Secondly, as the Protocols have been open for signature for a relatively short time, and few States have ratified them, it is not yet possible to assess satisfactorily how the Protocols have been received. In the present paper, the focus of attention must of necessity be on whether the Protocols are evidence of, or codify, or reflect the formation of customary rules. This paper cannot evaluate the possibility that provisions of the Protocols may give rise to customary rules in a norm-creating process taking place *after* the adoption of the Protocols. Consequently, of the five principle relationships between treaty and custom, the fifth cannot be investigated in the following inquiry.

II. INTERNATIONAL ARMED CONFLICTS

A. The Assimilation of Wars of National Liberation to International Armed Conflicts

In the 1960's and early 1970's the United Nations General Assembly (General Assembly) adopted a string of resolutions proclaiming that wars of national liberation were to be treated as international conflicts.[54] Freedom fighters were to be regarded as lawful combatants and all the rules of warfare on conduct of hostilities and the protection of war victims were to be extended to such conflicts. The political motivations behind the move are self-evident: the majority of States pressing for the adoption of the resolutions intended to promote by legal means the fight of liberation movements against colonial and racist regimes as well as military

51. Article 3 common to Geneva Conventions I-IV, *supra* note 48.

52. *See, e.g.*, VOLKERRECHT, LEHRBUCH 226 (H. Kroger ed. 1982) (stating that the content of article 3 "today can be regarded as the expression of customary international law.").

53. Geneva Protocols I & II, *supra* note 1.

54. *See, e.g.*, Res. 2383, 23 U.N. GAOR Supp. (No. 18) at 58, U.N. Doc. A/7218 (1968), and G.A. Res. 3103, 28 U.N. GAOR Supp. (No. 30) at 142, U.N. Doc. A/9030 (1973).

occupants such as Israel. A number of legal justifications were propounded to bolster the political move.[55]

These claims were, however, rejected by Western countries, which consistently held that wars of national liberation had the same objective features as internal armed conflict wherein a group seeks, by armed violence, to eliminate the central authorities and gain control over the territory previously under the sway of those authorities. In the view of Western countries, upgrading one class of civil strife to the category of international conflict because of the political motivations of liberation movements would mean the introduction of the "just war" concept into international relations.[56] These and similar considerations led most Western States to vote against the General Assembly resolutions, although their opposition to some extent gradually dwindled with the decline of colonial domination.

In 1974, Third World and socialist countries managed to have the first session of the Geneva Diplomatic Conference adopt a provision equating wars of national liberation with international conflicts. Once again, almost all Western countries cast negative votes.[57] Interestingly, however, Western opposition to the provision gradually diminished, so much so that, when it was finally voted upon in the 1977 plenary session, a general agreement had emerged.[58] The provision adopted became Article 1, paragraph 4 of Protocol I.[59] Only Israel totally rejected the provision. The States

55. It was claimed *inter alia* that the territories where liberation movements conducted their fights were not under the sovereignty of their opponents but constituted distinct and separate territories. It was also held that liberation movements, being holders of an international right to self determination, possessed international status; hence they could not be equated with private individuals but were to be treated as international subjects proper. It was also suggested on many occasions (although the claim was subsequently toned down or dropped altogether) that liberation movements and the peoples for which they were fighting exercised an international right of self-defence against the aggression constituted by colonialism, racism, or foreign occupation. *See generally* Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols*, 165 RECUEIL DES COURS 366 *passim* (1979).

56. A dangerous concept that was all the rage in the Middle Ages but was subsequently cast aside with beneficial consequences from the point of view of the humanitarian law of armed conflict. *See* M. Howard, *Temperamenta Belli: Can War be Controlled?* in RESTRAINTS ON WAR 4 (M. Howard ed. 1979).

57. This provision was adopted by 70 votes to 21 with 13 abstentions. I Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva 1974-77, Official Records, at 102 (1977) [hereinafter cited as C.D.D.H.].

58. The result of the vote was 87 in favor, one against (Israel) and 11 abstentions—these by Western countries such as the U.K., the U.S.A., the F.R.G., Canada, Italy, France, Spain, Ireland, Monaco, and Japan as well as Guatemala. *See id.* at 41.

59. Geneva Protocol I, *supra* note 1, art. 1, para. 4 (The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination, as enshrined in the Charter of the United Nations and the

that abstained voiced misgivings about the possibility of applying the provision without difficulties and differences of opinion and challenged the political and practical wisdom of the rule.[60] They did not, however, dismiss it out of hand as inapplicable in the future. In my view, the result of the vote and the tenor of the reservations shows that those States which did not vote in favor of the provision had eventually come to accept that the rule represented a *new law of the international community*, although in their view it was not good law.

The delegations from Egypt, Greece and Australia emphasized that the provision actually embodied a general norm binding on all States, in that it codified a previous practice.[61] No delegation challenged them; so the conclusion is warranted that, in 1977 there emerged in the Conference a general consensus to the effect that wars of national liberation falling within the three classes mentioned in the rule were to be regarded as international armed conflicts. The general consent consolidated and gave shape to an emergent customary rule that practically could not crystallize as a

---

Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations).

60. Italy stated that wars of national liberation were "indefinable from an objective point of view," such definition depending on the aim of the struggle, a subjective element, VI C.D.D.H. *supra* note 57 at 45. The U.K., *id.* at 47, Spain, *id.* at 63-64, and France, *id.* at 48, expressed similar views, as did the F.R.G., *id.* at 61. The F.R.G. also criticized the criteria as chosen with "a view to short-term political . . . objectives," and as being ill-suited to an instrument "intended to be of long-term value." Ireland sympathized with the aims behind the rule, but preferred "a clearer and more precise definition" of the conflicts, *id.* at 53.

61. Thus, the Egyptian delegate stated that:

> International practice on the universal, regional and bilateral levels had established beyond doubt the international character of wars of national liberation. The purpose of the amendment which had been adopted as para. 4 of Art. 1 had not been to introduce a new and revolutionary provision, but to bring written humanitarian law into step with what was already established in general international law, of which humanitarian law was an integral part.

His delegation considered that the importance of the article lay in narrowing future divergences in interpretation rather than in introducing new solutions. *Id.* at 44.

The delegate from Greece pointed out that:

> [P]ara. 4 was fully in accordance with modern international law as expressed in the United Nations Charter and as it had been applied during recent years.

Id. at 55, 122.

The Australian delegate declared that:

> This development of humanitarian law is the result of various resolutions of the United Nations, particularly resolution 3103 . . . and echoes the deeply felt wish of the international community that international law must take into account political realities which have developed since 1949. It is not the first time that the international community has decided to place in a special legal category matters which have a special significance.

Id. at 59.

fully-fledged international norm until the Western countries came to adhere to it. The adoption of Article 1 testified to the formation of a general rule, binding on all the States participating in the Conference whether or not they ratify the Protocol, save for Israel, the only State which consistently rejected the rule and therefore did not become bound by it.[62]

As the rule was principally aimed at Israel and South Africa, the adoption of the rule may have constituted a hollow victory.[63] However, international rules often have a significance transcending their legal force; they possess an "agitational" or "rhetoric" value that explains why States are so eager to enact them despite the fact that they may have little authority as legal standards of behavior. *Qua* rhetoric values they can make it possible to expose the conduct of States that do not live up to them.

B. Lawful and Unlawful Combatants

1. Guerrillas [Article 44][64]

Since the 1960's socialist and Third World States have held in the General Assembly that freedom fighters should be treated as lawful combatants entitled to prisoner-of-war status on capture, even though they do not meet all the five requirements laid down in customary international law.[65]

The debates in the Geneva Conference were complex and protracted, but eventually led to the adoption of a compromise

62. One might remark that Western States refrained from opposing the provision in 1977 not because they intended to abide by it but only because they planned either to refrain from ratifying the protocol or to enter a reservation of the provision. If this were so, one fails to understand why Western States which voted against the rule in 1974 abstained or even voted for it in 1977. The change in attitude of the Western countries had been brought about both by the gradual disappearance of colonial empires and by Western countries becoming convinced that the rule is not dangerous for humanitarian law since it safeguards all the basic principles of this law. This motivation came out with great clarity in statements of the U.K., *id.* at 46-47, and Japan, *id.* at 51.

63. South Africa did not participate in the final session of the Geneva Conference.

64. Geneva Protocol I, *supra* note 1, art. 44 (sets out the basic requirements which combatants are obliged to meet, and provides for forfeiture of prisoner of war status for certain violations.

65. The requirements consist of:

(1) Belonging to a Party to the conflict;
(2) Being commanded by a person responsible for his subordinates;
(3) Having a fixed distinctive sign recognizable at a distance;
(4) Carrying arms openly; and
(5) Conducting their operation in accordance with the laws and customs of war.

Geneva Convention II, *supra* note 48, art. 4.

In the view of socialist and Third World States that have made statements on the subject, freedom fighters cannot wear uniforms, nor can they have a distinctive sign recognizable at a distance. They must conceal themselves among civilians and strike at the adversary so as to take him by surprise. *See* Abi-Saab, *supra* note 55.

formula[66] which leaves unaffected three of the traditional requirements,[67] while it reduces the two other criteria[68] to one: combatants "are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."[69] In wars of national liberation or fighting against an occupying enemy, the rule requires only that a combatant should carry his arms openly "(a) during each military engagement and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."[70]

The article was not adopted by consensus. It was carried by 73 votes to one, with 21 abstentions.[71] The abstaining States were mostly motivated by misgivings about the proper construction of the rule, and nearly all of them propounded their own interpretations of some of its crucial provisions.[72]

Article 44 reflected the lowest common denominator acceptable to all States. In view of the previous positions of States evolved in the United Nations (U.N.), and the broad acceptance by socialist and Third World countries of General Assembly resolutions on freedom fighters,[73] it seems that Western consent to Article 44 added to the previous practice the element that was missing: the support of another important group of States. The fact that Article 44 was preceded by a stream of official pronouncements in the U.N.,[74] and that in 1977 it ultimately commanded the support of a conspicuous number of States, leads us to maintain that Article 44 embod-

66. Geneva Protocol I, *supra* note 1, art. 44 para. 3.

67. Those of belonging to a party to the conflict, of being commanded by a person responsible for his subordinates, and of conducting their operations in accordance with the laws and customs of war. *See* Geneva Convention III, *supra* note 48, art. 4.

68. Those of carrying arms openly and of having a fixed distinctive sign recognizable at a distance. *Id.*

69. Geneva Protocol I, *supra* note 1, art. 44, para. 3.

70. *Id.*

71. VI C.D.D.H., *supra* note 57, at 121 (interestingly, among the States which voted for the article were the United States, France, Belgium, the Netherlands, Austria, Denmark, Sweden, Finland, Norway, Greece and Turkey, in addition of course to socialist and Third World States). Ireland (abstaining) took a strong view, which should probably be construed as a rebuff of the article. It objected that "the protection of the civilian population demanded by humanitarian principles is eroded by Article 42 [present Article 44] to an unacceptable extent." *Id.* at 137.

72. *See, e.g.*, the statement of Protugal, *id.* at 148 ("While welcoming the adoption of Art. 42 [present article 44], which reflected new realities by granting prisoner-of-war status in the event of capture to combatants not belonging to regular armed forces, [the Portugal] delegation [retained] serious doubts with regard to the interpretation of the text."). *See also* the statements of Italy, *id.* at 122-23, Australia, *id.* at 127-28, Switzerland, *id.* at 130-31, New Zealand, *id.* at 131-32, the U.K., *id.* at 132, the F.R.G., *id.* at 133-36, Uruguay, *id.* at 144, Chile, *id.* at 145, Japan, *id.* at 151-52, Argentina, *id.* at 124-25, and Spain, *id.* at 138.

73. *See* Abi-Saab, *supra* note 55, at 418-22.

74. *See supra* text accompanying notes 40 & 41.

ied a customary rule. It restated and developed existing views and practices of States, thereby testifying to the birth of a general rule on lawful combatants. Admittedly, the new rule was the subject of differing interpretations by a number of States. The reason for this ambiguity does not lie in bad draftsmanship, but in the need to overcome objections and accommodate conflicting demands. The new rule may be regarded as "bad law" owing to its looseness and ambiguities, but it is law.[75]

The consequence, unfortunately, is that those States which advanced their own interpretations of some provisions of Article 44 will be bound by the general rule only to the extent of, and in conformity with, their own construction of the rule. State practice will either narrow the gaps and differences in interpretation of the rule, or it will lead to the rule becoming unworkable as a practical standard of behavior.

2. Mercenaries [Article 47][76]

The foregoing remarks concerning lawful combatants apply to a great extent to the provision on mercenaries. In the 1960's the General Assembly and the Assembly of the Heads of State of the Organization of African Unity (O.A.U.) adopted a string of resolutions condemning mercenarism and calling for the punishment of mercenaries as war criminals.[77] This was contrary to customary law, which plainly enjoins States to treat as lawful combatants all

75. A short survey of the principal "reservations" may prove this point. Italy pointed out the "ambiguity" of paragraphs 3 and 4 of article 44 and added that "the article was not unacceptable in itself if its true meaning according to the Italian delegation could be detected." VI C.D.D.H., *supra* note 57, at 122. Argentina stated that the distinction based on carrying arms openly "was . . . difficult if not impossible." *Id.* at 124. Austria pointed out that "the compromise text had some shortcomings. The article was obviously too cumbersome and complicated and thus difficult to apply." *Id.* at 126. The U.K. reiterated its doubts about the article and took pains to place its own interpretation of some of its provisions. *Id.* at 132. That the rule was ambiguous and could therefore give rise to differing interpretations was also stated by Australia, *id.* at 127, Switzerland, *id.* at 131, Denmark, *id.* at 143, Canada, *id.* at 145, and Japan, *id.* at 151. This general view led some States to entertain the hope that future developments would render the rule more precise. Thus, New Zealand for instance observed that "the principle underlying the article deserved a place in contemporary law. Theory and practice would, it was to be hoped, refine and crystallize the scope of that principle." *Id.* at 131. The F.R.G. stated that "it wished its abstention to be understood as an appeal for further efforts to reach complete agreement on an interpretation of the article which would be fully in keeping with the basic aim of Protocol I, namely the protection of the civlian population." *Id.* at 134. Similarly, Canada stated that "it was concerned about the perhaps necessary vagueness of the language adopted in some paragraphs, but hoped that time would make the meaning more precise." *Id.* at 145.

76. Geneva Protocol I, *supra* note 1, art. 47 (defines mercenaries and excludes them from the class of prisoners deserving prisoner-of-war status).

77. *See generally* A. Cassese, *Mercenaries: Lawful Combatants or War Criminals?*, 40 ZEITSCRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (1980) [hereinafter cited as Cassese (1980)].

the persons who fulfill the five conditions laid down in the Geneva Convention.[78] As mercenaries normally meet the requirements, they ought under customary law to be treated as lawful combatants. The split in the attitude towards mercenaries came out very clearly following the trial of some American and British mercenaries instituted in 1976 in Luanda, Angola. While the Luanda Court held that mercenaries were common criminals, the U.S. and the U.K. officially restated their view that under international law they were entitled to treatment as lawful belligerents and consequently qualified for prisoner-of-war status.[79]

The growing insistence of socialist and Third World countries in the U.N. and the O.A.U. found official recognition in the Conference when Article 47 was adopted. The provision states that "a mercenary shall not have the right to be a combatant or a prisoner of war,"[80] and then gives a definition of mercenaries.[81] The rule was adopted by consensus. No substantial criticism or reservation was voiced.[82]

The substantially favorable attitude shown by practically all States, the lack of important reservations and the upholding by all Western countries of the principle that mercenaries are ineligible for the status of lawful combatants, show with sufficient clarity that the adoption of Article 47 reflected the emergence of a broad consensus on a new general rule. Article 47 took up and codified the previous pronouncements and practice of the overwhelming majority of States and at the same time consecrated the formation of a customary rule on the matter.[83]

3. Spies [Article 46][84]

Although there had not emerged any controversy over the

78. *See supra* note 65.

79. *See* Cassese (1980), *supra* note 77, at 21-22.

80. Geneva Protocol I, *supra* note 1, art. 47, para. 1.

81. *Id.*, para. 2.

82. A few states stressed that the definition formulated in paragraph 2 of the article was open to differing interpretations. *E.g.* Switzerland, VI C.D.D.H., *supra* note 57, at 158; Italy, *id.* at 159; and the United Republic of Cameroon, *id.* at 156. Other States propounded their own interpretation of some provisions of the article. *E.g.* Zaire, *id.* at 160; Afghanistan, *id.* at 175; Cuba, *id.* at 183-84; and Mauritania, *id.* at 190-92.

A number of Western States emphasized that in their view mercenaries remained under the protection of Article 45 of the Protocol. *E.g.* Switzerland, *id.* at 158; Italy, *id.* at 159; Portugal, *id.* at 160; Canada, *id.* at 160; Colombia, *id.* at 161; Mexico, *id.* at 192; the Netherlands, *id.* at 194-95; and Sweden, *id.* at 198. This latter view was no doubt in accord with the intention of the draftsmen, as was pointed out by Nigeria, one of the delegations that contributed to the framing of the article, *id.* at 157.

83. Those States which propounded a certain interpretation of one or more provisions of Article 47 should be deemed bound by the general rule to the extent of their interpretation. *See infra* text accompanying notes 86-88.

84. Geneva Protocol I, *supra* note 1, art. 46 (states that those captured while

legal treatment of spies, either in State practice or in the proceedings of the Geneva Conference, States considered it advisable to restate the customary law governing the matter in a specific rule. Article 46 was adopted by consensus and did not give rise to any interpretation or reservation.[85]

4. Protection of Persons who have Taken Part in Hostilities [Article 45][86]

Customary law was relatively precise about the treatment of persons who fall into the power of the adverse party under the conditions that make it doubtful whether or not they are entitled to prisoner of war status. The Third Geneva Convention of 1949 provided that in case of doubt persons falling into the hands of the enemy shall enjoy the protection of the Convention "until such time as their status has been determined by a competent tribunal."[87] Article 45, adopted by consensus, clarified the matter by laying down *a presumption* in favor of prisoner of war status. It also instituted a series of important safeguards designed to protect captured combatants.[88] The rule codifies customary law and by the same token improves upon it by spelling out and strengthening the basic safeguards that a person captured by the enemy should enjoy. The unreserved attitude shown by the States in 1977 and the fact that Article 45 basically reaffirms existing rules, lead to the conclusion that it reflects customary law.

C. Means of Combat

This part is one of the most rudimentary and defective of Protocol I. Major Western Powers, with the support of the U.S.S.R., strongly urged that possible restrictions or prohibitions of the use of weapons should be discussed in international fora other than the Geneva Conference, in gatherings where limitations on the manufacture and stockpiling of arms could also be debated. As a consequence, the Geneva Conference confined itself to adopting two rules

---

engaging in espionage will not be entitled to prisoner-of-war status, and sets out specific exceptions to the rule for those acting in uniform, for residents of the territory, and for those who succeed in rejoining their own Party before capture).

85. Queries were raised by Argentina about the consistency of the article with other provisions of the Protocol, specifically Articles 43 and 44. VI C.D.D.H., *supra* note 57 at 110. These were aptly put to rest by the delegate of the United States, who convincingly explained how the rule was to be read in conjunction with other articles of the Protocol—articles which similarly reflect customary law. *Id.* at 111.

86. Geneva Protocol I, *supra* note 1 (treats the presumption of prisoner-of-war status upon capture, the right to a proceeding before loss of prisoner-of-war status, and the rights of persons determined not to be entitled to prisoner-of-war status).

87. Geneva Convention III, *supra* note 48, art. 5.

88. *See supra* note 86.

only,[89] and passed a resolution where it recommended the convening of a "special diplomatic conference" on "specific conventional weapons."[90] The two weapons provisions which were adopted substantially codify customary international law.

1. Basic Rules [Article 35][91]

The first two paragraphs of the provision (affirming that the right to choose methods and means of warfare and discussing weapons that cause unnecessary suffering) are undisputedly a reaffirmation of customary law.[92] Strikingly, these provisions do not clarify previously law, but merely restate it with all its ambiguities. This is apparent both from the wording of the provisions and from declarations accompanying its adoption.

The third paragraph of Article 35 prohibits "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[93] In my opinion, this provision reaffirms and spells out a principle that had already evolved in recent years as a result of two factors: (a) the prohibition of weapons destroying crops and other natural resources intended for consumption solely by the civilian population;[94] (b) the trend to protect the natural environment and the consequent prohibition on agencies capable of destroying it either in time of peace or in time of war.[95] A different view was however taken by West Germany, which declared that it had joined the consensus on Article 35 with the understanding that paragraphs

89. Geneva Protocol I, *supra* note 1, art. 35 & 36 (article 35 states the basic rules relating to the methods and means of warfare; article 36 states the rules relating to the development of new weapons).

90. Follow-up Regarding Prohibition or Restriction of Use of Certain Conventional Weapons, Resolution No. 22(IV), VI C.D.D.H., *supra* note 57, at 18-19.

91. *See supra* note 89.

92. Western countries emphasized on various occasions that the whole protocol did not affect nuclear warfare. *See, e.g.*, the declarations made by the Federal Republic of Germany, VI C.D.D.H., *supra* note 57, at 187-88, and by the United States, VII C.D.D.H., *supra* note 57, at 295. India stated that in its view the first provision covered all categories of weapons, including nuclear, bacteriological and chemical weapons. However, India made a narrow interpretation of the prohibition of weapons causing unnecessary injury. In its opinion the ban covered "those physical injuries which are more severe than would be necessary to render an adversary *hors de combat* or to make the enemy surrender and which are not justified by considerations of military necessity." VI C.D.D.H., *supra* note 57, at 115. Thus, India reiterated the narrow interpretation of the rule that had already been advanced before, *see, e.g.*, the Shimoda Case, 8 JAPANESE ANN. INT'L L. 212 (1964), at odds with the liberal interpretation which, it is submitted, is more justified by the humanitarian object of the rule.

93. Geneva Protocol I, *supra* note 1, art. 35, para. 3.

94. DEPARTMENT OF THE ARMY FIELD MANUAL, FM 27-10, THE LAW OF LAND WARFARE, July 1956 [hereinafter cited as U.S. ARMY MANUAL].

95. A. KISS, SURVEY OF CURRENT DEVELOPMENTS IN INTERNATIONAL ENVIRONMENTAL LAW (1976).

1 and 2 reaffirm customary international law, while paragraph 3 is an important new contribution in times of international armed conflict.[96]

Whichever view seems sounder, it is unquestionable that the provision reflects a general legal conviction extending beyond the scope of treaty relationships. Arguably, this is demonstrated by (a) the adoption of Article 35 by consensus without any substantial reservation;[97] (b) the fact that the only reservations entered by some States related to the interpretation of the expressions "widespread", "longterm" and "severe" and were intended to leave another Convention which uses the same terms unaffected;[98] (c) the existence of a large body of States' practice and international treaties concerning the protection of the environment.[99]

2. New Weapons [Article 36][100]

This provision makes it incumbent on each contracting party to determine whether any new weapon that it develops, studies or in any manner acquires is in keeping with the rules of the Protocol or other norms of international law. On the face of it, the provision departs from existing international law because it is worded in such a way as to convey the impression that it is intended for contracting parties only. In fact, the rule merely spells out an obligation implicit in general international law. If customary rules or principles prohibit the use of certain categories of arms,[101] it logically follows that any State is duty-bound to verify whether any new weapon it develops or obtains is prohibited by those rules and principles. The same duty of verification follows by implication from any treaty provision prohibiting the use of weapons.

The States gathered at Geneva clearly acknowledged the codificatory character of Article 36.[102] A few States pointed out that Ar-

96. VI C.D.D.H., *supra* note 57, at 115.

97. *Id.* at 101. Only France expressed some general misgivings about article 35 concerning its "direct implications for the defence and security of States." *Id.* at 101.

98. The Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.N. GAOR Supp. (No. 39) at 37.

99. *See generally*, A. KISS, *supra* note 95.

100. Geneva Protocol I, *supra* note 1, art. 36.

101. *See, e.g.*, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. 8061, 94 L.N.T.S. 65 [hereinafter cited as Geneva Gas Protocol].

102. Thus, the delegate of the United Kingdom stated that:

> In the past provisions of international law had in his country been taken into account informally during the process of weapons development; as a result, no weapons were in service with the British Armed Forces which would infringe international obligations on the design and use of weapons in armed conflict. The codification and development of international law in that field, which would come out of the Additional Protocols, had pro-

ticle 36 was "the logical consequence" of the prohibitions laid down in Article 35.[103] It should be stressed that Article 36 was adopted by consensus and that only France and Italy voiced misgivings.[104]

D. Methods of Combat

The relevant section of Protocol I[105] to a great extent codifies customary law. With regard to the conduct of hostilities against enemy armed forces, traditional law was fairly adequate and it did not therefore appear necessary to improve upon it to a great extent.[106] As a consequence, the Protocol restates the law and clarifies it or brings to the fore some notions implicit in customary rules. By contrast, the part of traditional law concerning the limits within which combatants may carry out armed hostilities without jeopardizing the life and assets of civilians was seriously defective. Rules were ambiguous and open to differing interpretations. Furthermore, the rules as evolved prior to modern wars, in which ever more sophisticated weapons are used with increasing efficacity, did not meet the demands of current warfare. In this area, Protocol I had of necessity to go beyond a mere restatement of law, and indeed it specified and detailed customary rules. Accordingly, this is the area where the Protocol regulation proves more significant and useful.

1. Conduct of Hostilities Against Enemy Combatants

a. Perfidy and Ruses of War [Article 37][107]

Customary law forbade acts that violate the rules of fair treat-

---

vided an opportunity for the codification of existing practice and his country was therefore at present establishing a formal review procedure to ensure that future weapons would meet the requirements of international law.

VI C.D.D.H., *supra* note 57, at 101-02.

103. U.S.S.R., *id.* at 101, Mexico, *id.* at 102, Switzerland, *id.* at 102.

104. France merely put on record its conviction that, as with Article 35, the matter dealt with in the provision should have been discussed in a forum competent in matters of disarmament. *Id.* at 102. Italy did not challenge the rule, but advanced an interpretation designed to restrict its scope: "[I]t could not be interpreted as introducing a specific prohibition operative in all circumstances attendant on the study, development, acquisition or adoption of particular weapons and methods of warfare." *Id.* at 102. In the light of the considerations set out above, this interpretation is surprising, to say the least; as Article 36 merely codifies a customary rule, the Italian interpretation cannot be such as to impinge upon the scope of the rule; it should therefore be construed as the expression of a loose feeling of dissatisfaction concerning existing law.

105. Geneva Protocol I, *supra* note 1, arts. 37-42.

106. *See, e.g.*, L. OPPENHEIM, *Disputes, War and Neutrality*, in 2 INTERNATIONAL LAW 338 (H. Lauterpacht ed., 8th ed. 1958).

107. Geneva Protocol I, *supra* note 1, art. 37 (treats perfidy, or "acts inviting the confidence of an adversary to lead him to believe that he is . . . under the rules of international law applicable to armed conflict, with intent to betray that confidence," and ruses of war, or acts intended to mislead which are not perfidious).

ment traditionally accorded to an adversary. The prohibition stemmed from the general principles of chivalry underpinning the whole body of the laws of warfare, and was also laid down in a specific provision of the Hague Regulations.[108] There was general agreement on the matter, as is apparent among other things from the U.S.[109] and the U.K.[110] manuals of war. Hence Article 37, paragraph 1 of the protocol merely codifies unwritten law and serves the useful purpose of indicating some examples of treacherous behavior. This is also true for the second paragraph of the same Article, on ruses of war.[111] Here, again, the provision has the merit of giving a clear-cut definition of ruses as well as a few examples.

b. Abuse or Improper Use of Emblems [Articles 38 and 39][112]

Here again the Protocol codifies existing prohibitions.

c. Prohibitions of Declarations of No Quarter [Article 40][113]

A comparison between the relevant rule of the Hague Regulations[114] and the Protocol is instructive. The former provision merely stipulates that "it is especially forbidden to declare that no quarter will be given."[115] The latter expands the scope of the former by stating that "It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis."[116] Clearly, the *threat* of no quarter and the fact of conducting hostilities *on the basis* of no quarter are logical corollaries of the general ban laid down in customary law; their spelling out is nevertheless helpful and deserves commendation.

---

108. Hague Regulations, *supra* note 40, art.23, para. (b.).

109. U.S. ARMY MANUAL, *supra* note 94, paras. 50 & 493.

110. THE WAR OFFICE, THE LAW OF WAR ON LAND (Part III of the MANUAL OF MILITARY LAW, London 1958) [hereinafter cited as U.K. MILITARY MANUAL].

111. *Supra* note 107.

112. Geneva Protocol I, *supra* note 1, arts. 38 & 39 (prohibits the misleading use of protective emblems and of emblems of nationality).

113. *Id.* art. 40.

114. Hague Regulations, *supra* note 40, art. 23, para. (d.).

115. *Id.*

116. Geneva Protocol I, *supra* note 1, art. 40.

d. Safeguard of Enemies *Hors de Combat* [Article 41][117]

The customary rule[118] hinged on two elements: (i) the enemy's defenseless condition either for his having laid down arms or for lack of arms; (ii) his surrender. The rule left some situations unclear,[119] so the International Committee of the Red Cross (I.C.R.C.) proposed to extend the international regulation to these cases as well.[120] However, Article 41, as eventually drafted, fails to do so completely. In this provision, the first element of the customary rule is replaced by a more general concept: being in the power of the adverse party.[121] The second element is also broadened to cover the express manifestation of the will to surrender, the fact of being unconscious or otherwise unable to manifest the intention to surrender, and the condition of a combatant unable to defend himself due to wounds or sickness.

The whole scope of the customary rule has been expanded, but not to such a point as to cover the situation of combatants refusing to surrender, although defenseless and in the power of the enemy. In addition to broadening the purport of customary law, Article 41 spells out an implicit element: The enemy *hors de combat*, in order to be treated as a prisoner of war, must abstain from any hostile act and must not attempt to escape.

While the regulation of Article 41 restates customary law and at the same time broadens its scope and makes it more precise, one provision requiring release of prisoners who cannot be evacuated, introduces changes into existing law.[122] It is suggested that this rule does not go beyond the bounds of a contractual undertaking and will go binding on ratifying States only.

---

117. *Id.* art. 41 (states that those "recognized or who in the circumstances should be recognized to be *hors de combat* shall not be made the object of attack," defines persons *hors de combat* and provides for release of prisoners-of-war where evacuation is impossible).

118. Hague Regulations, *supra* note 40, art. 23, para. (c.) (stating "It is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.").

119. *E.g.*, the case of troops who, having exhausted their means of combat, do not surrender because they have been prohibited to do so, or the case of a serious casualty who, being unable to express himself, cannot surrender.

120. 3 INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION, 44 & 50 (1960).

121. Geneva Protocol I, *supra* note 1, art. 41 (includes both the case where a combatant has laid down his arms or cannot use them any longer for lack of ammunition, and the case where he still has his weapons but cannot use them because he is surrounded by the enemy or at any rate is under his control).

122. *Id.* (enemies *hors de combat* taken as prisoners-of-war "under unusual conditions of combat which prevent their evacuation" must be released).

e. Occupants of Aircraft in Distress [Article 42][123]

It follows from the general principle of customary law concerning protection of enemies *hors de combat*, that airmen baling out of aircraft in distress must not be fired upon as long as they do not engage in hostile activities.[124]

The draft for Article 41 reaffirmed existing law, but was attacked by a number of States in the plenary session. Sixteen Arab States submitted an amendment to the effect that servicemen parachuting from an aircraft in distress should not be immune from attack if it was apparent that they would land in territory controlled by the State of which they were nationals or in an allied country.[125] The proposal, probably inspired by fear of the superiority of Israel in air combat, was widely criticized by Western countries and East Germany. One objection, voiced by West Germany, was that the proposal deviated from customary law as embodied in the draft.[126] The Syrian delegate replied that the proposed amendment was in keeping with customary law as a number of jurists, including Oppenheim, "affirmed that the practices arising from the Second World War gave a right to shoot at a pilot trying to escape" and that "confirmed that the Arab countries' amendment enshrined a customary rule."[127] The proposal was rejected.[128]

---

123. *Id.* art. 42 (treats the status and privileges of persons parachuting from aircraft in distress).

124. The application of the general principle to modern warfare is borne out by most military manuals. *See* U.S. ARMY MANUAL, *supra* note 94, at para. 30; 17/2—Military Law, General Staff—Code of Military Rules, *The Laws of War*, Catalogue no. 446-17-002 (unclassified) at 17 (1963) [hereinafter cited as ISRAELI MILITARY RULES]; *Grundsätze des Kriegsvölkerechts*, BUNDESMINISTERIUM FÜR LANDESVERTEIDIGUNG, TRUPPENFÜHRUNG 246, para. 57 (Wien, Juli 1965) [hereinafter cited as AUSTRIAN MILITARY MANUAL]; ARMEE SUISSE—MANUEL DES LOIS ET COUTUMES DE LA GUERRE, para. 46 (1963) [hereinafter cited as SWISS ARMY MANUAL]; *Reglement de discipline general dans les armees, de ret du ler Octobre 1966*, art. 34, para. 2, in 71 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 421-23 (1967) [hereinafter cited as FRENCH ARMY REGULATIONS].

125. VI C.D.D.H., *supra* note 57, at 414. The Syrian delegate, in illustrating the amendment, put forward three main criticisms of the provision drafted by the Committee: (i) it was very hard to determine whether a person descending by parachute had hostile intentions or not; (ii) while Article 41 deprived enemies *hors de combat* of immunity if they attempted to escape, under Article 42 an airman bailing out of an aircraft in distress would be granted privileged treatment although he was clearly trying to escape to a territory controlled by his country or by a friendly country; (iii) technical advances in aviation "gave aircraft crews advantages out of all proportion to the desvastation they could wreak, and consequently protection could not be granted in the case of operations that might be turned into surprise attacks." *Id.* at 104-05.

126. *Id.* at 108 (reference is to Geneva Convention II, *supra* note 48).

127. VI C.D.D.H., *supra* note 57 at 110.

128. By 47 votes to 23, with 26 abstentions. The whole article was adopted by 71 votes to 12, with 11 abstentions. *Id.* Interestingly, after the vote Israel stated that article 42 was "a declaratory codification of customary international law as set out *inter alia* in art. 20 of The Hague Rules of Air Warfare 1922/1923." *Id.* at 116. Sudan

Clearly there are cogent arguments in support of the majority view that Article 42 reflects customary law. One should therefore conclude that the Arab States and others that voted with them against Article 42 *intended to challenge the customary rule*. The fact remains, however, that they are bound by the rule, for their dissent was not voiced when the rule evolved, but only on the occasion of its restatement. Furthermore, as the rule enjoys the support of Western and socialist countries as well as a number of developing States, the Arab opposition does not seem likely to undermine it. It must, however, be conceded that the regulation of this matter is unsatisfactory, and that the Arab dissent might bring about erosion or change.

2. Conduct of Hostilities Involving Civilians

a. General Principles of Customary Law

The legal situation obtaining in customary law was aptly summed up by the British Prime Minister A. Neville Chamberlain in June, 1938:

> I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or war on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives, so that, by carelessness, a civilian population in the neighborhood is not bombed.[129]

Had this statement remained an isolated point of view, it would deserve only limited consideration. But Chamberlain's declaration elicited wide consent, and its basic principles were subsequently embodied in a resolution adopted unanimously by the Assembly of the League of Nations, in 1938.[130] The conclusion is therefore warranted that, as early as 1938 it correctly reflected international law.

(i) The Notion of Military Objective

One of the crucial concepts which emerged in the 1920s from the increasing use of air warfare was the notion of "military objective." First proclaimed in the Hague Draft Rules on Air Warfare of

---

reiterated in a lengthy declaration its opposition to the rule, more precisely to its first paragraph, under which "no person parachuting from an aircraft in distress shall be made the object of attack during his descent." *Id.* at 117.

129. 337 PARL. DEB., H.C. (5th ser.) 937-38 (1938).

130. L.N. Res. 1, LEAGUE OF NATIONS O.J. Spec. Supp. 183, at 135-36 (1938).

1928,[131] the notion was loose but not altogether undefined. It certainly covered the objects covered in the Hague Draft Rules: military works, military establishments or depots; factories engaged in the manufacture of arms, ammunition or distinctly supplies and lines of communication or transportation used for military purposes. It was unclear, however, whether it covered objectives of only potential military purpose, such as shipyards, industrial plants or oil supplies. Belligerents were free to consider these either as legitimate military objectives or as nonmilitary objectives.

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded under the auspices of UNESCO, provides for placing under special protection certain refuges or centers containing cultural property, on condition *inter alia* that they:

> 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.[132]

This provision has a relevance transcending its value as a contractual undertaking: it proves that the States which worked out the Convention as well as those which ratified it take the view that the places and establishments listed in the provision may lawfully be regarded as military objectives.[133]

The conclusion to be drawn is that under present international customary law belligerents are allowed to regard as legitimate targets not only strictly military objectives, but also those which are likely to serve, directly or indirectly, the war effort of the enemy, that is, objectives which by their nature are not intended for military purposes but which may acquire great importance for armies in the event of war. If the notion of military objective is so broad, it is difficult to see what protection is left for civilians from the ravages of armed hostilities. We thus turn to *restraints* imposed by international law on belligerents, when they attack military targets.

---

131. 17 AM. J. INT'L L. 245-60 (Supp. 1923).

132. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 8, 249 U.N.T.S. 240 [hereinafter cited as Hague Cultural Property Convention].

133. *See, e.g.*, the following statement of the General Counsel of the United States Department of Defense:

> [There is] a customary rule of international law, applicable by analogy to air warfare [which,] restated in the Hague Cultural Property Convention, is that the war-making potential of such facilities to a party to the conflict may outweigh their importance to the civilian economy and deny them immunity from attack.

67 AM. J. INT'L L. 123-24 (1973) (reference is to the Hague Cultural Property Convention, *supra* note 132, art. 8).

(ii) The Duty to Take Precautions

When launching an attack, combatants must take all possible *precautions* to avoid hitting civilians or civilian property not situated in the military objective or its immediate vicinity.[134] An important specification of the duty to take every possible precaution, laid down in Article 24 of the Hague Regulations, states that "the officer in command of an attacking force must do all in his power to warn the authorities before commencing a bombardment, except in cases of assault."[135] The aim of the rule is to allow, as far as possible, civilians to leave a locality before it is attacked. Given the wide discretionary power devolving on belligerents, the argument can be made that the need for warning is only a precaution the attacker must take for the purpose of sparing civilians to the maximum possible extent.[136]

(iii) Prohibition of Indiscriminate Attacks

A second legal restriction on belligerents forbids them to use weapons which, by their very nature, have *indiscriminate effects*, nor may they resort to methods that bring about indiscriminate destruction.

The prohibition of "blind" weapons is a natural consequence as well as a significant specification of the general principle forbidding any attack on non-military objectives. That prohibition, moreover, has been expressly restated with specific reference to certain weapons, above all with respect to the most frightful, nuclear bombs.[137]

---

134. *See, e.g.*, Kriegvölkerrecht, Leitfaden für den Unterricht, Teil 7, ALLGEMEINE BESTIMMUNGEN DES KRIEGSFÜHRUNGSRECHTS UND LANDKRIEGSRECHT, ZDv 15/10, 7 to end, para. 68 (März 1961) [hereinafter cited as F.R.G. MILITARY MANUAL], and the SWISS ARMY MANUAL, *supra* note 124, para. 27 (adds as an illustration of the rule, that for instance attacking a bridge, even though its destruction constitutes a sure military advantage, does not justify widespread devastation of inhabited districts situated nearby).

135. Hague Regulations, *supra* note 40, art. 26.

136. Although Article 26 refers to attacks from land or sea, it was rightly stated by the Greco-German Mixed Arbitral Tribunal in two well-known cases that the rule also applies to air warfare.

137. On August 10, 1945, the Imperial Government of Japan entered a protest against the atomic bombing of Hiroshima and Nagasaki. Japan stated *inter alia*:

> In light of the actual state of damage, the damaged district covers a wide area, and those who were in the district were all killed indiscriminately by bomb-shell blast and radiant heat without distinction of combatant or non-combatant or of age or sex. The damaged sphere is general and immense, and judging from the individual state of injury, the bomb in this case should be said to be the most cruel one that ever existed. . . . [T]he bomb in this case, which the United States used this time, exceeds by far the indiscriminate and cruel character of efficiency, the poison and other weapons the use of which has been prohibited hitherto because of such efficiency.

8 JAPANESE ANN. INT'L L. 251-52 (1964).

The issue was taken up by the General Assembly, which declared the use of nuclear weapons illegal for the main reason that these weapons are indiscriminate.[138] Not all States accept this view. In the opinion of a number of Western countries, nuclear weapons are not illegal *per se*, but only insofar as they produce indiscriminate effects.[139]

Belligerents are also duty-bound not to bomb entire zones containing scattered military targets, situated in populous regions. The prohibition of "target area" or "carpet" bombing follows[140] from basic provisions of the Geneva Convention of 1949.[141] While it applies directly to all States which are parties to the Conventions, the prohibition is only a consequence of a more general conception of limitations incumbent on belligerents. All States that framed and ratified the Conventions, as well as those which subsequently acceded to them have by this very fact accepted this concept of those limitations. This acceptance has a scope and significance transcending the Conventional bounds instituted through the ratification of or accession to the Conventions. It proves that a legal conviction has evolved among States that target bombing is unlawful. Once again, treaty provisions are indicative of a legal conviction which turns out to be independent of contractual undertakings among States that are parties to the provisions.

(iv) The Rule of Proportionality

Another duty incumbent upon belligerents is that there must be a proportionality between the importance of the military target and possible civilian losses.[142] Current formulations, however, can be regarded as too broad and not reflecting the existing legal situation. Arguably, what is required by international law is that the

---

138. G.A. Res. 1653, 16 GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961).

139. *See, e.g.* U.S. ARMY MANUAL, *supra* note 94; U.K. MILITARY MANUAL, *supra* note 110; F.R.G. MILITARY MANUAL, *supra* note 134.

140. *See, e.g.* F.R.G. MILITARY MANUAL, *supra* note 134, para. 68 ("It is forbidden to consider several military objectives and the inhabited districts in between as a whole objective, and to fire at or bomb indiscriminately such areas in their entire range."); AUSTRIAN MILITARY MANUAL, *supra* note 124, para. 187 ("Indiscriminate carpet bombing is prohibited even when thereby permissible targets also are destroyed.").

141. Geneva Convention I, *supra* note 48, art. 19; Geneva Convention IV, *supra* note 48, art. 18 (both articles provide that military or civilian hospitals "may in no circumstances be the object of attack.").

142. *See, e.g.*, F.R.G. MILITARY MANUAL, *supra* note 134, para. 28 (gives a helpful illustration of the rule, by stating that it would for instance be illegal to destroy a locality only because there is in it a localized nest of resistance); SWISS ARMY MANUAL, *supra* note 124, para. 68; *see also* 67 AM. J. INT'L L. 124 (1973) (statement of the General Counsel of the United States Department of Defense) ("The correct rule of international law which has been applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that the loss of life and damage to property must not be out of proportion to the miltary advantage to be gained.").

destruction of civilian life and property be proportionate not to the "military advantage" to be gained by the attacker but to the intrinsic military importance of the target. The contention could be made that the test advanced in the American formulation[143] would actually amount to stultifying any effective restraints on belligerents. If a belligerent can claim that it would obtain a sure military advantage from breaking enemy morale, it may argue that it is justified in bombing densely populated areas, comprising military targets situated at large distances from one another.

b. Provisions of Protocol I

(i) General

Most rules included in the section of Protocol I devoted to the protection of civilians are declaratory of customary law and at the same time make important additions and improvements. They were regarded by States gathered at Geneva as no less binding than the pre-existing rules.[144]

(ii) Basic Rules [Articles 48-50]

The protocol includes a group of provisions intended either to lay down very general principles[145] or to define fundamental elements of other provisions.[146] Article 49 defines, attacks, and speci-

143. 67 AM. J. INT'L L. 123-24 (1973).

144. The only State that throughout the conference made the most categorical reservations concerning the whole body of the rules was France. In its view the rules on protection of civilians were "a serious threat to its right of self-defence and [were,] furthermore, at variance with the fundamental tenets of humanitarian law in that they favour[ed] an invader to the disadvantage of a people defending itself against invasion." VI C.D.D.H., *supra* note 57, at 194. France made it clear that it did not feel bound by the rules. It thus came to play the role of "persistent objector" and should not be considered to have participated in the custom-creating process that took place in 1974-77.

145. *E.g.*, Geneva Protocol I, *supra* note 1, art. 48 ("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.").

146. Article 49 reads as follows:

> (1) "Attacks" means acts of violence against the adversary, whether in offence or in defence.
>
> (2) The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.
>
> (3) The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.
>
> (4) The provisions of this section are additional to the rules con-

fies the scope of application of all the provisions concerning civilians. Article 50[147] defines civilians and civilian populations. These provisions adopted by consensus and without basic reservation[148] are in large measure part and parcel of existing customary rules, to which, in some respects, they give precision and clarification. They should therefore be considered as reflecting general law.

(iii) Protection of the Civilian Population [Article 51][149]

Article 51 consists of general provisions,[150] two provisions on indiscriminate attacks,[151] a provision on reprisals[152] and one on coordination with other rules.[153]

The general provisions clearly codify and improve upon existing law. Significantly, they did not give rise to reservations.[154] The provisions on indiscriminate attacks, however, gave rise to numerous reservations.[155] Some states noted that the provision could conflict with a nation's legitimate right of self-defense. Interpretative reservations were voiced by a number of Western States,[156] most of whom interpreted the prohibition as not banning specific weapons, but only the indiscriminate way they might be used.[157]

The provisions on indiscriminate attacks reflect general inter-

---

cerning humanitarian protection contained in the Fourth Convention, particularly part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

Id. art. 49.

147. *Id.* art. 50.

148. Except for that of France, VI C.D.D.H., *supra* note 57, at 186. *See also supra* note 144.

149. Geneva Protocol I, *supra* note 1, art. 51 (limits attacks on the civilian population, and the exploitation of the presence or movement of the civilian population to protect military operations) (adopted by 77 votes in favor, one—France—against, with 16 abstentions, VI C.D.D.H., *supra* note 57, at 163).

150. Geneva Protocol I, *supra* note 1, art. 51, paras. 1-3 & 7.

151. *Id.* paras. 4 & 5.

152. *Id.* para. 6.

153. *Id.* para. 8.

154. *See, e.g.* VI C.D.D.H., *supra* note 57, at 201 (statement of the U.K.) ("[The first three paragraphs of article 51 contain] a valuable reaffirmation of existing customary rules of international law designed to protect civilians."); *id.* at 201-202 (statement of the Ukranian Soviet Socialist Republic) ("[Paragraph 2 is] in line with the generally recognized rules of international law, which lay down that Parties to the conflict shall not make the civilian population an object of attack.").

155. *Id.* at 161-62 (France); *id.* at 165 (Afghanistan); *id.* at 168 (United Republic of Cameroon); *id.* at 183 (Colombia); *id.* at 196-97 (Romania).

156. *Id.* at 164 (U.K.); *id.* at 164-65 (Italy); *id.* at 166-67 (Spain); *id.* at 167 (Turkey); *id.* at 168 & 179 (Canada); *id.* at 187-88 (F.R.G.); *id.* at 195 (Netherlands).

157. Some of the States also stated the position that, in the words of the United Kingdom delegate, the concept of "military advantage anticipated from the attack was intended to refer to the advantage considered as a whole and not only from isolated or

national law[158] with two qualifications. First, they are not binding on those states which explicitly reserved their right of self-defense, to the extent that they may impair that right. Secondly, some clauses of the rules, especially as they relate to weapons, are given interpretations by a few Western States that may differ from those upheld by other States. However, the fact that before or after the adoption of a treaty provision laying down customary law one or more States put on record their own constructions of some provisions of the rule does not detract from the norm-creating process by which the rule is put into being, although it may eventually weaken its purport or impact.[159]

The rule on reprisals[160] was the subject of express reservations by some States.[161] The rule clearly departs from existing law. To prove that its enunciation formed the subject of broad consent directed to create a general rule on the matter, one should have solid evidence available to this effect. The declarations made by States during the Conference and the lengthy discussions on the general rule on reprisals made it clear that no general agreement had emerged. The rule, therefore, is a merely conventional provision.

(iv) General Protection of Civilian Objects [Article 52][162]

Article 52 contains a definition of military objectives;[163] a general ban on attacks against civilian objects;[164] a presumption to the effect that, in case of doubt, civilian objects are not deemed to be used for military purposes;[165] and a general prohibition of reprisals against civilian objects.[166] The Article did not give rise to any major

particular parts of the attack." *Id.* at 164. *See also id.* at 188 (F.R.G.); *id.* at 195 (Netherlands).

158. *See, e.g., id.* at 202 (statement of the Ukranian Soviet Socialist Republic) ("For the first time in international humanitarian law, a reasonably accurate and comprehensive list is given of types of indiscriminate attacks, corresponding on the whole to present-day requirements for improved protection of the civilian population and civilian objects against the effects of hostilities."); *id.* at 179 (statement of Canada) ("many provisions [of the article] are codification of customary international law."); *id.* at 164 (statement of the U.K.) ("the reference in para 5 (b) to what had become known as the 'rule of proportionality' was a useful codification of a concept that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict."). *But cf. supra* notes 156 & 157 (interpretative reservations made by several States).

159. *See supra* text accompanying notes 40 & 41.

160. Geneva Protocol I, *supra* note 1, art. 51, para. 6.

161. *E.g.*, VI C.D.D.H., *supra* note 57, at 162 (France).

162. Geneva Protocol I, *supra* note 1, art. 52 (prohibits attacks on civilian targets).

163. *Id.* para. 2.

164. *Id.* para. 1.

165. *Id.* para. 3.

166. *Id.* para. 1.

reservation,[167] although a number of Western countries propounded their own interpretation of paragraph 2, concerning military objectives.[168]

The general prohibition against attacks on civilian objects and the definition of military objectives are merely declaratory of existing law. On the other hand, the presumption laid down in paragraph 3[169] constitutes an advance on previous law, in that it specifies a concept that could be inferred from the general principles on the matter. In this respect, the provision should also be held to enunciate customary law. By contrast, the ban on reprisals is a marked departure from previous law. It does not seem that in the course of the Geneva Conference there emerged broad consensus to the effect that the ban was regarded as generally binding.[170] It will be necessary to wait to see the future attitude of States, as it takes shape in the ratification of the Protocol, the making of reservations, etc., to judge whether the ban will pass into customary law.

(v) Cultural Objects and Places of Worship [Article 53][171]

Article 53 lays down three prohibitions concerning cultural objects and places of worship which are considered "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples."[172] The Article therefore goes well beyond the regulation laid down in customary law[173] and

167. VI C.D.D.H., *supra* note 57, at 168 (adoption by 79 votes to none, with 7 abstentions). *But cf. id.* at 169 (France again forwarding its argument based on self-defence, *supra* note 144).

168. First, they stated that an area of land might be a military object if, because of its location or other reasons specified in the article, its total or partial destruction, capture or neutralization at that time offered a definite military advantage. Second, they claimed that paragraph 2 did not treat the question of collateral damage. *See* statements of Italy, VI C.D.D.H., *supra* note 57, at 169, the U.K., *id.*, Canada, *id.*, the F.R.G., *id.* the Netherlands, *id.* at 195, and the U.S., *id.* at 204.

169. Geneva Protocol I, *supra* note 1, art. 52, para. 3.

170. *See, e.g.* VI C.D.D.H., *supra* note 57, at 176 (Australia's express reservation).

171. Geneva Protocol I, *supra* note 1, art. 53 reads:

> Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited;
>
> (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
>
> (b) to use such objects in support of military effort;
>
> (c) to make such objects the objects of reprisals.

172. *Id.*

173. *See, e.g.*, Hague Regulations, *supra* note 40, art. 27, para. 1 ("to spare as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments . . . provided they are not being used at the time for military purposes").

in the Hague Convention of 1954.[174] However, while the protection provided by customary law and the Hague Convention is general in character, in that it is designed to cover a broad range of objects,[175] Article 53 protects a limited category only.

The Article was adopted by consensus, and did not give rise to major reservations.[176] It seems that, to the extent that the Article strengthens, albeit with respect to a limited category of objects, existing customary prohibitions, it clearly restates general law. By contrast, one can doubt whether the ban on reprisals has become a part of general consent. The Hague Convention lays down a general prohibition on reprisals against cultural objects.[177] In view of the very broad participation in this Convention,[178] and the fact that contracting parties include States from practically all main areas of the world, the contention could be made that the prohibition has passed into customary law. If this view is correct, it could be argued that Article 53(c), on reprisals, is itself part of customary law, to the extent that it restates the prohibition of reprisals against cultural objects covered both by the 1954 Hague Convention and by Article 53 itself.[179]

(vi) Protection of Objects Indispensable for the Survival of the Civilian Population [Article 54][180]

This is an area where there exists great confusion and uncertainty concerning the content of customary law. It is therefore appropriate to dwell at some length on existing law before proceeding to an analysis of Article 54 of Protocol I.

(a) Customary Law

In modern war, belligerents increasingly use chemical agents to destroy the principle means of subsistence of the enemy. The use of weapons against means indispensable to the survival of a civilian

174. Hague Cultural Property Convention, *supra* note 132.

175. Canada, VI C.D.D.H., *supra* note 57, at 224, the F.R.G., *id.* at 225, the U.K., *id.* at 239, and the U.S., *id.* at 240-41, all emphasized that Article 53 was not intended to replace existing customary prohibitions reflected in Article 27 of the Hague Regulations, *supra* note 40, nor the provisions of the Hague Cultural Property Convention, *supra* note 132. *See also* UNESCO, Records of the Conference convened by UNESCO held at the Hague from 21 April to 14 May 1951 (The Hague 1966) at 2.

176. Except for the Australian reservation concerning the ban on reprisals, VI C.D.D.H., *supra* note 57, at 219-220.

177. Hague Cultural Property Convention, *supra* note 132, art. 4, para. 4.

178. Sixty-eight States have either ratified or adhered to the Convention.

179. One should, however, make allowances for Australia's attitude, *supra* note 176.

180. Geneva Protocol I, *supra* note 1, art. 54 (prohibits attacks on or destruction of anything indispensable to the survival of the civilian population such as foodstuffs and drinking water, and forbids starvation of civilians as a method of warfare).

population must be considered on two levels. It must be determined, first, whether the weapons used for that purpose are themselves lawful; second, whether lawful weapons may legitimately be employed against means of subsistence of civilians.

The problem of the lawfulness of weapons is not difficult to solve. The Hague Regulations forbid belligerents "to employ poison or poisoned weapons."[181] Similarly, the Geneva Gas Protocol of 1925 prohibits the use in war of asphyxiating, poisonous, or other gases, and bacteriological methods of warfare."[182] Since, however, these weapons are prohibited only insofar as they are used against human beings, their use is permitted to the extent that (a) they do not damage people, and (b) their use against vegetation, water supplies, etc., does not have the indirect effect of poisoning or intoxicating people, or of injuring them.

The problem becomes highly complex when one considers whether means of subsistence are a permissible means of *destruction*. Since so-called ecological warfare is a rather recent phenomenon, no specific rules have yet evolved. One must proceed by inference, seeking to deduce the relevant regulation from general principles as well as from rules which were not originally intended to apply to this field.

There is only one certain point: any attack upon means of subsistence which serves solely the civilian population is prohibited, whereas resources used only by military forces may legitimately be destroyed.[183]

What appears to be almost insoluble is the case of a third and more complex situation where crops, foodstuffs, reserve water supplies, etc., serve both civilians and combatants, or where it is impossible to determine whether those things are used by both categories or by only one of them. States are divided as to whether the means of subsistence may constitute legitimate targets in such cases.

The Hague Regulations, with some qualifications, answers in the affirmative: "it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[184] Under this provision, it is forbidden to destroy private or public enemy property; but the prohibition is not absolute.

A similar concern has been expressed with regard to the effects of blockades upon civilian populations. A provision of the Geneva

181. Hague Regulations, *supra* note 40, art. 23, para. a.

182. Geneva Gas Protocol, *supra* note 101.

183. Most military manuals take this view. *See, e.g.* U.S. ARMY MANUAL, *supra* note 94; U.K. MILITARY MANUAL, *supra* note 110; ISRAELI MILITARY RULES, *supra* note 124.

184. Hague Regulations, *supra* note 40, art. 28.

Convention of 1949 stipulates that belligerents shall "permit the free passage of all consignments of essential foodstuff, clothing and tonics for children under fifteen, expectant mothers and maternity cases."[185] This provision saves from the unfortunate consequence of blockade only specific categories of civilians. A further condition is that a definite advantage must not accrue to the military effort or economy of the enemy from the free passage of goods. From these limitations it may be inferred that among states there is no ban on denying civilians the means of subsistence that might be used by armed forces as well.

It seems that the only recognized international rule governing the destruction of means of subsistence of civilians is Art 23(g) of the Hague Regulations, which allows a belligerent to starve an enemy civilian population if the means of subsistence serve both civilians and combatants.

(b) Article 54 of the Protocol[186]

Art. 54 in part restates and codifies existing law, in part develops it to a great extent. It is declaratory of customary law inasmuch as it forbids starvation of civilians,[187] prohibits the destruction of objects indispensable to the survival of civilians only,[188] and allows the destruction of means of subsistence used as sustenance solely for the members of the armed forces or "in direct support of military action."[189] Article 54 departs from received law in that it encompasses situations where food and other means of subsistence are used by *both* civilians and combatants.[190]

The provision upholds the concept that a belligerent is allowed to destroy the means of subsistence used both by the enemy's combatants and its civilians, but it should never destroy them to such an extent as to deprive the civilians of all means of survival. In other words, one cannot starve civilians as a consequence of starving enemy combatants. The adoption of the provision by consensus, the lack of any reservation,[191] and the implicit acknowledgement of the humanitarian principle that civilians should not suffer unduly from the rigors of war, all indicate that the provision was the subject of

185. Geneva Convention IV, *supra* note 48, art. 23, para. 1.

186. Geneva Protocol I, *supra* note 1 art. 54.

187. *Id.*, para. 1.

188. *Id.* para. 2.

189. *Id.* para. 3.

190. *Id.* ("In no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.").

191. Except those concerning reprisals by Australia, VI C.D.D.H., *supra* note 57, at 219-220, and Qatar, *id.* at 234.

such broad consensus that it came to be regarded as a rule of general application.

However, another deviation from previous law, prohibiting reprisals against means of subsistence indispensable to civilians, cannot be regarded as constitutive of customary law. Not only were there express reservations, but also there clearly emerged in the Conference the sense that this, like similar provisions restraining reprisals, would be the subject of reservations by numerous states on ratification of the Protocol.[192] Therefore, one should wait for States to show whether or not their attitude is favorable to the general nature and legal effects of the provision. For the time being, the provision should be considered as having merely conventional character.

(vii) Protection of the Natural Environment [Article 55][193]

(a) Customary Law

It is controversial whether, before 1977, general law prohibited the use of weapons or methods of combat designed to damage the environment. There are, however, elements in State practice that point to the gradual formation of a rule on the matter.[194] It should be recalled that the use of herbicides and other anti-plant chemicals by the U.S. in Vietnam aroused broad opposition in a number of nations; the U.S. eventually renounced their offensive use.[195] Also, in 1976, the U.N. General Assembly adopted the Convention prohibiting military or any hostile use of environmental modification techniques.[196] This indicates that in 1977 there existed an incipient general rule prohibiting any means or methods of warfare likely to seriously damage the natural environment so gravely as to jeopardize the health or survival of civilians.

(b) Article 55 of the Protocol[197]

This imposes on belligerents a general duty to take care "to

192. *Id.*

193. Geneva Protocol I, *supra* note 1, art. 55.

194. There are, however, elements in State practice that point to the gradual formation of a rule on the matter. *See, e.g., Allgemeine Volkerrechtliche Bestimmungen*, in HANDBUCH MILITARISCHES GRUNDWISSEN 46 (5th ed. 1974) (G.D.R. MILITARY MANUAL).

195. The U.S. eventually renounced their offensive use in Executive Order No. 11850, 3 C.F.R. 980 (1975), reprinted in 50 U.S.C. Sec. 1511 at 138 (1983).

196. The Convention Prohibiting Military or Hostile use of Environmental Modification Techniques entered into force in October 1978 and has been ratified by a considerable number of States.

197. Geneva Protocol I, *supra* note 1, art. 55 ("Care shall be taken in warfare to protect the natural environment against widespread, long term and severe damage.").

protect the natural environment against widespread, long-term and severe damage."[198] The rather imprecise terms used leave great latitude to belligerents. More precise is the prohibition against means and methods of combat "which are intended or may be expected to cause . . . damage to the natural environment and thereby to prejudice the health or survival of the population."[199] These provisions crystallize an emergent rule of customary law. The whole Article was adopted by consensus.[200] It is therefore possible to conclude that the first two provisions were regarded by all States (except possibly for France) as reflecting general law. The paragraph on reprisals, by contrast, constitutes a bold innovation and has only contractual force.[201]

(viii) Protection of Works and Installations Containing Dangerous Forces [Article 56][202]

No customary rule exists on this subject. Although Article 56 was adopted by consensus without any major reservations,[203] it is impossible to determine whether by approving it, States intended to submit to a rule with a field of application broader than the range of the ratifying States. The lack of any previous rule and even of State practice on the subject dictates caution and suggests a negative response. However, this is an area where developments following the adoption of the Protocol could easily lead to the formation of a general rule. In this respect the provision can play an invaluable role as a catalyst of legal views and convictions, and initiate a custom-making process. Strong support voiced by such diverse States as Romania, Egypt and Ghana suggests that it is likely that the article will soon pass into general law.

---

198. *Id.* para. 1.

199. *Id.*

200. Only Australia, VI C.D.D.H., *supra* note 57, at 221, and Qatar, *id.* at 234, made reservations concerning the provision on reprisals and France, *id.* at 225, reserved its rights of self-defense, while a number of States, including Italy, *id.* at 208, Mexico, *id.* at 209, Peru, *id.* at 209, Venezuela, *id.* at 209, and Argentina, *id.* at 219, merely put forward interpretative declarations.

201. Geneva Protocol I, *supra* note 1, art. 55, para. 2.

202. Geneva Protocol I, *supra* note 1, art. 56 (prohibits attacks against works or installations containing dangerous forces which might be released onto civilian populations, such as dams, dykes and nuclear electrical generating stations unless they are being used in significant and direct support of military operations and an attack is the only feasible way to terminate such support).

203. Except for those of France, Australia and Qatar on reprisals. *See supra* note 200.

(ix) Precautionary Measures [Articles 57 and 58][204]

Article 57 takes up customary law on precautionary measures and greatly develops it by clarifying and spelling out aspects of existing regulations that were obscure or controversial; it also gives precision to loose legal provisions. Although the article was not accepted by consensus,[205] it seems that Article 57 reflects a general norm, subject to the self-defense requirements of a few States which entered reservations to that effect. It is generally a great improvement on existing law as it not only ". . . codif[ies] for the first time, the rule of proportionality, but . . . also gives to military commanders uniformly recognized guidance on this responsibility to civilians and the civilian population. . ."[206]

Article 58[207] to a great extent codifies existing principles of customary law and to some extent develops them. The insertion of the proviso "to the maximum extent feasible" seems destined to dispel the misgivings of some States which fear that the provision might jeopardize their inherent right of self-defense.[208] Nevertheless, it seems that the provision, by specifying duties that derive from general principles concerning civilians, is intended to restate and develop existing law. The manner of its adoption demonstrates that that there emerged in the Conference a wide measure of consensus to the effect that the rule is binding on all States.[209]

(x) Undefended Localities [Article 59][210]

(a) Customary Law

The notion of undefended localities was first propounded in the

204. Geneva Protocol I, *supra* note 1, art. 52 (requires those who plan to attack to take every precaution possible to avoid loss of civilian life and, if unavoidable, to do everything feasible to minimize it).

205. The article was voted 80 in favor, none against, with 4 abstentions. France, VI C.D.D.H., *supra* note 57, at 211, Madagascar, *id.* at 232-33, and Romania, *id.* at 235, reserved their rights of self-defense, while India, *id.* at 228, accepted, "on the clear understanding that it will apply in accordance with the limits of capability, practical possibility and feasibility of each party to the conflict." Turkey, Switzerland, Austria, Iran, the F.R.G., Italy and the U.S. put forth only interpretative reservations.

206. VI C.D.D.H., *supra* note 57, at 241 (statement of the U.S. delegation).

207. Geneva Protocol I, *supra* note 1, art. 58 (requires that parties to the conflict try to remove civilians and civilian objects under their control from military objectives and to avoid locating military objectives near densely populated areas).

208. France, VI C.D.D.H., *supra* note 57, at 213, Switzerland, *id.* at 214, Italy, *id.* at 232, and the United Republic of Cameroon, *id.* at 239 pointed out possible impairment of their right of self-defense and, therefore, made acceptance of the article conditioned on safeguarding those rights. Canada, *id.* at 224, the F.R.G., *id.* at 226, the Republic of Korea, *id.* at 234, and the U.S., *id.* at 241, put forward only interpretative reservations.

209. A vote, requested by France, VI C.D.D.H., *supra* note 57, at 214, was taken and the article was adopted by 80 votes to none with eight abstentions.

210. Geneva Protocol I, *supra* note 1, art. 54.

1874 Brussels Conference,[211] then taken up in the Hague Regulations.[212] The IXth Hague Convention of 1907 extended the applicability of the notion to naval warfare.[213] The rule had two major flaws: first, it did not define undefended localities; second, it did not specify by what procedures enemy belligerents can agree that a certain locality is "undefended" and therefore immune from attack.

State practice soon proved inconsistent in defining undefended localities. Some States took the phrase to mean any locality which, however provided with military establishments and armed forces, was open for the enemy to enter.[214] Others ruled out the possibility that any fortified place or place occupied by a combatant military force or surrounded by detached defense positions could be labelled an undefended locality.[215] Still other States attached importance to whether a town was far from the theatre of hostilities; if so, it could be regarded as undefended even if it had military installations and armed forces.[216]

Since the Hague Regulation did not lay down any procedure by which an attacking belligerent may determine whether a locality is undefended, the classification must chiefly be made either by a unilateral declaration of the belligerent holding the place, or on the basis of intelligence information. Neither course of action is binding on the attackers, who are entitled to discredit a declaration made by the enemy that a city is undefended or "open."[217]

The notion of undefended localities changed as air warfare developed and States began to uphold the concept of military objectives. It became increasingly difficult to invoke the Hague rule, since in modern warfare rarely are towns undefended to the extent that they do not enjoy any possible protection either from land or air attack.[218] Nevertheless, the notion was frequently invoked, although State practice proved erratic and no uniform interpretation or application of the rules emerged.

---

211. *Id.*, para. 1.

212. *Id.*, para. 2.

213. Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, art. 1, 36 Stat. 2363.

214. *See, e.g.*, F.R.G. MILITARY MANUAL, *supra* note 134, para. 93; AUSTRIAN MILITARY MANUAL, *supra* note 124, para. 58.

215. U.S. ARMY MANUAL, *supra* note 94, para. 40, followed almost verbatim by the ISRAEL MILITARY RULES, *supra* note 124, para. 4; U.K. MILITARY MANUAL, *supra* note 110, paras. 285-286.

216. *See* Shimoda Case, 8 JAPANESE J. INT'L L. 212 (1964).

217. *See, e.g.*, F.R.G. MILITARY MANUAL, *supra* note 134, para. 94 ("The enemy is not obligated to recognize as an 'open town' a locality declared as such by the adversary.").

218. In World War II, the concept was invoked on many occasions. President Roosevelt stressed its importance in his momentous message of 1939 to European nations and both the allies and Germany declared many a city open: On May 10, 1940, Belgium declared Brussels open and on June 13, 1940, France declared Paris open.

(b) Article 59 of the Protocol

Article 59[219] has the great merit of (a) defining the concept and (b) setting forth the procedures by which two or more belligerents can agree upon the granting of special immunity to a certain locality. Consequently, Article 59 proves an indispensable instrument for applying customary law: it dispels doubts about the notion of an undefended locality and sets up the procedures by which the procedure can be made operative. In view of these characteristics and of the unanimous assent it received in the Diplomatic Conference, the provision can be held to have crystallized a general conviction of all the States gathered at Geneva about what customary law says on the matter. Article 59 represents more than an authentic interpretation of existing law; it also represents a necessary means of making the customary law operative, which leads to the conclusion that the development of the previous law it embodied, has acquired the character of *general* law.

(xi) Demilitarized Zones [Article 60][220]

Unlike undefended localities,[221] demilitarized zones is a new concept in international law. Here the Protocol is completely innovative, yet Article 60 may acquire great importance for States not parties to the Protocol. Since it provides for agreements by armed forces on the granting of special status to certain areas, Article 60 could be taken as a useful reference point by belligerents not bound by the Protocol.

E. Substantive Rules Protecting War Victims

Protocol I is of course replete with explicit provisions designed to protect victims of international armed conflicts: the treatment of the wounded, sick and shipwrecked;[222] medical transportation;[223] missing and dead persons;[224] civil defense measures;[225] the provision of relief for civilians;[226] and the treatment of persons in the power of a party to the conflict.[227]

Most of these provisions reaffirm and supplement the existing regulations. They usually embody detailed provisions that attempt to address every contingency. It is precisely this thoroughness that

219. Geneva Protocol I, *supra* note 1, art. 59.
220. *Id.* art. 60.
221. *See, e.g.*, IV Geneva Convention, *supra* note 48, art. 14, para. 1 (referring to hospital and safety zones and localities"); *id.* art. 15 (referring to "neutralized zone").
222. Geneva Protocol I, *supra* note 1, arts. 8-17.
223. *Id.* arts. 21-31.
224. *Id.* arts. 32-34.
225. *Id.* arts. 61-67.
226. *Id.* arts. 68-71.
227. *Id.* arts. 72-79.

makes it difficult to maintain that States, by adopting these provisions, have intended to "enact" international "legislation" going beyond contractual undertakings. Treaty provisions, in order to crystallize customary rules, must possess some *generality* of character, something clearly lacking in the provisions before us.

Other provisions, for example those on medical transportation; on missing and dead persons; on refugees and stateless persons; and on journalists, cover matters that were not regulated either by customary law or by the Four Geneva Conventions. There, too, the great detail of the regulations cannot reflect the formation of customary rules. It is therefore likely that the provisions remain within the ambit of treaty stipulations, although it is possible that the general enunciations at least will gradually pass into customary law.

Of course, there are exceptions, as in the provision concerning the treatment of persons in the power of a party to the conflict, which specifies the fundamental rights guaranteed to such persons.[228] The very tenor and scope of the provision (and the views expressed before and after its adoption)[229] make it clear that participants in the Geneva Conference Considered Article 75 to represent a set of standards that all States should abide by, for they enshrine fundamental human values. The Article lays down a "Bill of Rights" for detained persons, reproducing the international standards on the basic rights devolving on any human being, as they are embodied in such international instruments as the Universal Declaration on Human Rights[230] and the 1966 U.N. Covenant on Civil and Political Rights.[231]

---

228. *Id.* art. 75.

229. Practically all states agreed that Article 75 enshrined very basic safeguards from which no departure was admissible. *See, e.g.*, VI C.D.D.H., *supra* note 57, at 250 (statement of Italy: "The article reaffirmed certain basic rules of general international law . . . there could be no derogation from the provisions of the article, which applied to every person who did not benefit from more favourable treatment under the Conventions or the Protocol."); *id.* at 264 (statement of Austria that the provision constituted "a body of rules of human rights which, while belonging to the context of the Universal Declaration on Human Rights . . . and the International Covenant on Civil and Political Rights . . . established special rules applicable in cases of international armed conflicts."); *id.* at 265 (similar statement by Belgium); *id.* at 268 (G.D.R. welcomed the fact that "some of the fundamental guarantees of the Covenant on Civil and Political Rights have been incorporated in this Protocol . . . [in addition] paragraph 7 of Article 65 [present Article 75] reaffirms the principle embodied in Article 6 of the Statute of International Military Tribunal of Nürenburg . . ."; *id.* at 251 (Norway and Afghanistan stressed the vital importance of the article to the Protocol).

230. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948), *reprinted in* INTERNATIONAL HUMAN RIGHT INSTRUMENTS OF THE UNITED NATIONS 1948-1982, at 5 (1983) [hereinafter cited as Universal Declaration of Human Rights].

231. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982, at 91 (1983) [hereinafter cited as International Covenant on Civil and Political Rights].

The fact that a number of States expressed interpretative reservations about some provisions does not detract from its generally binding character, for, as noted above,[232] offering different interpretations on some aspects of certain treaty stipulations does not prevent the provision from acquiring the status of a customary rule.

F. Means of Ensuring Compliance with International Humanitarian Law

1. The Protecting Power System

a. Customary Law

The 1949 Geneva Conventions codified and improved on international practice concerning the designation of "Protecting Powers" by belligerents for the purposes of safeguarding their interests as well as compelling the adversary to abide by international law. Briefly, the 1949 system involved a three-sided relationship: two belligerents and a third party. Once a triangular agreement was reached, the third party could act as a "Protecting Power" and scrutinize the implementation of the Conventions.[233]

A significant advance of the 1949 Conventions lay in the provision of "Substitutes for the Protecting Powers." Of the three possibilities envisioned by the Conventions, only the third entailed a mandatory response: the detaining Power was duty-bound to accept ". . . the offer of the services of a humanitarian organization, such as the I.C.R.C., to assume the humanitarian functions performed by Protecting Powers under the present Convention."[234] This obligation ". . . introduces a greater degree of automaticity into the system by making it possible in principle to have an entity exercise a certain measure of supervision over the implementation of the Conventions in all circumstances, regardless of the agreement of the parties or the goodwill of the detaining power."[235]

In actual practice the Protecting Powers system generally proved to be a failure. It was resorted to in only three cases.[236]

---

232. *Supra* notes 40 & 41 and accompanying text.

233. The 1949 system hinged on a three-sided relationship: the two belligerents and a third party. Once a triangular agreement was reached, the third party could act as a "Protecting Power" and scrutinize the implementation of the Conventions. Consent by each of the three States involved was necessary for the appointment and functioning of the Protecting Power; if consent by one was withdrawn, the Power ceased to act. Geneva Convention I, art. 10; Geneva Convention II, art. 10; Geneva Convention III, art. 10; Geneva Convention IV, art. 11.

234. *Id.* para. 3.

235. Abi-Saab, *The Implementation of Humanitarian Law*, in I THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 310, 322 (A. Cassese ed. 1979).

236. In 1956, during the Suez conflict, between Egypt and France with the U.K.; in 1961, during the Goa affair; and in 1971, during the Indo-Pakistani war—India soon withheld its consent to the Protecting Power's intervention.

Among the reasons for its failure were: fear that belligerents would have to recognize each other as a result of the appointment of Protecting Powers; desire not to sever diplomatic relations; and the unwillingness of the I.C.R.C. to step in and offer to take the role of substitute. When the 1974-1977 Conference opened, to the extent that it had not been the subject of reservations, the system was no doubt part of customary law,[237] yet it was scarcely workable in any real situation.

b. Article 5 of the Protocol

The system instituted in Article 5 of Protocol I[238] substantially takes up the 1949 system. It (i) spells out that everything depends on the consent of all parties concerned and any automatic obligation is done away with;[239] (ii) sets up a procedure for facilitating the appointment of Protecting Powers;[240] and (iii) eliminates some of the practical or political obstacles to the appointment of Powers, by specifying that the designation and acceptance of Powers does not affect the legal status of the parties to the conflict or any territory, and that diplomatic relations can be maintained by the belligerents despite the functioning of Powers.[241]

Although adopted by consensus, Article 5 gave rise to a number of reservations on account of its weakness.[242] There was, however, general agreement that some headway had been made, particularly with regard to the fear of recognizing the adversary or territories under its control, making parties more willing to maintain diplomatic relations during armed conflict. As a whole, however, the article was not considered to reflect general agreement. Only paragraphs 5 and 6[243] received unanimous support and formed the basis of general consensus. It follows that the customary system embodied in the 1949 Conventions has been developed by these paragraphs, which constitute a *logical* and *necessary* supplement and updating. Therefore, if two belligerent States not parties to the Protocol decide to resort to the Protecting Powers

237. To the extent that it had not been the subject of reservations.

238. Geneva Protocol I, *supra* note 1, art. 5.

239. Even the obligation to accept the services of a humanitarian organization laid down in paragraph 3 common to Geneva Convention I, art. 10, Geneva Convention II, art. 10, Geneva Convention II, art. 10, and Geneva Convention IV, art. 11, *supra* note 48.

240. Geneva Protocol I, *supra* note 1, art. 5, para. 3.

241. *Id.* paras. 5 & 6.

242. VI C.D.D.H., *supra* note 57, at 77 (Egypt joined Western and Third World countries in stressing that article 5 made no great improvement over the traditional system, and added that in some respects it was a step backwards in so far as it did away with the automatic obligation to accept the offer of the I.C.R.C. or any other humanitarian organization.).

243. Geneva Protocol I, *supra* note 1, arts. 5 & 6.

system, they ought to apply the system laid down in the 1949 Conventions as supplemented by Paragraphs 5 and 6 of Article 5 of the 1977 Protocol.

It is difficult to contend that the other provisions of Article 5 have turned into customary international law, not only because of the reservations entered, but also for the more fundamental reason that they do not lay down any specific obligations. The major innovation establishes the procedure for designating Protecting Powers for all the parties concerned. This procedure is not compulsory; it represents a "permissible" device for facilitating agreement. The I.C.R.C. ". . . *may, inter alia*, ask each Party to provide it . . ." with a list of five States deemed acceptable as Protecting Powers.[244] Clearly, one of the States concerned can refuse to provide the list without incurring any international responsibility for a breach of the Protocol. The nature and content of the provision indicate that it was not conceived of as a norm adopted *qua* expression of a general rule. Nevertheless, the provision can have some value for States not parties to the Protocol: it can be used as a pattern of behavior, a model from which to draw inspiration.

2. Penal Repression of Breaches

The 1949 Geneva Conventions set up a very advanced system for repressing violations by States. It included (i) the duty of any contracting State (whatever its status in the conflict, even a neutral country) to search for, arrest and bring to trial any person accused of grave breaches; (ii) the alternative duty to hand those persons over for trial to another contracting State, provided the latter made out a *prima facie* case.[245] Thus, the principle *aut judicare aut dedere* was upheld. The relevant provisions represented a significant departure from customary law, which in criminal matters proclaimed the traditional principles of (active or passive) nationality and territoriality. The Convention, by contrast, laid down the principle of *universality* of jurisdiction, whereby a contracting State could bring a person to trial regardless of his nationality, of the nationality of the victim and of the place where the alleged offence had been committed. It was precisely the very bold character of the regulation that rendered it ineffective in practice. The provisions were never invoked and remained a dead letter, never passing into customary law.

It follows that the provisions adopted in 1977 to supplement the 1949 system to a great extent remained treaty law. The principal stipulation, Article 85[246] lists all the violations of the Protocol

244. Geneva Protocol I, *supra* note 1, art. 5, para. 3.
245. Geneva Convention I, *supra* note 48, art. 50.
246. Geneva Protocol I, *supra* note 1, art. 85.

that should be regarded as grave breaches. It is apparent that the article is inextricably linked to the 1949 system. Consequently, if one takes the view that the 1949 system has not become customary law, then Article 85 cannot be deemed applicable to States not parties to the Protocol.

By contrast, there should be no doubt that Article 86, concerning the responsibility of superiors for criminal offenses committed by their subordinates, is declaratory of customary law.[247] Article 86 merely restates the general rule without adding any significant elaboration or clarification. Similarly, Article 91, on the duty of States to pay compensation for any violation of the Conventions and Protocols committed by their organs and by their armed forces,[248] makes no improvement on the general rule laid down in the Hague Conventions.[249]

The other provisions concerning criminal repression neither codify international law, nor bring to the fore the formation of general consent likely to give rise to a new general rule of international law. For example, the provision for mutual assistance in criminal matters contains a set of general "invitations" to States to cooperate.[250] The imprecision of the provision makes it improbable that it will ever turn into a customary rule. Similarly, the provision for an international fact-finding commission cannot acquire any legal value beyond its significance as a treaty provision, as the commission it provides for is totally contingent on the will of the States concerned.[251]

3. Reprisals

The four Geneva Conventions of 1949 prohibit reprisals against certain protected persons and objects.[252] There seems to be no controversy over the fact that the various prohibitions of the 1949 Conventions have gradually come to be considered as part and parcel of customary international law. In the 1974-1977 Conference it seemed only natural to a number of States, especially developing and socialist countries, to extend the ban on reprisals to cover all the persons and objects to which the Protocol extended its pro-

247. *Id.* art. 86. *See, e.g.*, the famous case In re Yamashita, 327 U.S. 1 (1946) (holding that a commander of armed forces of the enemy is accountable for permitting members of his command to commit brutal atrocities and other high crimes). *See also* U.K. MILITARY MANUAL, *supra* note 110, para. 361; U.S. ARMY MANUAL, *supra* note 94, para. 501; ISRAELI MILITARY RULES, *supra* note 124, para. 9.

248. Geneva Protocol I, *supra* note 1, art. 91.

249. Hague Regulations, *supra* note 40, art. 3.

250. Geneva Protocol I, *supra* note 1, art. 88.

251. *Id.* art. 90.

252. Geneva Convention I, *supra* note 48, art. 33 (reprisals against civilians were forbidden only to the extent that the latter found themselves in enemy hands).

tection. Other States, chiefly France[253] and Australia,[254] strongly challenged this view. They particularly contested any ban on reprisals against civilians in the area of hostilities. In their opinion, reprisals constituted the only effective means of compelling delinquent States to discontinue their wrongdoing or to pay reparation. The upshot of the lengthy debates on the matter was that no general provision on reprisals was adopted, but specific provisions were inserted in five Articles concerning civilians or civilian objects.[255] Only one of the five met with objections and the others were adopted by consensus.[256] While France subsequently entered formal reservations, only Australia made specific objection to the rules on reprisals.[257]

Their approval by consensus of four of the provisions and the lack of substantial reservations on the rules concerning reprisals could demonstrate that all States (except France and Australia) agreed to ban reprisals, and that such agreement was so strong as to demonstrate the intention to create a general rule. A more cautious and perhaps more accurate view would seem to be that many States were in fact opposed to any extension of prohibitions of reprisals, and that they eventually refrained from voting against them or from voicing dissent simply because they planned to enter reservations upon ratification of the Protocol. Consequently, it is premature to assess the legal significance of these provisions. Should States, upon ratification, refrain from making reservations and show widespread approval of bans on reprisals, one might conclude that the five provisions[258] have indeed become customary law.

III. *JUS IN BELLO* IN WARS OF NATIONAL LIBERATION

The fact that Article 1 paragraph 4 of Protocol I[259] labeling wars of national liberation international armed conflicts, embodies a rule of customary law binding on all States participating in the Geneva Conference (except for Israel),[260] has practical legal conse-

253. *See supra* note 144 (concerning France's role as "persistent objector").

254. *See supra* notes 191 & 200.

255. Geneva Protocol I, *supra* note 1, art. 51, para. 6, *id.* art. 53, para. (c), *id.* art. 54, para. 4, *id.* art. 55, para. 2, *id.* art. 56, para. 4.

256. VI C.D.D.H., *supra* note 57, at 162 (Article 51 was adopted by a vote of 77 to 1 (France) with 16 abstentions. France explicitly stated that one of the reasons for its opposition was the provision on reprisals, that it found *inter alia* "contrary to existing international law.").

257. Should France and Australia refrain from ratifying the Protocol, they would not be bound, in any case, by the "customary" rule prohibiting reprisals against civilian persons, in view of their voiced dissent.

258. *Supra* note 255.

259. Geneva Protocol I, *supra* note 1, art. 1, para. 4.

260. *See supra* notes 57-59 and accompanying text.

quences. States are enjoined to apply to the categories of wars of national liberation, the whole body of *customary* rules on the conduct of hostilities and protection of war victims governing inter-State conflicts. Consequently, States are duty-bound to apply to wars of national liberation both the customary rules existing before 1977 and those evolved as a result of the Geneva Diplomatic Conference. By contrast, the provisions of Protocol I that do not crystallize or reflect general rules but have merely contractual force, apply to wars of national liberation only if two very difficult conditions are met: (i) the (colonial, racist or occupying) Power against which the war is conducted is a party to the Protocol; and (ii) the national liberation movement fighting for self-determination makes the declaration provided for in Article 96.[261]

IV. INTERNAL ARMED CONFLICT

A. Customary Law

General law boils down to a set of rules protecting the civilian population which first evolved during the Spanish Civil War (1936-1939),[262] as well as the rules laid down in Article 3 of the four Geneva Conventions of 1949,[263] and in Article 19 of the 1954 Hague Convention on cultural property.[264] A brief look at these bodies of norms may be useful to ascertain to what extent Protocol II is innovative, and how far it merely restates previous rules.

1. General Rules on Civilians

The baneful effects of the Spanish Civil War and the magnitude of the armed hostilities lent the conflict features of an international war proper. This prompted the contending parties and several European States to affirm that general rules on civilians were applica-

261. Geneva Protocol I, art. 96, para. 3 provides as follows:

> The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in art. 1, para. 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depository. Such declaration shall, upon its receipt by the depository, have in relation to that conflict the following effects: (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect; (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Geneva Protocol I, *supra* note 1, art. 96, para. 3.

262. *See generally* Cassese, *The Spanish Civil War and the Development of Customary Law Concerning Armed Conflicts*, in CURRENT PROBLEMS OF INTERNATIONAL LAW 287 (A. Cassese ed. 1975) [hereinafter cited as Cassese (1975)].

263. Geneva Conventions I, II, III & IV, *supra* note 48, art. 3, para. 1(d).

264. Hague Cultural Property Convention, *supra* note 132, art. 19.

ble to this conflict and to all similar civil strife.[265] Thus, a phenomenon emerged which eventually constituted a major trend of the present century: the increasing extension to civil wars of the principles applicable to armed conflicts. General consent emerged that the applicable rules were: a ban on the deliberate bombing of civilians; a prohibition on attacking non-military objectives; a rule concerning the precautions that must be taken when attacking military objectives; and a rule authorizing reprisals against enemy civilians and consequently submitting such actions to the general conditions for reprisals.[266]

These four rules have become part of international customary law, and apply to any internal armed conflict, provided it has the characteristics of the Spanish Civil War. Insurgents must possess an organized administration; they must effectively control a portion of the territory of the State; and they must maintain organized armed forces capable of abiding by international law.[267] Internal armed conflicts having a lesser degree of intensity, for example instances of minor rebellion, do not fall within the scope of conflicts traditionally covered by the rules.

The formation of general rules on civilians was substantially borne out by the U.N. General Assembly in 1968, when it unanimously "affirmed" the principles to be observed "by all governmental and other authorities responsible for action in armed conflicts."[268] The resolution was patently intended to be observed by insurgents. The principles were reaffirmed and developed in 1970, when the General Assembly proclaimed a set of guidelines applicable both in international and in internal armed conflicts.[269]

The very wording of these provisions seemed to reflect the conviction of Member States of the U.N. that not all of them constituted binding law. Some of them express aspirations of emerging trends in the international community that have not yet taken the

---

265. Cassese (1975), *supra* note 262.

266. *Id.*

267. *Id.*

268. U.N. Res. 2444, 23 GAOR Supp. (No. 18) at 50, U.N. Doc. A/7218 (1968) (stating in part that "[i]t is prohibited to launch attacks against the civilian population as such;" and that "[d]istinction 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").

269. U.N. Resolution 2675 is worded as follows:

> 1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
>
> 2. In the conduct of military operations during armed conflicts a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
>
> 3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all neces-

form of legally binding rules. Nevertheless, insofar as the resolution restates principles already proclaimed at the international level, it can be regarded as declaratory of existing law. The caution shown in formulating the resolutions is also explained by the fact that they are intended to apply to *any* internal armed conflict, irrespective of its duration, intensity and magnitude. Plainly, the field of much greater application of the resolutions was to be compensated for by cautious wording.

The applicability to civil wars of at least some general rules on civilians was reaffirmed in State practice. Such applicability was urged by the I.C.R.C. on several occasions and did not arouse any significant opposition.[270] In the view of the I.C.R.C., belligerents, besides refraining from striking at civilians as such, must also refrain from attacking military objectives whenever the possibility exists that civilians in the vicinity might be injured or killed. No States objected to these interpretations. In addition, on at least two occasions, States explicitly took them up and formally pledged themselves to abide by the I.C.R.C. rules.[271]

---

sary precautions should be taken to avoid injury, loss or damage to the civilian populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used only by the civilian population should not be the object of military operations.

6. Places or areas designated for the sole protection of civilians, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the U.N., the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief, as laid down in Resolution XXVI, adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflicts, and all parties to a conflict should make every effort to facilitate this application.

U.N. Res. 2675, 25 GAOR Supp. (No. 28) at 76, U.N. Doc. A/8028 (1970).

270. The International Committee of the Red Cross, (I.C.R.C.), called upon the parties in general terms to refrain from attacking the civilian populations, first in 1964 during the conflict in the Congo, and again in 1967 during the conflict in Nigeria. The I.C.R.C. made its request more precise during the Vietnam War (in which there was a coexistence of an international war proper with a civil war). In 1967 and again in 1968 the I.C.R.C. called upon the parties concerned (all "Governments and authorities") to refrain from attacking innocent civilians deliberately and also "to use their utmost endeavors to ensure that innocent civilians are not killed or injured in the course of combat operations, whether by land, sea or air." *See also* Letter of the International Committee of the Red Cross on the Application of the Geneva Conventions in Vietnam, Geneva, June 11, 1965, 4 I.L.M. 1171.

271. In a letter of the I.C.R.C. of October 22, 1964, the Prime Minister of the Democratic Republic of the Congo wrote as follows:

> On October 21, I issued the attached statement in order to make clear the desire of the D.R.C. to abide by the Geneva Conventions and to show our

The increasing extension of general rules governing international conflicts to civil wars seems to be discounted or at least downplayed in a series of recent pronouncements by single States.[272] However, these pronouncements do not altogether preclude the conclusion that civil strife must be governed by some general rules of war. They deny that the *whole body* of international customary law applies to internal conflicts, while in my view, only *a few* customary rules are applicable. Nevertheless, the statements, insofar as they do not take account of the customary rules on civilians, are indicative of an objectionable tendency to oppose the drive towards greater protection of civilians that developed in the 1930's and congealed in the 1960's as a result of U.N. action.

2. The Rules Laid Down in Article 3 Common to the Four Geneva Conventions of 1949 and the 1954 Hague Convention

Article 3 of the Geneva Conventions is meant to protect only victims of civil wars who "[take] no active part in the hostilities."[273] It grants them a set of basic humanitarian safeguards, but it does not regulate the status of insurgents nor, on the face of it, does it have any direct bearing on the actual conduct of hostilities. On close scrutiny, however, Article 3 contains some indirect regulation of the conduct of hostilities, designed to protect civilians.

First, civilians as such must not be considered a military target and can never be the object of deliberate attacks. Furthermore, the contending parties must not resort to measures to intimidate or to terrorize the civilian population. These prohibitions clearly follow from the provision banning the infliction of violence on the life and persons of non-combatants.

> respect for generous humanitarian measures which would avoid needless suffering by civilians. I similarly called on those who are illegally in rebellion against my Government similarly to respect these Conventions and to protect human life. In the spirit of this announcement, I am directing my Air Force to limit its action to military objectives and not to conduct strikes against cities and important localities which would endanger the civilian population.

In the conflict in Nigeria, the central authorities issued the so-called "Operational Code of Conduct for Nigerian Armed Forces" which regulated *inter alia* combat operations and called for the sparing of civilians. Kirk-Greene, CRISIS AND CONFLICT IN NIGERIA; A DOCUMENTARY SOURCE BOOK 1966-1969. When it was claimed that Nigerian forces attacked civilian objects, the central authorities denied the claim and issued instructions to the troops to refrain from indiscriminate bombing. Mertens, *Les Modalities De L'Intervention Du Comite International De LaCroix-Rouge Dans Le Conflict Du Nigeria*, ANNUAIRE FRANCAISE DE DROIT INTERNATIONAL 183, 201 (1969).

272. *See, e.g.*, U.S. ARMY MANUAL, *supra* note 94, para. 11(a) (providing that "the customary law of war becomes applicable to civil war upon recognition of the rebels as insurgents.").

273. Geneva Conventions I, II, III & IV, *supra* note 48, art. 3, para. 1.

Secondly, civilians cannot be taken hostage.[274] This practice has frequently been resorted to during civil wars; the provision, therefore, is of great value.

Thirdly, all reprisals are forbidden which involve violence to the life and persons of non-combatants, or outrages upon their personal dignity.[275]

Fourthly, if civilians either belong to the adverse party or are suspected of supporting it, are arrested or detained, or are put in internment camps, they must be treated humanely. In particular, no discriminatory treatment can be meted out to them, nor can they be submitted to torture, or to cruel, humiliating, or degrading measures. In the event of their being brought to trial, all judicial safeguards must be observed.[276]

State practice developed after 1949 shows that Article 3 was invoked, reaffirmed and relied upon on a number of occasions.[277] Even when it was disregarded in actual practice, no State admitted violating it. Thus it gradually turned into a set of rules that all States regarded as fundamental, regardless of their being parties to the Geneva Conventions. It enshrines a handful of humanitarian principles proclaimed by States in other contexts, such as treaties on human rights. It seems, therefore, that it has become legally impossible for any State to deny the applicability of those fundamental safeguards in cases of civil strife.

Article 19 of the Hague Convention of 1954[278] is closely linked to Article 3 and is designed to extend the protection of civilians provided for in Article 3 to cultural property.[279] It enjoins the contending parties to respect cultural property, and in particular to abide by the fundamental duties laid down at the beginning of the Convention.[280] Its intrinsic importance, the fact that the Convention as a whole has been ratified or adhered to by a great number of States,[281] as well as the frequent reference to it in the Geneva proceedings, compel the conclusion that Article 19 of the Hague Convention has passed into the corpus of general norms of international law. The failure of States and rebels to apply it in civil strife does not disprove the general character of the rule. First, not all civil

274. *Id.* para. 1(b).
275. *Id.* para. 1(c).
276. *Id.* para. 1(d).
277. Draper, *The Geneva Conventions of 1949*, 114 RECUEIL DES COURS 82 (1965).
278. Hague Cultural Property Convention, *supra* note 132, art. 19.
279. *Id.* para. 1 (stipulating that "[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.").
280. *Id.* arts. 1, 2 & 5 (referring, respectively, to defining, protecting, and showing respect for cultural property).
281. Sixty-eight States to date.

wars give rise to the problem of safeguarding cultural property. Secondly, if in some instances cultural objects were involved, the lack of any protest on either side or by UNESCO[282] seems to indicate that the rules in question were in fact observed.

B. Protocol II[283]

The sad history of how Protocol II was mutilated and stripped of some very significant provisions at the eleventh hour is well known.[284] Although nearly all its provisions were adopted by consensus and the Protocol itself was the subject of consensus approval, strong and unequivocal reservations were made by a number of Third World countries. This should prompt us to proceed with the utmost caution when appraising the Protocol and ascertaining to what extent it codified customary law or generated rules possessed of legal force transcending the nature of contractual undertakings. The views of Third World countries should be given great weight for they took a different position from that of the western and socialist countries. Numerous Third World countries made it clear that they were unwilling to approve of the Protocol, implying among other things that they would never ratify it.[285] The number and content of the reservations was such as to lead the delegation of Turkey to state that the consensus was only apparent: [t]he consensus reached was impaired by the statements made by numerous delegations, to the extent that it might be construed as representing a consensus through abstention.' "[286]

Third World countries opposed Protocol II on two grounds: first, because they considered that it could legitimize rebellion, thereby undermining their sovereignty; secondly, because they saw in it a possible tool in the hands of foreign Powers for interference in their domestic affairs.[287] This does not mean that they were per-

282. Hague Cultural Property Convention, *supra* note 132, art. 19, para. 3 (providing that the United Nations Educational, Scientific and Cultural Organization may offer its services to the parties involved in the conflict).

283. Geneva Protocol II, *supra* note 1.

284. *See generally* Eide, *The New Humanitarian Law in Non-International Armed Conflict*, in 1 THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 277 (A. Cassese ed. 1979).

285. Includes such States as Nigeria, Sri Lanka, India, Indonesia, Mexico, Ghana, Sudan, Zaire, Guatemala, the Philippines and Uganda, as well as Chile, which made a reservation actually calculated to hamstring the Protocol, as far as its possible application to Chile was concerned, VII C.D.D.H., *supra* note 57, at 232. Some of these States declared Protocol II "superfluous," *id.* at 169 (Mexico), "pointless," *id.* at 203 (India), "quite unnecessary," *id.* at 251 (Uganda). Sudan stated that it "did not involve any international agreements but simply a concession on the part of States which agreed to apply it to their own nationals," *id.* at 201.

286. *Id.* at 250.

287. Condorelli, *Les Pays Afro-Asiatiques*, in I THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 387 (A. Cassese ed. 1979).

tinaciously opposed to *any* humanitarian attempt at improving the fate of victims of civil wars. They showed that they were ready to accept *particular improvements* in the *existing law*, provided such improvements did not entail the acceptance of a whole international instrument on the matter. This explains why they agreed to participate in the consensus on the various provisions and on Protocol II itself. Thus, what at first glance could appear to be a singularly contradictory stand, turns out in fact to be quite consistent. The States in question, while opposing any move likely to give legitimacy to rebels and affording to third parties the opportunity to intervene, favored *a few individual* humanitarian provisions solely intended to protect the persons outside the conflict, or wounded or captured rebels.

Where customary rules already existed, the acceptance in 1977 of rules reaffirming, supplementing and developing them can be taken to express the will to broaden and update the old regulations by general consent. In these cases the provisions of the Protocol could be taken to reflect an advance in *general* international law.

The category of provisions making innovations in existing law, i.e., marked departures from customary rules, includes: fundamental guarantees to be accorded to children;[288] protection of medical and religious personnel;[289] protection of medical duties;[290] protection of medical units and transports;[291] protection of distinctive emblems of humanitarian organizations;[292] protection of objects indispensable to the survival of the civilian population;[293] protection of works and installations containing dangerous forces;[294] a prohibition on the forced movement of civilians;[295] and a provision on relief societies and relief action.[296] The opposition of a conspicuous group of States to the Protocol precludes the conclusion that these provisions reflect a general consent going beyond their contractual nature. Consequently, they will only become binding on those States which ratify the Protocol.

Provisions which restate, clarify, spell out and develop existing rules of customary law may be regarded as reflecting general law.

The fundamental guarantees of Protocol II for all persons who do not take a direct part or have ceased to take part in hostilities,[297]

288. Geneva Protocol II, *supra* note 1, art. 4, para. 3.
289. *Id.* art. 9.
290. *Id.* art. 10.
291. *Id.* art. 11.
292. *Id.* art. 12.
293. *Id.* art. 14.
294. *Id.* art. 15.
295. *Id.* art. 17.
296. *Id.* art. 18.
297. *Id.* art. 4, paras. 1 & 2.

reaffirm the rules evolved out of the 1949 Geneva Conventions and at the same time expand their protection.[298] "It is prohibited to order that there shall be no survivors,"[299] clearly broadens the protection deriving from the general principles whereby civilians and all those who no longer take part in hostilities should be protected in any circumstance. Similarly, the prohibition of "collective punishments," "acts of terrorism," "slavery and slave trade in all their forms," "pillage," and "threats to commit any of the foregoing acts,"[300] broadens the protection laid down in 1949.[301] As in the prohibition of declarations of no quarter, here again, the new prohibitions are mere *extensions and expansions* of existing customary rules. By accepting these provisions by consensus, the States gathered at Geneva expressed the legal conviction that in the future they would be bound by the previously customary rules *as developed and supplemented at Geneva.*

The foregoing considerations apply to other provisions as well. Thus, Article 5, on the humanitarian safeguards of persons whose liberty has been restricted,[302] is but an expansion of the rule laid down in Common Article 3 whereby, "persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely."[303] Doubts might be entertained concerning paragraph 2 of the article,[304] if it did not limit fulfillment of the duty imposed by the paragraph to "the limits of their capabilities." As for Article 6[305] on the judicial safeguards for the penal prosecution and punishment of offenses related to the armed conflict, it is a development and specification of Article 3,[306] and in addition embodies a set of principles proclaimed in the Universal Declaration on Human Rights[307] and in the 1966 U.N. Covenant on Civil and Political Rights.[308] Similarly, articles on protection, care, and collection of and search for the wounded, sick and shipwrecked,[309] reaffirm and

298. Geneva Conventions (I, II, III, IV), *supra* note 48, art. 3, para. 1.

299. Geneva Protocol II, *supra* note 1, art. 4, paras. 1 & 2 (this provision, which adds, "[I]t is prohibited to order that there shall be no survivors," applies both to combatants who have laid down their arms and to civilians, and is intended to avoid their being killed as a result of a declaration of no quarter).

300. *Id.* art. 4, para. 2.

301. Geneva Conventions (I, II, III, IV), *supra* note 48, art. 3, para. 1(d).

302. Geneva Protocol II, *supra* note 1, art. 5, para. 2.

303. Geneva Conventions (I, II, III, IV), *supra* note 48, art. 3, para. 1(d).

304. Geneva Protocol II, *supra* note 1, art. 5, para. 2 (which provides for those who are responsible for the internment or detention of persons deprived of their liberty for reasons related to the armed conflict, referred to in paragraph 1).

305. *Id.* art. 6.

306. Geneva Conventions (I, II, III, IV), *supra* note 48, art. 3, para. 1(d).

307. Universal Declaration of Human Rights, *supra* note 230.

308. International Covenant on Civil and Political Rights, *supra* note 231.

309. Geneva Protocol II, *supra* note 1, arts. 7 & 8 (referring respectively to the protection and care of the wounded, sick and shipwrecked and to search procedures for the wounded, sick and shipwrecked).

enlarge upon a rule contained in Common Article 3.[310] The general principle in Protocol II concerning the protection of the civilian population against the dangers arising from military operations,[311] simply restates the general rules protecting civilians from the hostilities, referred to above. Finally, Article 16, on protection of cultural objects and places of worship,[312] greatly expands the customary protection laid down in the norms evolved out of the Hague Convention of 1954,[313] in that it provides that particular categories of cultural objects be immune from attack. Thus, the article provides better protection than the Hague Convention which allows for a waiver of protection "in cases where military necessity imperatively requires such a waiver."[314] By reinforcing and expanding the protection of a special category of cultural objects, Article 16 constitutes an extension of existing customary rules, and has itself acquired the character and status of a general rule.

All the provisions just mentioned did not form the subject of substantial reservations by the States gathered at Geneva. They are fully in line with previous customary law and lay down a more detailed and specific regulation than that provided for before. However, they are different from the rules generated out of Article 3[315] and on the same footing as the various rules on civilians which emerged as a result of the Spanish Civil War in that they cover only *large-scale armed conflicts*, i.e., civil strife presenting all the characteristics of intensity, duration and magnitude of the Spanish Civil War. They do not apply to "situations of internal disturbances and tensions, such as riots or isolated and sporadic acts of violence."[316] Thus, the progress made in 1977 is limited in two ways: first, because of the paucity of the rules evolved; and secondly, because they do not cover all classes of internal armed conflicts. This is the most that Third World countries were prepared to concede.[317]

It follows that at present the customary regulation of non-international armed conflicts is made up of two distinct sets of rules: those arising out of the Hague Convention,[318] which apply to any category of armed conflict, and those exclusively governing large-scale civil strife. The latter consist of the rules on civilians which evolved in the 1930's and were confirmed in the 1960's as well as

310. Geneva Conventions (I, II, III, IV), *supra* note 48, art. 3.

311. Geneva Protocol II, *supra* note 1, art. 13.

312. *Id.* art. 16.

313. Hague Cultural Property Convention, *supra* note 132, art. 19.

314. *Id.* art. 4.

315. *Supra* notes 273-77 and accompanying text.

316. Geneva Protocol II, *supra* note 1, art. 1, para. 2.

317. *See supra* note 285 and accompanying text.

318. Hague Cultural Property Convention, *supra* note 132, arts. 3 & 19 (referring to "any armed conflict not of an international character").

the detailed rules that took shape in the 1977 Protocol, which arose from the general consent of States.

V. CONCLUSIONS

We have seen above that a great number of provisions of the two 1977 Protocols are not only conventional rules, but possess at the same time the status and force of general norms of international law.

The category of general norms can be divided into *three classes of rules*. First, there is a small group of provisions that merely *restate* and *codify* customary law.[319] Second, many of the rules that are also binding *qua* customary law reaffirm existing law and by the same token *develop* it by adding precision, making additions or clarifications, or giving a detailed regulation that was merely implicit in previous law.[320]

A third group of provisions contains considerable *innovations*. Such innovations, however, were themselves preceded by extensive practice on the part of States, chiefly in the U.N., where pronouncements and declarations by a number of States set the stage for the normative developments within the Geneva Diplomatic Conference which gave birth to the Protocols. At Geneva, prolonged negotiations among the various groups of States succeeded in reaching agreement on some fundamental points that by and large constituted basic elements of a package deal. While, in the U.N., western States often resisted attempts by socialist and Third World countries at improving existing legal regulations, at Geneva it was possible to attain a large measure of consent. The adoption of the innovative provisions reflected a general conviction to the effect that they had the status of generally binding rules.[321]

These three groups of norms cannot, of course, be binding *qua* general norms upon the States that did not participate in the Conference.[322] Consequently, they will become bound by the new rules

319. Geneva Protocol I, *supra* note 1, art. 35 stipulates the principles on the methods and means of warfare. Article 40 prohibits declarations of no quarter and spells out the customary principle on the matter. *See supra* note 116 and accompanying text. Also included are Article 46, on spies, Article 86, which outlines the duty of superiors to prevent and repress violations of the Conventions and of the Protocol by their subordinates, and Article 91, on the duty of States to pay compensation for violations of the laws.

320. This applies to many rules protecting civilians, particularly Articles 48-55 and Articles 57-59 of Geneva Protocol I, *supra* note 1, save for the clauses on reprisals; as well as Article 4, paragraphs 1 & 2 and Articles 5-8, Article 13, and Article 16 of Geneva Protocol II, *supra* note 1.

321. This applies to such provisions as Geneva Protocol I, *supra* note 1, art. 1, para. 4 (on wars of national liberation as international armed conflict), art. 44 (on combatants), and art. 47 (on mercenaries).

322. States such as the People's Republic of China, South Africa and a few others,

only to the extent that they ratify or accede to the Protocols, or otherwise make it clear that they intend to uphold certain norms. Even States participating in the Conference were not all willing to adhere to the norms at issue. Israel, France and Australia, for example, occasionally articulated strong dissent concerning single provisions belonging to the second and third categories; they cannot therefore be regarded as bound by them. They are "persistent objectors" vis-a-vis an incipient customary rule.[323]

It should be added that many of the above provisions were *weakened* by interpretative declarations put forward by a few States, which put on record that they accepted the norms on the understanding that the norms be construed as propounded by them. Such reservations did not prevent the provisions from acquiring the status of general rules. However, they could not but have a bearing on the effectiveness of the rules. In some instances, the reservations render it necessary to wait for further pronouncements of States before making a definitive appraisal of their status.

Strikingly, no general rule has emerged from the Geneva proceedings in several areas where previous practice—however scattered and fragmentary—was not lacking, and where some States pushed for a marked departure from existing law. General rules could have come into being on such matters as the prohibition of reprisals against civilians or civilian objects in combat zones, or specific prohibitions of definite categories of conventional weapons. However, strong disagreements among States resulted in the adoption of provisions on reprisals which a number of States did not oppose only because they intended to enter reservations upon ratification. Lack of consensus also accounts for omission of specific reference to weapons, and in the deferment of the issue to other fora. Thus, unlike the Third Conference on the Law of the Sea,[324] the Geneva Conference did not provide States with the opportunity to develop general norms "on the margin" of the Conference.

Of course, one should not rule out the possibility that these prohibitions, as well as others that have remained merely contractual undertakings, will gradually turn into customary rules by a norm-creating process that has already played a great role in the field of the laws of war.[325] In this respect, the debates and negotiations that took place between 1974 and 1977 might serve as a powerful impulse to the gradual evolution of a general regulation of international and internal armed conflict. The unique opportunity

---

either took part in the first session only or refrained from attending the Conference altogether and so were not involved in the custom-creating process.

323. I. BROWNLIE, *supra* note 28, at 10-11.

324. *Supra* note 42.

325. *See, e.g.*, *supra* note 40.

for nearly all members of the world community to gather and exchange views and proposals on crucial problems of the laws of war stimulated the taking of stands, the forming of alignments and the utterance of pronouncements that will of necessity condition the future evolution of the laws governing armed conflicts. In the next few years, it will be possible to see to what extent the wealth of debates, pronouncements and undertakings elicited by the Geneva Conference is capable of giving rise to a regulation encompassing all States—or, at least, most members of the international community.

A. The Norm-Creating Process in the Geneva Diplomatic Conference as Typical of Current Trends in International Law-Making

The restatement, codification and development of customary rules on the law of warfare is not an isolated phenomenon concerning the Geneva Diplomatic Conference alone, but is indicative of a general tendency of the present world community. In my view, to grasp its significance, one ought to contrast the process with the trend towards international legislation by treaty that manifested itself in Europe in the nineteenth century, with completely different features.

Between the Congress of Vienna of 1815[326] and the First World War, international rules having a general character evolved as a result of treaties concluded by a few Great Powers.[327] Some jurists have concluded that the major Powers "agreed among themselves and legislated for the rest of Europe,"[328] or that "agreements between certain Powers did play a legislative role."[329] Others have spoken of a quasi-legislative activity of the European Powers.[330] The Committee of Jurists appointed by the Council of the League of Nations on the Aaland Islands Question, stated in 1920 that "The Powers have, on many occasions since 1815 and especially at the

326. Final Act of the Vienna Congress of 1815, June 19, 1815 (the first law-making treaty of world-wide importance).

327. The eminent British jurist L. Oppenheim noted that from about 1820 onwards, general international law was frequently evolved by means of an international convention. It was in this way that the permanent neutralization of Switzerland, Belgium and Luxembourg was effected, the navigation of the so-called international rivers in Europe declared free, the slave trade abolished, the grades of diplomatic agents regulated, privateering abolished, the necessity of effectiveness in a blockade recognized, the principle of 'free ships, free goods' finally established, neutral goods on enemy ships declared free, rules provided in the interests of those wounded in battle, explosive bullets under weight of 400 grams forbidden, the Suez Canal neutralized and so forth.

328. Scott, *The Work of the Second Hague Peace Conference*, 2 AM. J. INT'L L. 1, 6 (1908).

329. Shihata (1966), *supra* note 5, at 60.

330. OPPENHEIM (1958), *supra* note 327, at 879 & n.1.

conclusion of Peace Treaties, tried to create true objective law, a real political statute, the effects of which are felt outside the immediate circle of contracting parties."[331] Others held instead that the practical application by non-signatories of treaties made by major European Powers was actually due to "an express or tacit but peaceable acceptance" dictated by the "hopelessness of resistance in these circumstances."[332] The last view seems closer to reality. A handful of Great Powers made treaties which formally were binding only upon them, but which came to be tacitly accepted by other countries. Thus certain treaties turned into customary rules applicable to all States.

This political and legal pattern could not materialize again at the present stage of evolution of the world community. There is no common agreement among the major Powers and the community is split into three main groups of States differing politically, economically and ideologically. No coalition of major Powers exists capable of imposing international legislation *de facto* on other States. Nevertheless today, as in the nineteenth century, general international rules primarily evolve from treaties and are created on the occasion of diplomatic conferences designed to draw up international conventions. In the last century, the few powerful States were united by ideological tenets, a common economic and political structure at home, and a common outlook concerning foreign affairs. Today the lack of a united front of leading States and the multifarious divisions make it necessary for all three main segments of the world community to agree upon standards acceptable to all.

Diplomatic conferences open to all States have therefore become a necessity. Within these conferences, States endeavor to reshape rules governing international relations so as to accommodate the basic demands of the major alignments and groups. Just as in the nineteenth century, when the major Powers used the traditional process of treaty-making but the rules they agreed upon eventually transcended their conventional range, today rules drawn up in international fora often go beyond purely contractual undertakings.

The necessity of renegotiating the fundamentals of various issues prompts States to reach major areas of agreement in a complex process of bargaining and trading-off. Often the points where an equilibrium between conflicting demands is established are so important that they form the subject of general consent and give rise to customary rules. Were States to leave major points of agreement in the condition of conventional regulations, so that any State would be free to adhere to them by ratifying the treaty, or to hold

331. Shihata (1966), *supra* note 5, at 59.
332. J. WESTLAKE, INTERNATIONAL LAW 321-322 (2d ed. 1910).

aloof by merely withholding ratification, there would be a lack of general standards on crucial areas of international intercourse. There are therefore compelling reasons for States to bestow the imprint of *general* rules upon those standards of behavior.

In the process of rediscussion and remodeling of traditional law, States need both to reaffirm old rules that prove to be vital and acceptable to all groups of States, and at the same time to update, develop and elaborate upon old rules in such a way as to render them equally binding upon all States. It would be incongruous if only the old rules were binding upon the whole world community, while their revisions took effect only for ratifying States. Often the reaffirmation of the old law goes hand in hand with its development, and it is therefore only logical for States to consider themselves equally bound by the whole corpus of rules.

The division of the international community into different and often conflicting groups of States, makes it necessary for the world community to cooperate in establishing rules of conduct within international gatherings where all the geo-political areas of the community are represented. The norm-creating effect of nineteenth century treaties was based on unequal relationships between hegemonic and minor States. The custom-creating process of the present century tends towards democratic interaction among practically all States.

B. Final Remarks

It was pointed out by the late Judge Baxter that "[t]he recognition of a treaty as customary law may have an effect on the willingness of States to become parties. There is . . . certain incongruity in informing States that they are already bound by a treaty *qua* customary international law and then in urging them to become parties."[333] Assuming that this is true, one should not fear to call upon States to ratify the Geneva Protocols. As has been shown, although many provisions of the 1977 Protocols bind States participating in the Conference because they represent general rules, many other provisions lay down merely conventional obligations. It is therefore not superfluous for a State to ratify the Protocols as, by so doing, a State undertakes many humanitarian commitments.

The fact that some provisions are already binding upon States *qua* customary rules may in fact greatly facilitate ratification of the Protocols. Thus, for example, as far as western States are concerned, often the provisions that pose most problems politically are precisely those which have anyway become obligatory owing to the norm-creating process. The fact that the bulk of Protocol II is

333. Baxter, *supra* note 5 at 98.

binding upon Third World States regardless of their ratification of the Protocol, should be an added reason for their becoming parties. Ratification would *inter alia* allow them to take advantage of Article 3 which inhibits foreign interventions. Finally, socialist countries did not express any major misgivings about the Protocols in Geneva; however, except for Yugoslavia, no socialist country has so far ratified them. The fact that they were behind most of the provisions that declare existing or emergent rules of law,[334] and those which crystallize norms that have passed into the general corpus of international law,[335] should be an incentive to ratify the Protocols. Their failure to object to the other provisions means that they were, and should still be, ready to undertake the humanitarian obligations flowing from them. If the only reason for their postponing ratification is their desire to watch the western attitude, they would do better to take the lead and become fully bound by international instruments which they so strongly promoted and to which they contributed with constructive proposals.

334. Geneva Protocol I, *supra* note 1, art. I, para. 4, art. 44 (refer respectively to armed conflicts against colonial domination, alien occupation and racist regimes; and combatants and prisoners of war).

335. Geneva Protocol II, *supra* note 1, art. 3, paras. 1, 2 (provides for safegaurds against intervention. Nothing in the Protocol may be invoked to affect the sovereignty of a State . . . nothing in the Protocol may be invoked as a justification for intervention. . .).