GENERAL REPORT

CONDUCT OF COMBAT AND RISKS RUN BY THE CIVILIAN POPULATION

by

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I. — International Law before the Geneva Protocol I of 1977

The rules for the protection of the civilian population during combat were to be found in custom or expressed as general principles in treaties. Before studying the rules of Protocol I it is useful to review the old rules so as to see the Protocol in its proper context. The general principles in question are :

a) That means of warfare are not unlimited.

b) That unnecessary suffering may not be inflicted.

c) The principle of humanity.

d) The rule of distinction.

e) The principle that attacks must be directed at military objectives.

f) The principle that the civilian population and objects and undefended towns are protected.

g) The rule of proportionality.

h) The rule on indiscriminate attacks.

i) The rule on reprisals.

I.1. **The right of the parties to the conflict to choose means of warfare is not unlimited** (HR 22; PI 35).

This seems to be a general principle, not related to any particular weapon, which has become firmly established, at least in the 20th century (Krüger-Sprengel 12).

I.2. **Unnecessary Suffering.**

This principle first found conventional expression in the preamble to the Declaration of St Petersburg of 1868. Recognising the need to disable enemy combatants, it said that this need would be exceeded by uselessly aggravating the sufferings of the disabled or rendering their death inevitable. Its aim was to prohibit weapons that went beyond what was required to achieve disablement, weapons that not only put men out of action but also inflicted horrible, gaping wounds, or ensured that they would eventually die of their injuries. Weapons in this category might be bullets impregnated with poison or another lethal substance, or those which rendered medical treatment useless.

The principle was confirmed by Article 23(e) of the Hague Rules of 1907 which prohibited weapons « propre a causer des maux superflus » (French text) or « calculated to cause unnecessary suffering » (English text).

The English and French texts have been brought together in Article 35 of Protocol I which provides that it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

I.3. **Humanity.**

The famous Martens clause in the preamble to the Hague Rules of 1907 provides that in cases not covered by the rules the belligerents « remain under the protection and governance of the principles of the law of nations. » This law, according to Martens, was derived from :

a) the usages established among civilised peoples;

b) the laws of humanity;

c) the dictates of public conscience.

As will be seen in § I.8, the interests of humanity play an important part in the rule of proportionality.

The question remains whether the Marten's clause was intended :

a) merely to say that in uncovered cases the customary laws and usages of war were to apply, or

b) to introduce a new and overriding principle.

Bearing in mind the context, the better view seems to be the former.

That is not say that humanitarian principles are of no importance. They are fundamental to the essential rule of proportionality.

I.4. Distinction between Combatants and Non-Combatants.

In the 18th Century the rule emerged that non-combatants should not be directly attacked (Oppenheim 346). This was confirmed in the Lieber Code of 1863.

According to the preamble to the Declaration of St Petersburg « The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy ».

After World War II some commentators were left wondering what had happened to the traditional distinction between combatants and non-combatants, and were left with the impression that State practice indicated variously :

a) only a duty not to terrosise; or

b) a duty not to attack civilians in a wanton or unnecessary manner, or for purposes unrelated to military operations and to abstain from terrorisation; or

c) that the special, rather than the general war potential of the enemy was the objective (Starke 514; Blix 37/8).

It would be a mistake, however, to think, as some commentators do (Starke 514), that the fact that this was so was demonstrated by the need for the detailed rules of the fourth Geneva Convention of 1949. In fact, the Convention does not deal specifically with the protection of civilians from attacks in the course of military operations.

The problem is partly a matter of deciding who are combatants and who are non-combatants, As has been asked, what is the status of civilians transporting ammunition to troops in the front line ? (Carnahan 41).

Perhaps the confusion caused writers to concentrate on the wrong problem. They might more profitably have looked at what was a legitimate military objective. There can be little doubt that one is entitled to attack an ammunition column, being a military objective. If the column is manned by civilians, the loss of civilian life is incidental, not the direct object of the attack. The lawfulness of such an attack would fall to be determined by the rule of proportionality, see § I.8.

It is best to sub-divide the distinction rule into its constituent elements which are :

a) Attacks must not be directed at non-combatants, see § I.5

b) Attacks must be directed at military objectives, see § I.7.

c) Even when attacking military objectives, the rule of proportionality must be observed, see § I.8.

Any doubt, caused by the confusion of World War II, about who belongs to the combatant and non-combatant categories has been clarified by Articles 43 to 50 of Protocol I. This can be regarded as a satisfactory conclusion which does not depart significantly from customary law.

I.5. **The Civilian Population and Individual Civilians must not be attacked** (PI 51).

As show in § 1.4, this princple is firmly entrenched (Oppenheim 524) and is so clear as to require no explanation. But it only excludes direct attacks on civilians. It does not exclude proportionate incidental damage caused by attacking military objectives. There is also a very important exception, of reprisals as to which see § 1.10.

I.6. **Undefended Towns.**

Attacks on or bombardments by any means whatever of undefended towns, villages, dwellings or buildings are prohibited (HR 25). The rule was drawn up to prevent bombardment of undefended places by artillery or bombing to facilitate occupation by ground forces. Bombardment in those cases is clearly unnecessary. By analogy with Article 2 of the Hague Convention IX of 1907, this rule does not prevent attacks on military objectives in undefended places (Blix 41/2).

I.7. **Attacks must be limited to Military Objectives** (PI 52).

This traditional rule was confirmed by the preamble to the St Petersburg Declaration.

The difficulty was to define what amounted to a military objective.

An attempt at definition was made in the Hague Air Warfare Rules of 1923, but they were never internationally accepted. During World War II it was thought legitimate to attack civilian morale, for example by destoying workers' houses and generally making life unpleasant for them.

However, this practice resulted in such hostile criticism after the war that it cannot be regarded as an internationally accepted practice.

Further attempts were made by the ICRC in 1971 (ICRC 51).

The most recent attempt is in Protocol I, see § 3.2.

I.8. **The Rule of Proportionality.**

The rule of proportionality strives to maintain a balance between military necessity and humanity, or as one expert has put it, to achieve « an acceptable relation between legitimate destructive effect and undesirable collateral effect » (Krüger-Sprengel 7).

This rule is the very nub of the rule of armed conflict which itself may be regarded as a development of this one basic rule (Johnson). Long regarded as a principle of customary law, it may be inferred from Article 22 of the Lieber Code of 1863 which stipulated that the unarmed citizen is to be « spared in person, property and honour as much as the exigencies of war will admit. » This is a clear indication that civilians were to be spared incidental damage as much as possible.

The rule has been fundamental in shaping Conventions on the law of armed conflict, in arms control and in the doctrine of reprisals. it has also been used in connection with the doctrine of self-defence (Caroline).

The rule was first stated in conventional form in Articles 51 and 57 of Protocol I (Krüger-Sprengel 7, Carnahan 60).

It is difficult to state precisely how the rule stood before the Protocol. Hall stated in 1924 that « military acts cease to be permitted... if they are grossly disproportionate to the object to be obtained » (Hall). The ICRC in 1940 drew attention to the need, when attacking military objectives, not to risk harm to the civilian population out of

proportion to the estimated military advantage, and in 1956 the need to take into account the loss and destruction which the attack is liable to inflict on the civilian population (ICRC 78, 81, 83, 053). Almost all the experts consulted by the ICRC in 1970 approved of the concept of proportionality. But under customary law a variety of interpretations were possible (Rauch I). The US considered in 1972 that they conducted operations in South East Asia in conformity with this rule (Blix 52).

I.9. **Indiscriminate Attacks are Prohibited.**

It is debatable whether there was a customary rule prohibiting indiscriminate attacks. It was perhaps implicit in the principles of distinction and proportionality. A thin line very often exists between incidental damage and negligent, indiscriminate attacks (Blix 47 quoting Raby). Blatently indiscriminate, in the sense of blind, attacks have been justly condemned in the past (Blix quoting Spaight). They probably offend the basic rule dealt with in § I.5 above.

Carnahan says (Carnahan 43) that before the new Protocol theorists fell into two groups :

a) Those who felt that the law of war prohibited both indiscriminate attacks and those producing disproportionate civilian casualties.

b) Those who felt that the rule against indiscriminate attacks was merely an aspect of the proportionality rule, and that attacks which did not produce disproportionate civilian casualties were not indiscriminate.

The true position under the traditional rule was probably an intermediate one, that is that :

a) blind attacks were prohibited; and

b) direct attacks had to conform to the proportionality rule.

Controversy also raged as to whether certain weapons were in themselves blind or so imprecise that the likelihood of their hitting an identified military target was too low (Blix 49). Biological Weapons came closest to being blind. V1 rockets were also very inaccurate as they could only be aimed at an area the size of a city (Carnahan 61). But, as Blix has said, the argument is rather artificial. Indiscriminate effects are caused by the *use* rather than the nature, of the weapon (Blix 51).

One may conclude that no weapon is *per se* indiscriminate. It is always the use that must be looked at.

I.10 **Reprisals.**

Reprisals are otherwise unlawful acts justified by customary law in order to redress a violation of the law by the enemy. Reprisals must :

a) be preceded by efforts to redress the violence by other means or, at the very least, an ultimatum;

b) be aimed at redressing a violation;

c) be proportionate;

d) cease as soon as the violation complained of ceases.

Reprisals cannot be taken against persons and objects specifically protected by treaty against reprisals, for example, prisoners of war, the wounded and sick, medical personnel and facilities and protected persons.

The view has been expressed that since an act of aggression is an international offence, the victim can respond by violating the law of war, for example, by using prohibited weapons, provided he acts proportionality.

Johnson, however, considers that this is a dangerous argument since aggression is so serious a breach of the UN Charter that it would be difficult to respond proportionately, and the protection of the law would be prejudiced from the outset. He believes that *jus ad bellum* and *jus in bello* should be kept apart, and that no matter how the conflict started both the aggressor and the victim should comply with the law of war (Johnson 687).

I.11. **Treaties Dealing with Weapons.**

Apart from the general provisions already referred to dealing with unnecessary suffering, treaties dealing specifically with the use of weapons are :

a) The St Petersburg Declaration which prohibits the use of projectiles below 400 grammes in weight which are either explosive or charged with fulminating or inflammable substances. State practice indicates that the Declaration does not apply to tracer, nor to anti-aircraft and anti-armour projectiles.

b) The Hague Declaration II of 1899 prohibiting projectiles the sole (according to the authoritative French text) object of which is the diffusion of asphyxiating or deleterious gases.

c) The Hague Declaration III of 1899 prohibiting the use of bullets which expand or flatten easily in the human body.

d) The Hague Rules 1907 Article 23(a) which prohibits the use of poison or poisoned weapons.

e) The Geneva Gas Protocol of 1925 which prohibits the use of bacteriological methods of warfare and, bearing in mind the reservations, the first use of asphyxiating, poisonous or other gases and of all analogous liquids, materials or devices.

These treaties, drawn up in peace-time, are an application of the rule of proportionality, a compromise between military and humanitarian interests (Krüger-Sprengel 26).

They may also be seen as an attempt to give meaning to the rather vague provisions dealing with unnecessary suffering.

I.12. **Rules on Interpretation of Treaties.**

The most important rules of treaty interpretation are :

a) Effect is to be given to the ordinary meaning of the words used, in the light of the context and the object and purpose of the treaty (VC 31).

b) If the ordinary meaning is ambiguous or absurd, supplementary means of interpretation may be used, including reference to the preparatory works (VC 32).

c) State practice. Apart from assistance in interpreting, as between the parties, the terms of the treaty, state practice indicates whether the rules have universal application, that is they have been recognised and implemented by the most important states affected by their application (Krüger-Sprengel 11).

II. — The impact of Geneva Protocol I of 1977

II.1. The new Protocol has confirmed some of the traditional rules of the law of war, modified others and introduced new rules.

II.2. It confirms :

a) That means of warfare are not unlimited (PI 35).

b) The distinction between combatants and non-combatants (PI 43, 51).

c) That civilians are not to be attacked (PI 51).

d) That attacks should be directed at military objectives (PI 48, 52).

e) The Rule of Proportionality (PI 51, 57).

f) That weapons must not cause unnecessary suffering (PI 35).

g) That indiscriminate, in the sense of blind, attacks are prohibited (PI 51).

h) That terror attacks are prohibited (PI 51).

II.3. It has modified traditional rules as follows :

a) By extending the not unlimited principle to methods.

b) By clarifying combatant and non-combatant status.

c) By defining military objectives.

d) By extending the unnecessary suffering principle to methods.

e) By extending the definition of indiscriminate attacks to those which employ a method or means of combat — which cannot be directed at a specific military objective, — or the effects of which cannot be limited as required by the Protocol (see Aldrich 779/80).

f) By extending the terror concept to threats of terror. It is to be noted that acts intended to terrorise are prohibited, not those whose incidental effect is to terrorise (Blix 46).

g) By prohibiting reprisals against the civilian population, civilian objects, certain cultural objects, food, crops and drinking water, the natural environment, and dams, dykes and nuclear power stations.

II.4. The Protocol introduces the following new rules :

a) Prohibition on methods or means of warfare which are intended, or which may be expected, to cause widespread, long-term and severe damage to the natural environment (PI 35, 55).

b) The obligation to verify the legality of new means or methods (PI 36).

c) Prohibition of starvation and attacks on objects indispensable for the survival of the civilian population (PI 54).

d) Prohibition of attacks on works containing dangerous forces (PI 56).

III. — A closer study of some aspects of Geneva Protocol I of 1977

The Protocol contains in parts III and IV many provisions dealing with the conduct of combat and the protection of civilians in the combat area. It is a very useful codification and development of customary law. It is not possible in the scope of this report to go into the full details of these provisions. It is intended to concentrate on five areas :

Attacks, military objectives, precautions in attack, precautions against the effects of attack, and weapons.

Other matters dealt with the Protocol, such as cultural objects, protection of objects indispensable for the survival of the civilian population, protection of works containing dangerous forces, protected zones and civil defence will not be dealt with.

III.1. Attacks.

In part III of Protocol I are to be found numerous rules dealing with restrictions on, and precautions to be taken during, attacks.

Attacks are defined as acts of violence against the adversary, whether in offence or defence (PI 49).

The word « attack » has been variously described as use of force to defeat an adverse unit (8), an offensive action to recover territory (9), to defeat enemy forces or to acquire control over territory (7), a general

notion for offensive action (6), use of fire and a movement to defeat the enemy (3), any offensive military operation (10), gaining ground by crushing or repelling enemy forces (4), to take offensive military action (11). Most commentators see no difficulty in applying the definition of Protocol I to military doctrine.

However, there may be misunderstanding (9) and it is necessary in military training to make it clear to soldiers that a party attacked is subject to the same restrictions under international law as are applicable to the attacker (4).

Questions have been raised as to what stage in a minelaying operation amounts to an attack. Is it when the nine is laid, or when it is armed, when a person is endangered by the mine or when it finally explodes? From a purely legal point of view, the answer must be that the attack occurs when a person is immediately endangered by a mine.

The Protocol only applies to attacks which may affect the civilian population on land. It therefore covers land to land, sea to land, and air to land attacks. It excludes air to air, air to sea, sea to air, land to sea and sea to sea attacks (Carnahan 35).

It should be noted that the Protocol applies to attacks in whatever territory conducted, including the national territory of a party to the conflict which territory is under the control of an adverse party (PI 49). It has been argued by *a contrario*, that since it applies to the national territory under the control of an adverse party it does not apply to the national territory not under the control of the adverse party. This is a line of argument that cannot be followed, see also Obradovic 154.

III.2. **Military Objectives.**

Article 48 of Protocol I is a re-statement of customary law, that is that attacks should only by directed against military objectives.

Article 52 of the Protocol contains a partial definition of military objectives. So far as objects are concerned, military objectives are those which (a) by their nature, location, purpose or use make an effective contribution to military action and (b) whose total or partial destruction, capture or neutralisation in the circumstances ruling at the time, offers a definite military advantage.

At first sight this seems a very wide definition. It does, however, have certain limitation :

a) Part (b) of the definition limits part (a) which otherwise would be limitless. The term « definite » was eventually chosen from among various other suggestions such as distinct, clear, direct, substantial, obvious and specific. There seems to be no special significance about the final choice (Kalshoven), but it has been suggested that « definite » rather than « relative » had the effect of excluding the rule of proportionality as a criteria for the interpretation of the term « military objective », for an attack may offer a definite military advantage whether or not excessive collateral damage is caused by it (4).

b) It must be read in conjunction with the prohibition against attacks against civilians and the civilian population in Article 51 § 2. This rules out attacks directed against such civilians. But, subject to the rule of proportionality, it does not prevent attacks directed at military objectives which cause incidental damage to civilians.

c) There is no apparent reason for the inclusion of the words « In so far as objects are concerned » since the definition is sufficiently wide to include areas of land, enemy combatants and their equipment, which are quite clearly military objectives (CDDH/215/Rev 1, Report of Committee III, 2nd session, § 64). It could, of course, be argued that the word « object » does not include combatant personnel (4).

d) The words « in the circumstances ruling at the time » are also a limiting factor (Kalshoven). A cathedral, for example, would not normally be an object of military importance and could not be attacked. If, however, the enemy moved its divisional headquaters into the cathedral it would become a military objective in view of the circumstances ruling at the time, that is the presence of the enemy headquarters.

The presumption of civilian status in Articles 50 and 52 of the Protocol which applies even in the contact zone. This presumption was accepted despite some reservations in the negotiating committee to the effect that soldiers are unlikely to place their lives at risk because of the presumption especially as in the front line civilian buildings may be incorporated in the defensive works (Kalshoven).

There are a number of key words in Article 52. The first of these is *limited.* This word means that care must be used in directing attacks only against military objectives. Article 52 does not deal with the question of collateral damage, which is regulated in Article 57.

The words *nature, location, purpose,* or *use* are sufficiently wide to give the military commander considerable room for manoeuvre, but are subject to the qualifications later in the definition of *effective contribution to military action* and the offering of a *definite military advantage.*

It has been suggested that there is no connection between effective contribution and military advantage. This means that it is permissible to attack bridges, fuel dumps and airfields in the rear areas since these targets make an effective contribution to the enemy's military power in the area of operations. Similarly, diversionary attacks are permitted because by diverting enemy attention away from the point of attack they confer a definite military advantage on the attacker (Carnahan 61). Industry producing goods used by the armed forces and facilities supporting those factories are military objectives but the precise extent to which industry can be made the object of attack is far from clear.

The term *military action* appears to have a wide meaning equating to the general prosecution of the war.

It has always been difficult to define military objectives with sufficient precision for military commanders. There are so many variable factors.

The only certainties are as follows :

a) A purely civilian object contains neither military personnel nor things of military significance.

b) A civilian object which contains military prsonnel or things of military significance is considered a military objective (9, 10).

Taking into account the practice of States and the attempts at codification, the following examples of military objectives might tentatively be given : military personnel, facilities, equipment, works, depots and establishments; works producing or developing military supplies and other supplies of military value; areas of land of military significance such as hills, defiles and bridgeheads; railways, ports, airfields, bridges, main roads; oil and other power installations; communications installations. However, when attacking these targets the proportionality rule must be respected.

It follows from the general rule that attacks on certain types of targets are prohibited. These include cities, towns, villages as such; buildings used by civilians such as dwellings, schools, museums, and other buildings without military significance; foodstuffs and food producing areas; water sources for the civilian population. Special protection, of course, is given under various Conventions to hospitals, internment and prisoner of war camps.

In cases of doubt objects are to be considered as civilian (PI 52).

On reporter has mentioned that making a distinction between military objectives and civilian objects often involves a lot of effort. If it calls for a disproportionate consumption of man, ammunition, or loss of time as a tactical factor, commanders, especially at lower levels may be inclined to be less careful in their selection of targets (6).

There continues in some quarters to be some inexplicable doubt about whether an area of land can be a military objective. A study of armed conflict reveals that areas of land have always featured very prominently in combat. The definitions of « attack » given earlier emphasise this prominence. Denying land to enemy forces is often a principal consideration in military operations. In this respect Protocol I has changed nothing. If an area of land has military significance, for whatever reason, it becomes a military objective. It may be attacked or occupied. It would, therefore, be wrong to say (4) that « civilian intervening areas » can never be a military objective. It is not the definition of military objective, but the other rules of Protocol I that provide the necessary protection. If, for example, an area of land contains civilian objects, the military commander will be obliged to ensure that those civilian objects are not directly attacked and that pracautions are taken to minimise incidental loss. If the rule of proportionality were offended, the action would have to be replanned.

Having decided which are military objectives, the military commander then has to consider whether they can be attacked jointly or whether they must be attacked separately. Article 51 § 5 of the Protocol prohibits as indiscriminate attacks by bombardment which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or area containing a similar concentration of civilians or civilian objects. It has been pointed out that whilst *bombardment* was understood at the conference to mean bombardment by artillery as well as by air, the meaning of *clearly separated and distinct* was far less certain. (Aldrich 780).

No hard and fast rules can be laid down since so much depends on the facts of each case. If, for example, the military objective consists of widely scattered enemy tank formations in sparsely populated country it would be clearly permissible to use weapons having a wider range of effect than would be possible were the attack to be directed at a single munitions factory in the centre of a heavily populated area. Military objectives dispersed about densely populated areas would normally have to be treated as separate military objectives requiring separate attacks (8, 9, 10). One reporter has adverted to

the difficulty of getting information about the exact location of enemy military objectives and the consequent us of an area covering method (8). Of course, there is nothing in the Protocol to prevent the use of artillery covering fire to deny an area to the enemy. That area of land is a military objective. Other rules of the Protocol, such as the rule of proportionality might, however, impinge on this practice.

Another reporter has referred to the difficulty in the choice of means when attacking several targets by artillery fire. He concludes that it is not feasible to separate artillery units below battery level (6).

Aldrich expresses the view that « if the objectives are sufficiently separated so that they can feasibly be attacked separately with the weapons available and if this degree of separation is evident to the attacker, then they must be attacked separately in order to reduce the risks to the civilian population » (Aldrich 780).

Article 51 § 4(a) and (b) of Protocol I may be regarded as a development of the traditional rule which prohibited aimless attacks. In the examples given in Article 51 § 5, elements of proportionality have been introduced into the prohibition of indiscriminate attacks by deeming indiscriminate those attacks which cause excessive incidental damage. Although this is likely to create confusion, it may be regarded simply as a re-statement of the customary proportionality rule in another guise.

But the Protocol goes further in Article 51 § 4(c) by prohibiting as indiscriminate attacks those « which employ a method or means of combat the effects of *which cannot be limited as required* » by the Protocol. This condition, which is new to international law, is unfortunately vague. There is no provision of the Protocol that specifically limits the effects of methods and means. It may be a reference to the rule of proportionality in Article 57. If so, it is superfluous because Article 57 applies anyway. If it is a reference to the Protocol as a whole, it lacks the precision necessary for an offence creating provision (compare Article 85 § 3(b)).

The precise relationship between the rules in the Protocol of proportionality and prohibiting indiscriminate attacks has been closely scrutinised (Krüger-Sprengel, Rauch I). Some believe that indiscriminate attacks will be illegal even if the proportionality rule has not been offended (4). Others believe that the proportionality rule prevails, so that even if an attack is actually indiscriminate, there is no violation of the law if the proportionality rule is not broken.

While it is difficult, applying the language of the Protocol, to come to the same conclusion as those in the second group, on has some sympathy for their argument. After all, who is concerned about the attack's technically being indiscriminate if no civilian is killed as a result?

Perhaps it is better to regard the various provisions of the Protocol as cumulatively requiring commanders to take care in their planning of an attack to ensure that separate military objectives are separately attacked, with incidental damage reduced as much as possible, and that if the incidental damage outweighs the military advantage, the attack must be re-planned. Basically, the commander will have to ask himself three questions before the proceeds with the attack.

a) Is the target a military objective?

b) Is the attack indiscriminate?

c) Is the rule of proportionality likely to be offended?

II.3. **Precautions in Attack.**

Article 57 of Protocol I deals with the prevention and reduction of incidental damage caused by military operations. Commanders must take feasible precautions to ensure that targets attacked are military objectives and that in the choice of weapons or method of attack, the need to prevent incidental damage must be taken into account. This is a conflict of interests which it is difficult to resolve (9). On the one hand efforts to prevent incidental damage must not render defensive measures illusory, especially when protecting one's own territory (9). On the other, the feasible test must not be restricted so far as to render nugatory the protection of the civilian population.

Attacks are to be cancelled or suspended or the plans changed if it becomes apparent that the incidental damage will be out of proportion to the concrete and direct military advantage anticipated. This is the rule of proportionality.

The word *feasible* may be interpreted in the light of the interpretative statements made on signature and ratification of Protocol I and the definition of this term in the Weaponry Convention. In that Convention it is stated that :

« feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. » (3).

Commanders must make their decisions on the basis of the information available to them and the whole of the attack has to be locked at. (See also (10)).

The term « feasible » has rightly ben criticised for its vagueness (8), but it seems that a text shorn of ambiguities either provides insufficient protection or does not provide sufficient flexibility to cover the many situations that can arise in armed conflict. One reporter has opined that feasible used in Article 47 means that all precautions practicable in the given circumstances must be taken (4).

A decision to attack can be taken at any level of command (4) provided that it falls within the Commander's competence to do so under national orders and procedures. This may involve decisions at relatively junior level where an officer is faced with an emergency and may have insufficient time to consult higher authority (7). The commander ordering the attack is responsible for the order if he gave it or, in certain circumstances, it was given on his behalf by his staff (6 and PI 86). Switzerland considers that this paragraph imposes obligations on commanders at battalion and higher levels (9). Others consider that the provisions of Article 57 really affect commanders at brigade and higher level, those at lower level being responsible for carrying out attacks in accordance with humanitarian principles and supervising the conduct of their subordinates (8).

This all has something to do with the question of *superior orders.* Soldiers are required to carry out orders on pain of punishment if they fail to do so. In some countries soldiers are only obliged to carry out lawful orders (e.g. 11) and orders which are contrary to international law would be unlawful. It is very difficult for the recipient of the order to know whether is is lawful or not, especially when he has insufficient information on which to base his judgment. Under some legal systems (e.g. 11) the fact that a person is ordered to commit a crime is no defence. However, the order may be relevant to other defences such as duress, mistake of fact or absence of criminal intent. This is why it is important that it is generally recognised and understood that commanders make their decisions on the basis of the information available to them. This is so from the general commanding the army in the field down to the private soldier. Clearly the general will have more information at his disposal than the private soldier, and any tribunal dealing with the matter will have to look at the situation as the soldier making the decision saw it before assessing his guilt.

It is noteworthy that in Denmark a soldier who obeys an order is not culpable unless he knew that it was illegal or this was self-evident (3).

One reporter has raised the interesting concept of mitigation of guilt, or indeed absolution, where the enemy has failed to comply with its obligations so to site military objectives as not to endanger the civilian population (10). This is, presumably, yet another factor to be taken into consideration by a court.

The *Rule of Proportionality* is a balance. This interests of humanity do not always outweigh military necessity (Johnson; see also 3). On the other hand, military necessity cannot always over-ride humanity. In taking care to protect civilians soldiers must accept some element of risk to themselves. The rule is unclear as to what degree of care s required of a soldier and what degree of risk he must take. Everything depends on the target, the urgency of the moment, the available technology and so on (Walzer).

Writers, on the whole, have not expressed any views as to the factors to be taken into account when establishing whether the balance has been achieved. Are the effects both in favour of the military and to the detriment of civilians to be looked at narrowly or broadly in time and space? Should one look only at the battle or at its long term effects? Some advocate measuring against the contribution that the mischief makes to the end of victory not only the immediate harm to individuals but also any injury to the permanent interests of mankind. A longer-term view is certainly favoured by some. On signing Protocol I one country declared that the military advantage anticipated from the attack relates to the attack considered as a whole, not only from isolated or particular parts of the attack (11).

It seems that those preferring the long-term view would take into account the gravity of the military situation as a whole, particularly the likely loss of the state's own territory. They might even include the prospect of bringing the armed conflict swiftly to an end, thereby saving life. Then, of course, they would also have to take into account the long-term effects, such as the effect on neutral countries and the environment.

One writer has stated that the proportionality rule set out in Protocol I has to be applied on a case by case basis rather than on a cumulative basis (Rauch I). The same writer said elsewhere (4) that the test of excessiveness must be related to a specific act of military violence. He argues in support the use of the word « attack » in § 2 of Article 57 (which sets out the rule of proportionality) whereas the more general term « military operations » is used in § 1 of that Article (which deals with a more general concept of protection). If he is right, a long-term view would be inadmissable, although there seems to

be scope for a mid-term approach such as that advocated by the UK in their declaration.

It has been pointed out that the restrictive words of Protocol I « *concrete and direct military advantage* » mean that indirect and long-term military advantage is not to be considered (Krüger-Sprengel) or mean that at least some remote advantages to be gained some unknown time in the future must be excluded (Carnahan 61).

It seems, though, whether one takes a short-term or long-term view, one must apply the same measure to each side of the proportionality equation : military necessity and humanitarian interests.

One reporter has suggested that a commander's actions must be assessed by application of the following standards :

a) The ability of the military commander and his staff.

b) Their quality to discharge their functions conscientiously.

c) Their taking into consideration the circumstances ruling at the time (6).

To conclude, the rule, even as stated in the Protocol, lays down very few guidelines for the military commander. It cannot, because situations are so infinitely variable.

It is relatively easy to think of extreme examples such as the counter-attack on an enemy stronghold in a village. If the commander directs his attack at the stronghold, the risk of excessive incidental loss is minimal. If he destroys the whole village, there is a much greater risk of infringing the proportionality rule (8).

It is the commander who has to make the decision. He must weigh up the military advantages and the incidental loss. He must decide what steps are feasible to verify that objects to be attacked are military objectives and what feasible precautions can be taken to minimise incidental loss. He may be able to make a comparison between different methods of attack, so as to be able to choose the least excessive method compatible with military success (8).

But his decision may be questioned later by a tribunal dealing with grave breaches under Article 85 of the Protocol. It would seem that such a tribunal would have to look at the situation as it appeared to the military commander at the time, and then decide whether, in its opinion, the proportionality and feasibility tests were satisfied. If the tribunal found that the civilian object damaged was clearly separate, or that the military advantage was either nil or negligible, it might

take the view that the commander had failed to do everything feasible or take all reasonable precautions (10). The commander should, of course, be given the benefit of any doubt.

As elsewhere, the danger of a purely subjective approach is the greater risk of excessive incidental damage being caused (8).

III.4. Precautions Against Effects of Attacks.

Article 58 seems, at least at early stages of hostilities, to place the responsibility primarily on the civil authorities of a State to remove civilians from the vicinity of military objectives, to avoid locating military objectives in or near densely populated areas and to take other necessary precautions to protect them from the effects of military operations. Some of these steps can be taken in peace-time or at an early stage in the hostilities such as the provision of air-raid shelters and adequate civil defence measures, and the decision as to where new military facilities should be located. Evacuation of civilians from areas likely to be attacked would only occur when there is an immediate danger and when evacuation would cause less hardship and suffering than leaving civilians where they are.

As hostilities become more intense so the military authorities would become more involved in these issues, especially where civil administration is absent or in disarray (10). But some reporters see the civil defence organisation as always taking the lead, in consultation with the military (8). This applies mainly to cases of defence of one's own territory.

Obviously, the military authorities would have to take into account Article 58 in any decisions about the siting of new military facilities or the moving of existing ones. Similarly, they would have to bear Article 58 in mind if administering an area of territory. They would also, no doubt, be called upon to assist the civil authorities, especially with repair and engineering projects (8).

The importance of close co-operation at high level between the civil and military authorities has been stressed by many reporters (7, 9, 3, 8). This is particularly so where the armed forces of the State are operating on allied territory (6). The civil authorities will be concerned mostly with passive protection, such as fire-fighting, nuclear and chemical protection of the civilian population, black-out precautions (9, 3) and with fixed installations (8), whereas the military will be concerned with active protection, such as the siting of military objectives (9) and with mobile units (8). Passage of information, for example,

air-strike warnings, between military and civil authorities is also important (3). The precise division of responsibility between the civil and military authorities is a matter of national, rather than international law, but the Protocol places an obligation on States to make the necessary arrangements (4).

The word feasible in Article 58 has the special meaning already referred to. Although some reporters seem to detect a difference of emphasis (4, 8), it is not clear whether there is any significant difference between the phrases « everything feasible », « all feasible precautions » or « to the maximum extent feasible ». They all seem to imply that everything must be done that is practicable in the circumstances. When considering what is feasible, reporters have referred to considerations of military expediency (10, 8) especially the defence of one's own territory (9) and expense (6).

Under the heading of other necessary precautions, it has been said that it is impossible to lay down universal standards. Differences of geography, politics and development will play a part in any decisions. These questions include the density of population, civil defence traditions, local standards of living and recent experience of armed conflict. In at least one country precautionary measures include : warning procedures, an evacuation service, shelters and a co-ordinated emergency service (3).

III.5. **Weapons.**

One expert has described the law of war as prohibitive law in that it recognises the use of force in principle, but prohibits certain uses of force. These prohibitions are to be found not only in specific treaties, but also in general treaties, customary law and basic legal principles. Use of weapons is prohibited when a specific prohibition or prohibition by analogy applies (1).

Article 35 of Protocol I re-affirms and develops certain basic principles of customary law (1) by saying :

a) The right of the parties to the conflict to choose means of warfare is not unlimited.

b) It is prohibited to use weapons of a nature to cause superfluous injury or unnecessary suffering.

The Protocol goes on to prohibit weapons which are intended, or may be expected, to cause widespread, long-term and severe damage

to the natural environment. In this connection, one may also refer to the UN Environmental Modification Treaty of 1977 (3).

Article 36 goes on the place a special obligation on States to consider, when acquiring or developing new weapons, whether the use of such weapons might infringe international law. Such law will include not only specific weapons treaties but also general principles including, perhaps, rules of proportionality and in discriminateness (4) although one expert has said that the rule of proportionality is not to be applied in developing new weapons since military and humanitarian considerations cannot be balanced in abstract terms, they must be related to a definite situation (Krüger-Sprengel 22).

A State conscious of its obligations under this Article may establish a system of vetting new weapons such as the inter-departmental committee in Switzerland (9) or by placing an obligation on an official who can take expert advice (3).

The problem, as with all general rules, is of evaluation. What amounts to unnecessary suffering or unlimited means of warfare? One reporter considers that the use of weapons that cause excessive injury cannot be justified on the grounds that it will lead to an early cessation of hostilities (10). Others have referred not only to the need to look at the characteristics of the weapon, but also at targets it is likely to be used against (7, 3) and the way in which it is to be used (2).

It makes very much more sense if treaties are drawn up dealing with specific weapons, and the basic principles of Article 35 can then be used as guidance by those negotiating the special treaties.

In 1980 a new convention was drawn up under the auspices of the United Nations which :

a) Prohibits weapons the primary effect of which is to injure by fragments which cannot be detected by X-rays.

b) Regulates the use of mines, booby-traps and analogous devices in land warfare.

c) Prohibits the delivery from the air of pure incendiary weapons against targets in populated areas, and regulates other of incendiary weapons.

A brief review of the convention has been published by Fenrick.

The precise relationship of this convention to Articles 35 and 36 of Protocol I has been extensively studied by the committee for the protection of human life in armed conflict of this Society (see, e.g.,

Rauch II - Hughes-Morgan). It has been suggested that the convention supplements, but does not derogate from, the provisions of Protocol I, even on the question of mines and incendiary weapons (4). Others see this convention as an application of the rule of proportionality, a compromise between military and humanitarian interests, an attempt to give meaning to the general provision of the Hague Rules and Protocol I and as a complément to them (8). The relation between the two has been described as the relation of the general rule to the specific rule (6, 9, 1 and 3).

The use of *mines* is of particular legal interest. Mines are weapons of crucial importance for defence against invasion by off-setting, to some extent, the attacker's advantage of surprise. They can be used to delay and channel an advance or plug gaps in the defences. Mine-laying of large areas by traditional methods is a time-consuming process. Minefields laid in anticipation of attack may not be ideally placed when the attack materialises. Remotely delivered mines enhance defence capabilities because mines can be laid more rapidly and in the right places. The problem with mines, however, is that although intended to be used against military objectives, they are not directly aimed at the target by the user as occurs, for example, with a rifle or certain anti-tank missiles.

It follows, therefore, that mines represent a danger for one's own troops as well as the civilian population unless carefully controlled. Even after the cessation of hostilities they continue to pose a threat until they have been finally cleared. Remotely delivered mines cause further complications. While the civilian population may be aware, by seeing the mine-laying operation, of the whereabouts of traditionally laid mines, they may be unaware of the arrival of remotely delivered mines. On the other hand, remotely delivered mines are only laid when it is necessary to do so and usually when the thrust of an enemy attack is known. To this extent the civilian population is better protected because those mines are not laid in such extensive areas or for such long periods of time. Usually they are fitted with self-neutralising mechanisms which render them useless after a certain lapse of time.

The Weaponry Conference was concerned, therefore, with finding ways of protecting the innocent from the dangers of mines at the same time preserving this importance means of self-defence. The new mines Protocol achieves this aim in the following ways :

a) By prohibiting indiscriminate use, and requiring precautions to be taken to protect the civilian population, especially in populated areas.

b) By requiring the recording of all pre-planned minefields and areas where there has been large-scale and pre-planned use of booby-traps.

c) By prohibiting the use of remotely delivered mines unless such use is connected with military objectives and unless either their location is recorded or they are fitted with self-neutralising mechanisms.

d) By prohibiting certain types of booby traps.

e) By laying down rules for the protection of UN forces and missions.

f) By requiring States, at the end of hostilities, to publish information about the location of mines and booby-traps and to co-operate in their clearance.

Without the mines Protocol it would have been difficult to interpret and apply the provisions of Article 51 of Protocol I relating to *indiscriminate attacks.* The mines Protocol, therefore, contains following special rules on mines :

« The indiscriminate use of weapons to which this Article applies (mines, booby-traps and other devices) is prohibitied. Indiscriminate use is any placement of such weapons :

a) which is not on, or directed against, a military objective; or

b) which employs a method or means of delivery which cannot be directed at a specific military objective; or

c) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. »

It follows that the Weaponry Convention is both wider and narrower in scope than Article 35 of Protocol I. Wider, because it extends beyond the humanitarian principles of superfluous injury and unnecessary suffering. Narrower, because it only applies to the weapons dealt with in the Protocols annexed to the convention (7).

IV. — Conclusion

The negotiating of treaties on the law of armed conflict is a difficult and sometimes frustrating experience for those involved. As has been emphasised elsewhere in this report, the final result always represents a compromise between the interests of humanity and military necessity, especially the defence of one's own territory against aggression. As with all compromises, it tends to please no-one. Neither those seeking the maximum protection for the innocent and even for combatants nor those who are loath to give up any military advantage which boosts their defence capability will be satisfied. Because of conflicting interests, development is slow. We are perhaps now accepting as reasonable and practicable measures that were being advanced by the theorists a hundred years ago. Developments in the law of armed conflict seem to drag behing developments in military technology. New experience of armed conflict tends to point to the need for new rules for the protection of victims of war. Long negotiations, hard bargaining, late-night sessions and attempts to seek solutions often lead to tortuous and ambiguous language. The product may be difficult to interpret and apply. Military commanders may be tempted, on randing Protocol I to put it on one side and say « this is too difficult ». Nevertheless, it performs a useful purpose. The greatest problem with customary law is knowing what the law is. The codification, however worded, is an improvement because the law is written down for all to see. As the ICRC have rightly said, ignorance is the worst enemy of the Geneva Convention. The same is true of customary law.

It is considered that despite its deficiencies, Protocol I is a useful step forward in the development of the law of armed conflict and a useful codification of many customary principles. Nowadays a military commander can actually find written down all he needs to know about the law of armed conflict. While at first sight it may appear difficult and complicated, a close analysis does not bear out this initial prejudice. It is, therefore, the task of military lawyers to study the Protocol in detail and to analyse it, and it is hoped that this report will provide some assistance in that respect, so that in their advice and publications, particularly training pamphlets, the law can be put across in simple and straightforward terms that can be understood and applied by the soldier.

V. — Résumé

Négocier des traités de droit des conflits armés est une expérience difficile et parfois frustrante pour ceux qui y sont mêlés.

Comme souligné ailleurs dans ce rapport le résultat final représente toujours un compromis entre les intérêts humanitaires et la nécessité militaire, spécialement la défense de son propre territoire contre l'aggression. Comme tous les compromis, il ne peut plaire à tous. Pas plus à ceux qui recherchent la protection maximale des innocents et même de combattants, qu'à ceux qui ne renoncent qu'à contre-cœur aux avantages militaires qui vantent leurs possibilités de défense. A cause d'intérêts contraires le développement en est plus lent. Nous acceptons peut-être maintenant comme raisonnables et praticables des mesures qui ont été avancées par des théoriciens il y a une centaine d'années.

Les développements du droit des conflits armés semblent être à la traîne de ceux de la technologie militaire. De nouvelles expériences en conflit armé démontrent le besoin de nouveaux réglements pour la protection des victimes de la guerre. De longues négociations, de durs marchandages, des sessions nocturnes et des essais de solutions aboutissent souvent à un language tortueux et ambigu. Le résultat peut être difficile à interprêter et à appliquer.

Les commandants militaires seront peut-être tentés, en lisant le Protocole I, de le mettre de côté en disant : « c'est trop difficile ». Néanmoins il remplit un rôle utile. Le plus grand problème avec la coutume c'est de savoir ce qu'est le droit.

La codification, quelqu'en soient les mots, est une amélioration parce que le droit est écrit et visible pour tous. Comme le dit à juste titre le CICR, l'ignorance est le pire ennemi de la Convention de Genève. La même chose est vraie pour la coutume.

L'on considère que malgré ses lacunes le Protocole I est un pas en avant utile dans le développement du droit des conflits armés et une codification utile de maints principes coutumiers.

A l'heure actuelle un commandant militaire peut trouver noir sur blanc tout ce qu'il doit savoir à propos du droit des conflits armés. Quant à première vue il peut paraître difficile et compliqué, une analyse plus profonde infirme ce préjudice.

C'est dès lors la tâche des conseillers juridiques militaires d'étudier le Protocole en détail, de l'analyser, et l'on espère que ce rapport proposera une certaine aide à ce propos, afin que dans leurs avis et publications, en particulier les fascicules d'entraînement, le droit puisse être expliqué en termes simples et concrets qui pourront être compris et appliqués par chaque soldat.

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