PROTOCOL I TO THE GENEVA CONVENTIONS: A VICTIM OF SHORT SIGHTED POLITICAL CONSIDERATIONS?

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[*Armed struggles by peoples to achieve self-determination and the rise of guerrilla warfare has revealed deficiencies in the humanitarian law of armed conflict. The international community attempted to redress some of these deficiencies by enacting Protocol I and II to the Geneva Conventions of 1949. Protocol I, dealing with international conflicts, has aroused much controversy culminating in the Australian Government's indefinite adjournment of the legislation ratifying the Protocols. The author examines the grounds of objection to the provisions of this Protocol and concludes that humanitarian considerations outweigh short-lived political ones and Australia should ratify both Protocols forthwith.*]

INTRODUCTION

In March of this year, the Australian Government introduced legislation into the House of Representatives to ratify the 1977 Protocols I and II to the Geneva Conventions of 1949.[1] After the Opposition announced its unexpected withdrawal of support, the Government adjourned the debate on the legislation and it appears ratification is to be indefinitely delayed.[2] Protocol I, dealing with international armed conflicts and Protocol II, dealing with internal conflicts represent the latest attempt by the international community to continue the codification and development of the law[3] of armed conflict.[4]

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1 On the 2 March 1989, the Geneva Conventions Amendment Bill 1989 was introduced into the House of Representatives.

2 When debate commenced on the Bill, the Opposition announced that it would not support the legislation. This was despite their consistent previous statements of support for the Protocols. Furthermore, the present Opposition had been the government of the day during the negotiations leading up to the enactment of the Protocols. In light of this withdrawal of support, the Government adjourned debate on the Bill. In a press release issued by the Attorney-General, Lionel Bowen, on 9 March 1989, it was stated that 'the underlying principles were of such importance and self evident value that any attempt to push the legislation through without bi-partisan support would be highly inappropriate.'

3 The codification of the law of armed conflicts commenced in the latter half of the 19th Century. This matter is discussed further *infra.*, and see generally Schindler, D. and Toman, J.(eds), *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and other Documents* (2nd ed. 1981) and Friedman, L., *The Law of War, A Documentary History* (1972).

4 'Armed conflict' is a term which has come to replace such terms as 'state of war'. The Charter of the United Nations, by Article 2(4), has outlawed the use of force except in restricted circumstances such as self-defence (Art. 51). The exact extent of the Charter prohibition on the use of force and whether a declaration of war is still permissible under the Charter is unclear and has given rise to much debate amongst international lawyers. This uncertainty is one of the factors which has led to States discontinuing the practice of declaring war and in fact often denying the existence of a state of war even where hostilities have reached a high level of intensity. For example, Israel refused to acknowledge the existence of a state of war in relation to the Arab/Israeli conflict of 1968. For a discussion of the other factors which have led to the discontinuance of the declaration of war by States and the significance of the practice for the laws of war, including the traditional body of rules as to belligerency and neutrality, see Schindler, D. 'State of War, Belligerency and Armed Conflict', in Cassese, A.(ed.), *The New Humanitarian Law of Armed Conflict* (1979). For a discussion of the outlawry of war and the extent of the prohibition of the use of force under the United Nations Charter see Dinstein, Y., *War, Aggression and Self Defence*(1988).

These Protocols are of special significance for the law of armed conflict generally, and humanitarian law in particular, for two reasons. First, the Protocols represent the first attempt since 1907 to update the Law of the Hague, the term often used to describe the law of warfare proper, that is the means and methods of warfare. Secondly, they recognize the interdependence of the Law of the Hague on the one hand and on the other the Law of Geneva, traditionally the source of humanitarian law whose purpose is to ensure respect for human life in armed conflict as far as is compatible with military necessity and public order. These laws have previously developed quite separately.[5] Protocol I, however, makes significant progress in the protection of the civilian population against the effect of hostilities which necessarily requires the imposition of limitations on the means and methods of warfare.[6] This acknowledgement by the international community of the fact that these two bodies of law are interdependent and should be dealt with in the one set of rules is a great step forward. To treat the rules of humanitarian law separately from the rules as to the means and methods of armed conflict is unrealistic given the conduct of modern warfare, which involves the civilian population to an unprecedented extent. Despite these jurisprudential advances, the Protocols have aroused considerable controversy at all stages of their development, from the Diplomatic Conferences of 1974-1977 at which their terms were negotiated, to the current debate taking place in the international community over whether these Protocols should be ratified. The debate about the Australian Government's proposal to ratify the Protocol parallels the concerns of the wider international community. From the beginning Australia was a strong supporter of the move initiated by the International Committee of the Red Cross (I.C.R.C.) to further develop and codify the law of armed conflict. The Australian delegation to the Diplomatic Conferences took an active part in all the negotiations and was regarded as providing an influential moderate voice in the debate. Why then did the Government delay introducing legislation to ratify the Protocols, and why has the Opposition withdrawn its earlier support? These actions appear to be a response to the pressure brought to bear on the Australian Government, and on all its allies, by the United States' Government not to ratify Protocol I.

The provisions of Protocol I contain the new rules for international conflicts. Protocol II, on the other hand, sets out the new rules for civil conflicts. At a very early stage of the negotiations, it became clear that the most controversial questions to be resolved by the Diplomatic Conference were in relation to certain

[5] The sources of humanitarian law are various, both codified and customary. There has been much discussion amongst commentators as to whether the law of Geneva and the law of the Hague are separate bodies of rules and the true content and sources of humanitarian law. Such a discussion may seem somewhat academic. States, however, regard such matters as the means and methods of warfare more seriously than they do narrowly defined humanitarian law. This is illustrated by the comparative ease of the negotiation of the four Geneva Conventions of 1949 contrasted with the difficulties experienced in the negotiating of the Hague Regulations of 1907 and 1909. Indeed, the negotiation of Protocol I would not have aroused the controversy it has if its provisions were restricted to an improvement of humanitarian rules without attempting to interfere with the means and methods of combat.

[6] Art. 48 of Protocol I codifies for the first time the fundamental principle of humanitarian law that the parties to a conflict shall always distinguish between the civilian population and combatants.

aspects of Protocol I. Although several States attempted to ensure an effective Protocol for civil wars, their attempts were frustrated by the political agenda of other states which managed to shift the concentration of efforts to Protocol I. Consequently, the provisions of Protocol II achieve very little of significance and have largely escaped protest. Therefore, the focus of this paper is upon Protocol I. It is proposed, first, to provide a brief background to the development of humanitarian law culminating in the provisions of the Protocols, and then to examine the arguments for and against the ratification of Protocol I. Despite the flaws in this document, it is important that Australia and the rest of the international community should ratify this Protocol, on the basis that humanitarian considerations should prevail over political ones.

THE BACKGROUND OF THE PROTOCOLS

Although nearly all civilizations throughout history have placed some restraints on behaviour in war,[7] the attempt to establish a system of binding international law did not begin until the codification of the law of armed conflict in the latter half of the nineteenth century. Up to this stage the laws of war were of a customary nature only. Individual States had on occasions entered into agreements to provide for special problems that might arise in war.[8] The first attempt, since the exposition of the classical law of war by Grotius, Vattel and Gentili,[9] to codify the laws and customs of war was the Code of Land Warfare drawn up by Francis Lieber during the American Civil War for the Armies of the United States.[10] To what extent this code represented customary law is not clear, but it provided at least the groundwork for the further development and codification of the law of war. The Code was the basis of the work of the Brussels Conference of 1874 and the Oxford Manual of the Institute of International Law, which were themselves the basis of the Hague Conventions on Land Warfare and the annexed Regulations, adopted in 1899 and 1907.

These documents all dealt with the means and methods of warfare — the law of the Hague. Humanitarian law, the law designed to ensure respect for human beings as far as compatible with military necessity, developed separately. The genesis of modern humanitarian law is to be found in the writings of a Swiss banker, Henri Dunant, who, on witnessing the appalling suffering after the Battle of Solferino in 1864, described it in detail in a book entitled *A Memory of Solferino*. As a result, the Swiss Government formed an international committee to discuss ways of improving conditions of warfare. This committee was to

[7] Friedman, L. (ed.), *The Law of War — A Documentary History Vol. 1*(1972) 3 ff; Montross, L., *War Through The Ages* (1960); Nussbaum, A., *A Concise History Of The Law Of Nations* (1961): Wright, Q., *A Study Of War* (2nd ed. 1965).

[8] *E.g.* The United States-Prussia Treaty of Amity and Commerce of 10 September 1785; 8 Stat. 84, T.S. 292.

[9] H.Grotius, *De iure belli ac pacis libri tres* (English Trans. 1925); Vattel, E., *Le Droit des Gens ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (English Trans. 1933); Gentilli, A., *De iure belli libri tres* (English Trans. 1933).

[10] Lieber's code was published in 1893 by the War Department as General Orders No. 100, 'Instructions for the Government of the Armies of the United States in the Field'. For a discussion of the Code and its influence on later developments in the law of warfare, see Harley, L., *Francis Lieber, His Life and Political Philosophy* (1899).

become the International Committee of the Red Cross (I.C.R.C.). In 1864 the Committee drafted an International Convention for the care of all sick and wounded military personnel,[11] the first step in the codification and development of the principles of humanitarian law.

Over the years the categories of protected persons has grown to include, *inter alia*, shipwrecked members of armed forces,[12] prisoners of war[13] and civilians in occupied territories.[14]

Many factors have influenced this process of codification of the law of armed conflict. With each new major outbreak of international hostilities new problems arise in the conduct of war which render the existing law inadequate. After the cessation of these hostilities the international community attempts to devise new rules to overcome these changed circumstances. For example, after the Second World War it became apparent that the treatment of civilians in occupied territories had been unregulated at an international level, with disastrous consequences. This became a priority for the I.C.R.C. in its work in revising the laws of war after this conflict.[15]

The changing role of war was another important factor in the development of the law of armed conflict. Until the end of the First World War, war was regarded as an instrument of national policy or, to use the commonly quoted statement of Clausewitz, 'War is a mere continuation of policy by other means'.[16] The age-old debate, which had been the focus of all studies of war since Christian times, namely the distinction between just and unjust causes of war,[17] had been abandoned. The result was a shift in concentration from the *ius ad bellum* (the law of warfare) to the *ius in bellum* (the law in warfare). The growth of imperialism and the birth of the first socialist state in 1917 also exerted considerable influence on the directions taken in the regulation of armed conflict.

The increasing destructiveness of war as a result of the rapid advances in weapons and the influence of Soviet ideology (the Marxist theory of the just war), led to a new emphasis on the outlawing of the use of force,[18] culminating in the prohibition on the use of force in Article 2(4) of the Charter of the United Nations .

[11] 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.

[12] 1899 Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864.

[13] Third Geneva Convention Relative to the Treatment of Prisoners of War 1949.

[14] Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.

[15] See Part III of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.

[16] Clausewitz, C.M., *On War* (1968) Bk 1, 101.

[17] There is a wealth of literature on the concept of the just war: *e.g.* Johnson, J. T., *Ideology, Reason and the Limitation of War* (1975); Bainton, R. W., *Christian Attitudes Toward War and Peace* (1960); Ramsay, P., *War and the Christian Conscience: How Shall Modern War Be Conducted Justly?* (1961); O'Brien, W., *The Conduct of Just and Limited War* (1981); Best, G., *Humanity in Warfare* (1980); Russell, F. H., *The Just War in The Middle Ages* (1975); Van Der Mole, *Alberico Gentili,and the Development of International Law* (2nd rev. ed. 1968); Scott, J. B., *The Spanish Origins of International Law* (1934).

[18] *E.g.* Articles 12,15,and 16 of the Covenant of The League of Nations imposed some restraints on the liberty of States to resort to war and established a rudimentary collective security system. See also the Treaty for the Renunciation of War, usually referred to as the Kellogg-Briand Pact, signed at Paris in 1928, which came into force for almost all States in the world.

In light of this prohibition, the desirability arises of the international community addressing the issue of the further codification of the law in warfare, rather than concentrating solely on the prohibition of warfare. It is feared that attempts by the international community to further codify the law of armed conflict involves some acknowledgement that conflict is inevitable and even acceptable. Arguments based on the same concerns were raised against the movement which led to Protocols I and II. Although this viewpoint did not prevail, it influenced the debate, in particular in relation to the extension of the scope of Protocol I. To acknowledge some internal conflicts as international seemed to some states a retrograde step in the cause of the outlawing of force.

The combination of the emergence of nuclear weapons and the perceived advantages of peaceful co-existence has seen the disappearance of wars of aggression between major powers. But wars have by no means been eliminated. Another factor of great significance, especially in the influence it has had on the latest developments in the law of armed conflict, is the de-colonization process which commenced after the Second World War[19] and continues to a certain extent today.[20] It is these emerging nations which have changed the balance of power in the United Nations and which were instrumental in the broadening of the scope of Protocol I to cover certain non-international conflicts. Their fight for independence has also fundamentally changed the face of warfare itself. Wars of self-determination saw the rise of guerilla warfare, the characteristics of which rendered the traditional rules of war quite inappropriate and unworkable.[21]

One way around this difficulty is to argue, as many members of the international community still do, that these are civil disputes and as such are primarily a domestic matter.[22] However, it is an inescapable fact that civil wars of one sort or another are the predominant form of armed conflict since the Second World War and the civilian casualties of such disputes have reached catastrophic

[19] This has seen an increase in the membership of the United Nations from 76 in 1955, to 159 in 1986.

[20] A recent example of a colonial dispute is the situation in New Caledonia. Whether the situation there attracts the operation of Protocol I depends on a number of factors. One is obviously whether this is an 'armed conflict in which peoples are fighting against colonial domination . . . in the exercise of their right of self determination' within the meaning of Art 1(4) of the Protocol. Another issue is as to what level of hostilities is required before the conflict becomes an armed conflict sufficient to attract the operation of Protocol I and whether the Liberation Organization has acceded to the Protocol. These issues are discussed further *infra*.

[21] Suter states that guerrilla warfare has now revealed three major limitations in the Geneva Conventions. First, the Conventions are the product of an era of conflicts fought along conventional lines. Secondly, they blur the distinction between international and non-international conflicts and the Conventions only regulate the former.Finally,guerrilla warfare is political warfare, warfare for ideology not for territory or fortified lines, with the result that many military principles as taught in military academies are redundant. See Suter, K., 'The Regulation of Guerrilla Warfare' *International Humanitarian Law Bulletin*, No. 3, October 1985, 11.

[22] Civil wars have always posed a serious problem for humanitarian law as historically they are bitterly fought and the bloodiest of all conflicts. In particular, the position of civilians in these conflicts has always been one of great vulnerability. The Red Cross managed to secure the addition of Common Article 3 to the 1949 Geneva Conventions to provide a minimum standard of protection for persons taking no active part in hostilities in armed conflicts not of an international character. Protocol II to the Geneva Conventions is an attempt to expand these principles, but is widely regarded as disappointing in its achievements. Any attempt to make this an effective Protocol seems to have been abandoned early on, and all the energies of the Diplomatic Conference were devoted to the resolution of the disagreements over the scope of Protocol I.

proportions.[23] By way of illustration, a study by Kende[24] of twenty-five years of local wars from 1945-1969, revealed that out of 97 wars during that period, only 15 were classified as being inter-state wars, primarily frontier in nature.[25] The other 82 wars were either characterized as internal anti-regime wars (67)[26] or internal Tribal wars (15).[27] Contrast these figures with the study made by Quincy Wright of wars between 1900-1941, of which 79% were international wars and only five were civil wars.[28] The high level of foreign participation which exists in many of these conflicts adds to the difficulties for their regulation by the law of armed conflict.[29]

From as early as the 1950s, various commentators had been advocating a revision and update of the laws of war[30] in the light of the various factors discussed above, namely the changes in the means and methods of warfare, and the effects on civilians. It was argued that the 1949 Geneva Convention on Civilians was not effective to protect civilians from new methods of warfare, particularly aerial bombardment. The 1949 Convention had only protected civilians in occupied territories, civilian medical establishments and interned civilians. What was needed were provisions guarding against civilians being the objects of attack. The Hague Regulations had merely provided that the right of belligerents to adopt means of injuring the enemy was not unlimited[31] and placed certain restrictions on bombardments by land or sea.[32]

The I.C.R.C. took on the task of the revision of the law of Geneva, and in 1956 completed a set of Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Time of War.[33] These draft rules were submitted to the XIXth International Red Cross Conference, held in 1957. No action was taken on the draft rules, and the question of the further revision of the law of war was shelved by the international community until the work being done by the United

23 It has been stated that civilian losses, as a percentage of all losses, have been estimated at 5% in First World War, about 50% in the Second World War and have been estimated as at least 70% in the Vietnam War: Rosas, A., *The Legal Status Of Prisoners Of War* (1976), 31. It has been estimated that the 25 wars going on in the world in early 1988 have killed about 3 million people, fourth-fifths of them civilians: 'The World's Wars', *The Economist*, March 1988.

24 Kende, L., 'Twenty-Five Years of Local Wars'(1971) 8 *Journal of Peace Research*, 5.

25 Examples of such conflicts are those between Israel and the Arab States (1949-63 and 1967); India and Pakistan (1956 & 1965); India and China (1962).

26 Examples of such conflicts are those in Tchad (1968); South Yemen (1968); Sudan (1965-69) Algeria (1954-62); Angola (1961-) and Mozambique (1964-).

27 Examples of such conflicts are the Sudan (1965-69); Iraq (1961-64 and 1965-70) and China and Tibet (1959).

28 Wright, Q., *op. cit.* Table 41.

29 For an analysis of the applicability of international humanitarian law to such conflicts and the problems that such conflicts pose for the law of war, see Gasser, H., 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon'(1978) 33 *American University Law Review* 145. See also Bindschedler, R., 'A Reconsideration of the Law of Armed Conflicts', in *Conference on Contemporary Problems in the Law of Armed Conflicts* (1971) 1; Friedman, W., 'Intervention, Civil War and the Role of International Law' (1965) *Proceedings of the American Society of International Law* 67; Rosas, A., *op. cit.* 282-92.

30 Best, G., *op. cit.* 316-7.

31 Article 1 of the Hague Regulations Concerning the Laws and Customs of War on Land 1907.

32 Articles 25 and 26 of the Hague Regulations and Articles 1 and 3 of the Hague Convention respecting Bombardment by Naval Forces in Time of War 1907.

33 I.C.R.C. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956). Art. 6, paragraph 1 of the Rules stated: 'attacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited. This prohibition applies both to attacks on individuals and to those directed against groups.'

Nations Human Rights Commission and the General Assembly on human rights in times of peace began to expand logically into concern for human rights in armed conflicts. The International Conference on Human Rights held in Teheran in 1968 adopted a resolution[34] requesting the General Assembly to invite the Secretary-General to study the need for advances on existing humanitarian protections, particularly for civilians, in times of war. As a result, the Secretary-General of the United Nations submitted three substantial reports (in 1969,[35] 1970[36] and 1971[37]) setting out the areas of humanitarian law which needed attention. The I.C.R.C. convened two conferences of Red Cross experts and two conferences of Government experts 38 which came up with the text of two draft Protocols, Protocol I, relating to international conflicts, and Protocol II, relating to non-international conflicts.[39]

These draft texts were submitted to the Diplomatic Conference summoned by the Swiss Federal Council in 1974. The Conference met every year for a period of several months,[40] until on 8th June 1977 the two Protocols were adopted by consensus.[41] There are 62 signatory states to Protocol I and to date 78 states have

[34] Resolution XXIII, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41, 18 (1968).

[35] Respect for Human Rights in Armed Conflicts (First) Report of the Secretary-General, U.N. Doc. A/7720 (1969).

[36] Respect for Human Rights in Armed Conflicts (Second) Report of the Secretary-General, U.N. Doc. A/8052 (1970).

[37] Respect for Human Rights in Armed Conflicts (Third) Report of the Secretary-General, U.N. Doc. A/8370 (1971).

[38] For details of the Conference, see I.C.R.C. Report on the Work of the Conference, 2 vols. Forty one States were invited to attend the First Conference of Government Experts in 1971. After some criticism of this limited representation, the I.C.R.C. invited all parties to the 1949 Geneva Conventions to attend the 1972 Conference, 77 States ultimately attended.

[39] As one commentator has stressed, the Protocols have to be read in conjunction with the relevant provisions of the 1949 Geneva Conventions. The Protocols are documents supplementing the Conventions because it was feared that a new formulation might have an adverse effect on the widely accepted provisions of the Geneva Conventions: Bothe, M., Partsch, K., and Solf, W. (Bothe *et al.*), *New Rules For Victims Of Armed Conflicts Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982), 7. See 'Statement of Professor Baxter' in Levie, H., (ed.), *When Battle Rages How Can Law Protect?* 73, 78. How real were these fears? There are 165 States parties to the Geneva Conventions of 1949 and it appears that many of the provisions of the Conventions represent customary international law. In fact some have attained the status of peremptory norms of general international law, *ius cogens*. Therefore the threat was probably in reality of little substance.For an analysis of the opinions of courts and legal experts on this question in the context of the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War, see Rosas, A., *op. cit.* at 96-104. Particularly relevant for the approach to the formation of custom and the principles of humanitarian law as customary law is the judgment of the International Court of Justice in *Military and Para-Military Activities in and Against Nicaragua. (Nicar. v. U.S.)* 1986 I.C.J. 14 (Judgment of June 27). See also Meron, T., 'The Geneva Conventions as Customary Law'(1987) 81 *American Journal of International Law* 348, and for a discussion of the 1977 Protocols as customary international law see Greig, D. W., 'The Underlying Principles of International Humanitarian Law' 9 *Australian Yearbook of International Law* 46, 72-84.

[40] The documents of the Conference were published in 1978 by the Federal Political Department, Berne, Switzerland, in seventeen volumes of *Official Records*. For details of the content of these volumes, see Bothe *et al.*, *op. cit.* 11; Levie, H., *Protection of War Victims, Protocol I to the 1949 Geneva Conventions* (1979), which contains a compilation of documents in relation to selected articles of Protocol I. For a description of the work of the Conference, see Baxter, R. R., 'Humanitarian Law or Humanitarian Politics?'(1975) 16 *Harvard International Law Journal* 1; Forsythe, D. P., 'The 1974 Diplomatic Conference on Humanitarian Law: Some Observations'(1975) 69 *American Journal of International Law* 77; Cantrell, C. L., 'Humanitarian Law in Armed Conflict: The Third Diplomatic Conference'(1977) 61 *Marquette Law Review* 253; Green, L. C., 'The Geneva Humanitarian Law Conference, 1975'(1975) 13 *Canadian Yearbook of International Law* 96.

[41] For a comprehensive analysis of the proceedings of the Diplomatic Conference and the

ratified or acceded to this Protocol. There are 58 signatory States to Protocol II and to date 69 States have ratified or acceded to it. No major Western or Soviet bloc States have accepted the Protocols.

FIELD OF APPLICATION OF PROTOCOL I

The most controversial aspect of Protocol I is its scope of application. Article 1(4) of Protocol I reads:

> The situations referred to in the preceding paragraph [international armed conflicts within common Article 2 to the Geneva Conventions of 1949] 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 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

International armed conflict is thus defined to include some forms of internal conflict involving guerilla warfare. This has led to strong criticism. For example:

> Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called 'war of national liberation'. Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purpose would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to 'wars of national liberation', an ill-defined concept expressed in vague, subjective, politicized terminology.[42]

From the beginning it was clear that the scope of application of the Protocol and the status of wars of self-determination was the major issue requiring solution before progress could be made on the development of humanitarian law.[43] The matter was first raised by a considerable number of States in the general debate immediately after the opening of the Conference. The First Committee which dealt with this issue,[44] had before it when it first convened various proposals as to the scope of the Protocol. A number of Third World States, together with Australia, Norway and Yugoslavia, supported the inclusion within the scope of Protocol I of wars of national liberation which had the aim of achieving the principle of self-determination as defined in certain United Nations instruments. The Socialist States wanted such wars to be restricted to wars

provisions of Protocols I and II see Bothe *et al.*, *op. cit.*

[42] Letter of Transmittal for the consent of the Senate to ratification, Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977. The White House, January 29, 1987.

[43] Hand in hand with the scope of the Protocol was the issue of participation and representation at the Conference. The following national liberation movements presented themselves at the First Session of the Conference and asked to be admitted: The African National Congress, The Angola National Liberation Front, The Palestine Liberation Organization, The Panafricanist Congress, The People's Movement For The Liberation Of Angola, The Seychelles People's United Party, The South West African People's Organization, Zimbabwe African National Union and Zimbabwe African People's Union. The Third World States wanted these organizations to be allowed to participate fully, that is have the right to vote. The Western countries opposed even observer status for these organizations. However, this was an unwinnable position and a compromise was arrived at which allowed those movements recognized by the relevant regional intergovernmental organization to attend as observers. See Baxter, R., 'Humanitarian Law or Humanitarian Politics?'(1975) 16 *Harvard International Law Journal* (1975) 1, 9.

[44] The Conference split into three main Committees which were each given the responsibility for drafting and negotiating certain parts of the Protocols. Committee 1 was responsible for the general and final provisions. For full details of the procedures of the Diplomatic conference, see Bothe *et al.*, *op. cit.* 4 ff.

against colonial powers, racist regimes and foreign domination. The majority of the Western Powers took an uncompromising stand against including wars of self-determination within Protocol I. Australia, as stated above, was a co-sponsor of the amendment proposed by the Third World countries, but abstained[45] when the Socialist States and the Third World countries managed to reach a compromise solution on this article. This compromise solution was easily adopted at the Committee stage.

Although the majority of the Western Powers continued to oppose the article[46] it was accepted in the thirty-sixth Plenary Meeting with 80 votes in favour, 1 against (Israel) and 11 abstentions, mostly Western countries. Australia had changed its position in the meantime. In an attempt to salvage something in the interests of humanitarian law, a different interpretation of Article 1 was adopted and Australia voted in favour of the article, making the following declaration:

> This development of humanitarian law is the result of various resolutions of the United Nations, particularly resolution 3103(XXVIII), and echoes the deeply held view 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.[47]

The first question to consider is the basis on which such conflicts, traditionally regarded as civil conflicts, were elevated by consensus to the status of international conflicts.

A. *Legal Status Of Wars Of Self-Determination*

Two issues dominate the discussion of the legal status of wars of self-determination. First, what are the legal arguments on which the right to self-determination is based? Second, what is the position as to the use of force by peoples in the exercise of such a right?

The legal arguments supporting the right to self-determination as a legal right are intricately associated with political and ideological arguments. This is not an unusual phenomenon in international law, but such arguments have been particularly significant in the negotiations of the Protocol and it is therefore proposed to deal with them specifically.

(i) *Legal Bases for Wars of Self-Determination*

The legal arguments[48] are based on the claim that wars of self-determination have a special status at international law. Until the era of the United Nations,

[45] When Art. 1 was considered in plenary in 1974, the Australian delegate made the following statement in explanation of why Australia had abstained: 'At that time his delegation had explained that, although it favoured a broadening of the field of application of draft Protocol I, it feared that the terms used in paragraph 2 of the amendment might be too restrictive and exclude all conflicts other than those enumerated. After due consideration, his delegation had realised that if paragraphs 1 and 2 were taken together and if the word 'include' in paragraph 2 was taken literally, the list could be interpreted as not being exhaustive. On the basis of that interpretation, his delegation supported the text of article 1 which appeared in paragraph 14 of the report . . .' (CDDH/SR.22, para. 14).

[46] For a criticism of the attitude of the Western States to the expansion of Art. 1, see Lysaght, C., 'The Attitude Of Western Countries at the Diplomatic Conference on Humanitarian Law' in Cassese, A.(ed.), *The New Humanitarian Law Of Armed Conflict* 349.

[47] CDDH/SR. 36, Annex.

[48] See Abi-Saab, G., 'Wars Of National Liberation and The Laws of War'(1972) 3 *Annales*

such conflicts would have been regarded as civil conflicts and as solely within the domestic jurisdiction of a State. It was possible for such conflicts to attract the operation of the laws of war as to international conflicts by the process of recognition of belligerency by the incumbent government.[49] However, recognition of belligerent status was not dependent on any analysis of the cause of the civil war but on facts which related to the magnitude and duration of the dispute. In addition, recognition of belligerent status was at the election of the incumbent government. Some States and writers maintain that this is still the position at international law in relation to all civil disputes.[50]

The argument contrary to the traditional analysis is that as a result of certain provisions of the Charter of the United Nations and of various resolutions of United Nations organs, a rule of general international law has emerged of the right to self-determination of peoples. The relevant provisions of the Charter are Articles 1(2) and 55.[51] The concept of self-determination contained in these Articles was developed[52] by the Declaration on the Granting of Independence to Colonial Countries and Peoples [53] and the two 1966 Human Rights Covenants.[54] However, the resolution which is generally accepted as of most significance is the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, which was adopted by General Assembly Resolution 2625 (XXV) of 1970. Art. 1(4), it will be recalled, refers specifically to this Declaration.

The Declaration was adopted in the General Assembly by acclamation, that is unanimously, and it is this aspect of the declaration in particular, along with the other developments referred to earlier, which some States[55] claim gives the principle of self-determination its legal effect.[56] The effect of this recognition of

d'etudes Internationales 93; Abi-Saab, G., 'Wars of National Liberation and the Development of Humanitarian Law' in Akkerman, R.(ed.), *Declarations on Principles: A Quest for Universal Peace* (1977) 143; Ronzitti, N., 'Resort to Force in Wars of National Liberation' in Cassese, A. (ed.), *Current Problems of International Law* (1975) 319; Higgins, R., *The Development of International Law Through the Political Organs of the United Nations* (1963); Wilson, H., *International Law and the Use of Force By National Liberation Movements* (1988) Parts II and III.

49 Siotis, J., *Le droit de la guerre et les conflits armes d'un caractere non international* (1958); Castren, E., *Civil war* (1966).

50 Bindschedler, R., *op. cit.* n. 29; Castren, E., *op. cit.* 37. Castren limits the effect of the right of self-determination to a prohibition on intervention of third parties under Article 1(2) of the Charter of the United Nations.

51 For an analysis of the impact of these articles on the debate in relation to the right to self-determination as a legal right, see Higgins, R., *op. cit.* 90 ff.

52 The issue of the legal status of the right to self-determination has been extremely controversial within the United Nations Organization. See Shukri, A., *The Concept of Self-Determination in the United Nations* (1965); Johnson, H.S., *Self-Determination Within the Community of Nations* (1967).

53 General Assembly Resolution 1514 (xv) (Dec. 14, 1960).

54 Art. 1(1) of the International Covenant on Economic Social and Cultural Rights, 993 UNTS 3; Art. 1(1) of the International Covenant on Civil and Political Rights, 999 UNTS 171.

55 The States who take this position are the Eastern European countries, most Afro-Asian States, some Latin American States, including Mexico and Venezuela, and Norway. Australia also supports this position. As has been pointed out, when the issue of the status of wars of self-determination came to be debated by Committee 1 of the Diplomatic Conference, the division of views was not as might have been expected, between the major military blocks in the East and West, but was that between the Third World and the other two. Of course, there were some exceptions, with some of the Nordic countries aligning with the Third World on this issue: see Bothe *et al.*, *op. cit.* 7 ff.

56 *E.g.* Abi-Saab, G., 'Wars of National Liberation and the Laws of War' (1972) 3 *Annales d'etudes Internationales* 93, 99 where he states 'It can thus be said that even if self-determination was

self-determination is to confer an international character on these disputes. Therefore, from the point of view of the law of armed conflicts, wars waged by such peoples against colonial domination are wars between international entities and have the status of international wars.

Some States maintain that the Declaration on Friendly Relations merely expressed a commitment to an ideal which members of the international community should strive to achieve. Before the decision of the International Court Of Justice in the *Nicaragua* case,[57] States could argue that General Assembly resolutions were not binding on member States and could not serve as evidence of the transformation of a principle into a customary legal right.[58] In that decision, however, the I.C.J. emphasised the importance of some General Assembly resolutions in the formation of customary international law. The Court discussed in particular the force of the Declaration on Friendly Relations and stated that its rules amounted to a statement of custom.[59]

(ii) *Ideological Bases*

The majority of States at the Diplomatic Conference took the legal position that Article 1(4) of Protocol 1 was merely a recognition of the existing situation at international law. This position rested to a large extent on an ideological reaction to Western domination of international law. A minority of States, however, chose to couch their arguments for the extension of Protocol I in very controversial and emotive concepts, such as that of the 'just war'. As will be seen in the later discussion, this spectre of the just war and all its horrors is, in the context of the effect of the Protocols, more imaginary than real. But the use of such concepts allowed scope for considerations not relevant to the issues before the Diplomatic Conference to be seized on by States to justify their opposition to the Protocol and their subsequent refusal to ratify. The attitude of States[60] on the ideological basis of wars of self-determination is exemplified in the following extract from the statement in the first Plenary meeting of the delegate from the Peoples Republic of China:

> Since the conclusion of the Geneva Conventions in 1949, the world situation had undergone great changes. Many countries had achieved independence and had thrown off the colonial yoke. It was

not universally accepted as a legal principle in 1945, or even in 1960, the practice which has taken place in interstate relations since the adoption of the Charter, leading to the emergence of some sixty new States, as well as the consistent and cumulative practice of the organs of the United Nations, have led in 1970 to the universal recognition of the legal and binding nature of the principle of self-determination.'

57 1986 I.C.J. 14

58 Bothe *et al.*, *op. cit.* 45-6.

59 1986 I.C.J. 14, 97 ff.

60 The position of most States on this issue appears from two sources. First, see the discussion in the Plenary Session of the Diplomatic Conference of the participation of the Provisional Revolutionary Government of the Republic of South Vietnam and the Liberation movements, of which some fourteen had sought to attend as observers: Summary Records of the Plenary Meetings, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), First Session (CDDH/SR 1-22) (hereafter cited as Official Records) Vol. v., 1 ff. Secondly, see the discussion in Committee I of the Scope of Protocol I and in particular the amendments proposed by various groups of States (Docs. 8 CDDH/1/5 and CCDH/1/11) to Art. 1 of the Draft Additional Protocol submitted by the I.C.R.C. to the Conference (Doc. CDOH/1).

therefore essential to supplement and develop the 1949 Geneva Conventions in order to adapt them to contemporary requirements.

Wars were divided into two kinds, just and unjust. Imperialism was at the root of all wars of aggression. While imperialism persisted in the world, there would always be the danger of war. The two world wars launched by imperialism had inflicted tremendous losses of life and property on the peoples of the world. The first step in protecting victims of international armed conflicts was therefore to condemn imperialist policy of aggression and to mobilize the people of the world in a resolute struggle against the policies pursued by the imperialist countries. Moreover, a distinction between just and unjust wars, should be made in the new Protocols.

Another major issue was the affirmation of the legal status of wars of national liberation. Since the Second World War, many oppressed nations had overthrown the criminal domination of imperialism and colonialism and a whole group of newly independent States had emerged one after another. Armed struggles for national liberation had developed in Asia, Africa, and Latin America. Wars for national liberation were just and should be supported by all countries that upheld justice.[61]

B. *Resort to Force and Wars of Self-Determination*

Various practical legal problems arise from the inclusion of wars of self-determination in Art.1 of Protocol I. For example, what are 'peoples' within the meaning of Art.1(4)? How do we distinguish between combatants and civilians in such conflicts? What level of armed conflict of the varieties covered by Art.1(4) is required before the provisions of the Protocol become applicable? How can organizations engaged in wars of self-determination undertake legal obligations that traditionally are dependant on Statehood? Finally, is it realistic to expect liberation armies to be capable of assuming the obligations which would be imposed on them if their conflict came within the ambit of Art. 1(4)?

However, the major stumbling block for States such as the United States, France and the United Kingdom flow from the apparent reappearance of the concept of the just war and from the claims by the Third World that a particular category of non-international conflicts, wars of self-determination, are just wars. The elevation of wars of self-determination to the status of international conflicts is regarded as an acknowledgement by the international community that these wars are outside the prohibition on the use of force in the Charter. Additionally, it is feared that this will lead inevitably to a distinction between categories of victims, and that the forces in opposition to persons exercising their right of self-determination will not be entitled to the protection of the humanitarian laws of war. Finally, it is suggested that from the acceptance of the concept of these wars as just, will flow the acceptance of lesser standards in the armed pursuit of the goal of self-determination. In other words, the ends will be perceived to justify the means. That this was a major consideration in the refusal of the United States to ratify Protocol I is clear from the remarks of President Reagan noted earlier.

The highly respected Swiss expert in the area, Jean Pictet, and the United Kingdom military expert, Colonel Draper, have both also expressed grave reservations that the wider category of international wars could import dangerous notions of the *ius ad bellum* (the law of warfare) into humanitarian law.[62]

The raising of the spectre of the just war makes it appropriate to consider

[61] Official Records (CDDH/SR 12), Vol. v., 119-20, and see also statement of the President of the Islamic Republic of Mauritania, Official Records (CDDH/SR 1) 13.

[62] See Draper, G., 'Wars of National Liberation and War Criminality', in Howard, M. (ed.), *Restraints On War* (1979) 135.

briefly the place of this concept in the modern law of armed conflict. Nearly all civilizations have had some form of just war theory at some stage in their history. When European writers and international lawyers refer to the just war they are referring to the Christian theory which had its origins in the medieval writings of theologians and canonists such as St Augustine and St Thomas Aquinas.

The European just war theory, with its combination of secular and religious elements, preoccupied canon lawyers and theologians for many centuries, to the exclusion of the *ius in bellum*, until it was crystallized into what is referred to as the classic doctrine of the just war by the writings of, amongst others, Grotius and Vattel. Although the theory was examined in detail in the treatises of these writers, there was and still remains considerable dispute as to whether the theory ever attained the status of a legal theory.[63]

By contrast, when Third World States referred to the doctrine of the just war in the Protocol negotiations, they had quite different just war theories in mind: either the Marxist-Leninist view of a just war, namely that those engaged in a war against an aggressor are fighting a just cause and colonial powers which forcibly opposed peoples exercising their right of self-determination were engaged in an aggressive war; or that wars of self-determination are just wars under the Charter of the United Nations, and according to one analysis, outside the prohibition against the use of force in Art.2(4) of the Charter.

What is the impact on the use of force of the legal theory that wars of self-determination are just wars? Most of the discussion has centred around the legality of the use of force in the exercise of the right of self-determination by colonial peoples and the various resolutions of the General Assembly condemning the use of force against colonial peoples as codified in the Friendly Relations Declaration. In their struggle to be recognized as States these 'peoples' have in practice usually been represented by national liberation movements which claim the right to use force on their behalf. The issue has consequently been considered primarily in the context of such disputes. The legal principle of self-determination of peoples however, covers a considerably broader area than that right of colonial peoples.

The assertion by such peoples of the right to the use of force has met with resistance from the international community on the basis of the strong presumption that the use of force is illegal under the Charter.

Various interpretations of the right to self defence under Art. 51 of the Charter have been advanced to support the use of force in the exercise by peoples of the right to self-determination. Alternatively, the argument has been made that the use of force by peoples engaged in a war of self-determination is not covered by the prohibition in the Charter and that the use of force by peoples to attain their objective of self-determination is legitimate.[64] This use of force is a form of self

[63] *E.g.* Nussbaum, A. 'Just War — A Legal Concept?' (1943) 42 *Michigan Law Review* 453; Risley, *The Law of War* 68; Kunz, J., 'Bellum Justum and Bellum Legale'(1951) 45 *American Journal of International Law* 528, 529-30.

[64] There are a number of different arguments which have been used to support the position that wars of self-determination are outside the prohibition against the use of force in the Charter. It can be argued that the relationship between a colony and the colonial power does not amount to international relations within the ambit of Art. 2(4) of the Charter. If this approach is accepted the corollary is that

defence in opposition to an unlawful, aggressive use of force to prevent the exercise of the right to self-determination.

It could be that the reasoning of the I.C.J. in the *Nicaragua* case provides a solution to the difficulties posed to the Charter system by wars of self-determination. In the context of the legality of the use of force, the Court refused to accept the argument, which had previously enjoyed a lot of support, that the provisions of the Charter subsumed the principles of customary law and general international law and prevented the independent existence of customary rules in the same area. In the opinion of the Court, the treaty process does not necessarily deprive customary norms of their continued separate existence. Neither did they accept the alternative argument that even if the customary rules as to the resort to force had not been subsumed, the effect of the Charter was to influence 'the later adoption of customary rules with a similar content.'[65] In the opinion of the Court, these customary rules are not identical in content to the position under the Charter. These rules, whilst recognizing the legitimacy of such struggles, also prohibit the aggressive use of force as outlined by the Court in *Nicaragua*. This customary law prohibition is, however, subject to the exception for the use of force in self-defence in a legitimate struggle for self-determination. The content of this right to self-defence would not necessarily mirror Article 51 of the Charter.

To regard wars of self-determination as governed by customary rules, rather than by the provisions of the Charter, avoids many of the difficulties of treating the legality of the use of force in wars of national liberation under the provisions of the Charter. The provisions of the Charter are no longer distorted to cover a relatively short-lived phenomenon and continue to deal with the conflicts they were drafted to cover, namely conflicts between States.

Are the provisions of the Protocols in any way relevant to the above analysis? It is clear they are not. Issues as to the *ius ad bellum*, the legality of the resort to force, are quite distinct from issues as to the *ius in bellum*, the rules of warfare. They are two separate bodies of law. At different stages of history variations of emphasis have certainly occurred, but the position at international law is that the application of the rules of humanitarian law is totally unaffected by the status of the parties in dispute.[66]

any use of force by the colonial power is equally outside the prohibition in the Charter. It also requires an interpretation of General Assembly Resolution 1514 (xv) of 1960 as merely a commitment to an ideal rather than as the legal position under the Charter. Even if Article 2(4) does prima facie apply, as a result of the changing status of colonies, the use of force in such situations is an exception under customary international law. On this issue generally, see Graham, D. E., 'The 1974 Diplomatic Conference on the Law of War: A Victory For Political Causes and a Return To The "Just War" Concept of the Eleventh Century' (1975) 32 *Washington and Lee Law Review* 25, 44; see the rejoinder to this article by Bond, J. E., 'Amended Article 1 of Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerilla'(1975) 32 *Washington and Lee Law Review* 65; Abi-Saab, G., 'Wars of National Liberation and the Laws of War', *op. cit.* 100; Wilson, H. *op. cit.* Part III and Bokor-Szego, H., 'The Attitude Of Socialist States Towards The International Regulation Of The Use Of Force' in Cassese, A.(ed.), *The Current Regulation Of The Use Of Force* 453, 468.

65 1986 I.C.J. 14, 95.

66 In his appeal for ratification of Protocol I by the United States, Gasser states: 'It is equally important to state the effect that application, through Article 1(4), of humanitarian law to wars of national liberation does *not* have: it does not recognize or grant legitimacy to any armed conflict or to any group or its claims. *Humanitarian law never legitimizes any recourse to force*. The Diplomatic

Arguments to the contrary are evidence of a failure to grasp the true nature of humanitarian law. This is by no means the first time such arguments have been raised in similar contexts. Since the Charter system, in fact since the era of the League of Nations, objections to the further development and codification of the laws of war have been based on such actions being a contradiction of the Charter's prohibition of the use of force. Humanitarian law, however, must deal with reality. Despite the Charter's prohibition on the use of force, wars continue unabated whether characterized as in self-defence or not. The role of humanitarian law is to protect the victims of such conflicts. By doing so it gives no legitimacy to the conflict.

The doctrine of the just war, whatever the content of the doctrine that might be advanced by various States or Organizations, is totally irrelevant in the context of the Protocols and the application of the rules of humanitarian law. That is certainly the position that States agreed to during the negotiations of the Protocols and found expression in the preamble to Protocol I. The relevant part of the Preamble reads as follows:

> *Expressing* their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorising any act of aggression or any other use of force inconsistent with the Charter of the United Nations,
> *Reaffirming* further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties of the conflict . . .

Unfortunately, this statement of the position at international law has not had the desired effect of putting at rest the fears of some States that a recognition on humanitarian grounds that such disputes should attract the higher standard of humanitarian rules has inevitable implications for the issue as to the legality of the resort to force.

C. *Article 1(4) in Operation*

What of the other problems that are alleged to flow from the inclusion of wars of self-determination in a Convention designed for international wars? What solutions are provided for by the provisions of the Protocols themselves or from other sources?

(i) *Scope of Article 1(4)*

Article 1(4) requires the presence of several elements before an armed conflict comes within its scope. First, it refers to 'peoples'. Second, these peoples must

Conference managed to separate the issues governed by *jus in bello* from those that fall under the *jus ad bellum*.' Gasser, H. P., 'An Appeal For Ratification By The United States' (1987) 81 *American Journal of International Law* 912, 917. See also Lysaght, C., 'The Attitude of Western Countries Towards the Development of Humanitarian Law', *op. cit.* 351, where the author, after considering the argument relied on by Western countries to justify their opposition to the expansion of the concept of armed conflicts, namely, the just war spectre, states: 'In the view of the present writer the heavy reliance placed on this line of argument was misguided. While proponents of the extension of the application of the 1949 Geneva Conventions and Protocol I to wars of national liberation stressed the justice of that cause and some even implied that the opponents of it were less entitled to the protection of humanitarian law, their case was, in essence, founded on the nature of the conflict rather than its motivation or justification.'

be engaged in exercising their right of self-determination within the meaning of the Charter of the United Nations and the United Nations Friendly Relations Declaration. Third, the conflict must be one in which this right is being asserted against colonial domination, alien occupation and racist regimes within the meaning of Art. 1(4).

The use of such terms without a clear meaning in a legal document caused a great deal of criticism of Art. 1.[67] What is clear is that each of these categories is not to be viewed in complete isolation, particularly the terms 'peoples' and 'self-determination', as they are qualified by the categories of armed conflicts specified in Art 1(4) and the reference to the U.N. Friendly Relations Declaration. Standing alone, 'peoples' could cover a very wide ground. For example, the 1960 Declaration of the Granting of Independence to Colonial Countries and Peoples acknowledged the right of all 'peoples' to self-determination. As Bothe states in his commentary,[68] on one interpretation the Ibos in Nigeria, the Kurds in Turkey, Syria, Iraq and Iran, the Mexicans in California and the Tyrolese in Italy would qualify as 'peoples'. However, the concept is significantly narrowed by the other requirements of Article 1(4), which are discussed below.

Clearly it is to the advantage of groups of fighters engaged in conflicts to argue that they fall within the protection of the Protocol and are thus entitled to be treated as prisoners of war rather than criminals. On the other hand, the Protocol cuts both ways: these 'peoples' must also comply with the laws of war if their dispute is within Art. 1(4). Equally, it is clearly not in the interests of governments in opposition to such disputes to be obliged to treat such forces as regular combatants and to apply the restrictions on the means and methods of warfare in relation to civilians contained in the Protocol.

With this in mind, as a starting point, the definition in Art. 1(4) does not mirror the customary law right to self-determination.[69] This right is not confined to situations of colonial domination, racist regimes and alien occupation, but is broader in its scope. The Protocol was in fact supported on the basis of the more restricted interpretation by the Socialist States and most Western States, and finally accepted by the Third World. As stated above, Australia takes a different, minority, view in the interests of a broad application of Protocol I for humanitarian reasons and regards the three categories as merely illustrative, and not exhaustive. Australia's position appears to be that people engaged in the pursuit of their customary law right to self-determination are covered by Art. 1(4).

What is the ambit of Art. 1(4)? It appears there are no real difficulties with the concept of wars against colonial regimes. This is the classic type of situation governed by the principle of self-determination and it will not be difficult to identify such an armed conflict. The likelihood of difficulties with these disputes is also lessened by the fact that colonial regimes are increasingly scarce. The categories of wars against racist regimes and alien occupation, because of the lack of any accepted legal meaning for these terms, raise the issue whether the Protocol could be invoked in situations of ethnic revolt or secessionist move-

[67] *E.g.* Graham, D., *op. cit.* 48 ff.
[68] Bothe *et al.*, *op. cit.* 47.
[69] See n.47 and accompanying text.

ments.[70] Leaving aside the unlikelihood of such a movement being able to comply with the provisions of Art. 96, discussed below,[71] what interpretation should be placed on these phrases bearing in mind the other requirements of the definition in Art. 1(4)? The States supporting expansion of the Protocol wanted recognition of the legitimacy of the struggles in Southern Africa and colonial territories, and prisoner-of-war status for the freedom-fighters involved in these conflicts. They sought, however, to avoid any possibility that the struggles against post-colonial governments, which all too frequently followed the successful exercise of the right to self-determination, were within Art. 1(4).

These States found a solution to this dilemma in certain provisions of the United Nations Friendly Relations Declaration. First, this declaration limited the separate status of a colony to the period prior to the exercise of its right to self-determination. Once a colony has exercised this right, either by the establishment of a sovereign and independent state, the free association or integration with an independent state, or the acquisition of any other status freely determined by the people, it is regarded as having exercised its right of self-determination.

Secondly, the declaration does not authorize or cover any action:

> which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states . . . possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

If these limitations arising from the reference to the Friendly Relations Declaration are accepted, Protocol I can be restricted to armed conflicts involving colonial peoples who have not yet exercised their right of self-determination and the peoples of Southern Africa and Palestine.[72]

In light of this analysis of the scope of Protocol I, which appears to have been accepted by the majority of States at the Diplomatic Conference, it appears that the opposition to Art. 1 in its final form is somewhat of an over-reaction. Art. 1(4) will in all probability never be invoked. Art. 1(4) was designed with specific conflicts in mind, the wars of liberation in Angola and Mozambique, the situation in South Africa and the fight for self-determination by the Palestinians in Israel. As the process of de-colonization has nearly finished, it appears that the majority of the Western Powers have little to lose in adopting Protocol I.

In addition, the provision will probably never be used in the South African or Israeli conflicts. As will be seen in the later discussion of Article 96(3), which amongst other things deals with the problem of accession to the Protocol by a party representing a people engaged in a conflict within Art. 1(4), the Protocol can only come into force against a High Contracting Party. South Africa and

[70] Examples of such conflicts are the troubles in Northern Ireland, Ethiopia, Yemen and Nigeria.

[71] In reply to the allegation that Protocol I is a pro-terrorist Treaty, the argument has been made that: 'However one defines "Terrorism" in other contexts, within the context of the Geneva Conventions, any violent act prohibited by the Conventions or Protocol I committed against persons or against property which affects the life or health of persons is an act of terrorism . . . [T]he [liberation] movement would be under the same obligations to repress grave breaches and to suppress ordinary breaches. Its guerrillas would be subject to the same sanctions on a universal basis.' Solf, W. A., 'A Response To Douglas J. Feith's "Law in the Service of Terror — The Strange Case of the Additional Protocol" ' (1986) 20 *Akron Law Review* 261.

[72] Kalshoven, F., 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977' (1977) 8 *Netherlands Yearbook of International Law* 106, 122.

Israel are unlikely to ratify the Protocol. It appears that a restrictive interpretation of the Article is assisted by its reference to the right of self-determination as enshrined in the United Nations Friendly Relations Declaration. Solf, in his analysis of the Protocol,[73] suggests that this is the reason why the United States and its allies returned to the second session of the Diplomatic Conference in 1977 despite having lost the fight to prevent the inclusion of wars of self-determination in Protocol I. Solf states:

> After the 1974 session there was serious consideration within the Defence and State Departments that the U.S. and many of its allies should not return to the conference, but on further consideration it began to dawn on those concerned that the provision would have no practical effect. The colonial power targeted by the provision, Portugal, was in the process of giving up its struggle. South Africa, Rhodesia and Israel and the other target states would not ratify or accede to the Protocol and the reference to the U.N. Declaration of Friendly Relations would afford all other states which might be affected by dissident or separatist elements with a plausible basis for denying its application to their situation.[74]

It is now apparent, however, that the present U.S. administration and its military advisors are in fact not convinced that Art. 1(4) is so limited in its scope as to be virtually a dead letter.

Another factor provides a further basis for the strong and continued objections of States to Protocol I. Some States fear that the Protocol may well have an impact on the customary rules applicable in a range of conflicts previously only minimally regulated at an international level. The judgement in the *Nicaragua* case made it clear that there are customary and treaty rules applicable to both international and non-international conflicts. These rules cover both the means and methods of warfare and humanitarian principles. Some aspects of the judgement of the Court in that case are extremely controversial. However, it appears that its position on humanitarian law is consistent with the position which would be reached using traditional approaches to the formation of custom.

Although most States probably are cautiously prepared to concede that the right of self-determination is a principle of customary international law, they are not prepared to accept the practical results of this acceptance as enshrined in Protocol I. These States see as a dangerous outcome of the acceptance of the Protocol that such action may result in or hasten the transformation of these rules into custom. Although the ambit of the Protocol may be limited,there are so many uncertainties as to its coverage that it is conceivable that the major powers may at some time in the future be involved in armed conflicts which are alleged to fall within the Protocol. If all, or, as is more likely, some of the provisions of the Protocol are also rules of customary law, these rules must be complied with, as parties cannot terminate their customary law obligations by withdrawal. Furthermore, there is the fear that once these changes are accepted it is only a

[73] Solf, W. A., *op. cit.*

[74] *Ibid.* 281. This is the opinion of a number of commentators on Article 1(4). See the statement by the head of the U.S. Delegation to the Diplomatic Conference (George Aldrich) in 'Progressive Development of the Laws Of War' *op. cit.* 703 that 'article 1, paragraph 4 poses no threat to the U.S. and needs no reservation. If it were feasible to apply the Geneva Conventions and Protocol I to the armed conflicts to which that provision is intended to apply, compliance with these treaties could bring significant humanitarian benefits. Such application and compliance have not been and seem unlikely to become feasible for a multitude of reasons, both political and practical. In effect the provision is a dead letter.'

matter of time before an attempt is made to extend the range of non-international conflicts covered by these rules.

The other interpretation of Article 1(4), which Australia adheres to, would make the ambit of the Article wider to cover more conflicts and expand the protection offered by humanitarian law. After the emasculation of Protocol II, dealing with internal wars,[75] it seemed desirable to make Protocol I as effective as possible. Such a move never found widespread support.[76]

(ii) *Definition of Armed Conflict*

Another controversy in the negotiation of Article 1(4) was the level of armed conflict necessary before the provisions of the Protocol became applicable. This problem was not new. It had already arisen in relation to the Geneva Conventions themselves, and in particular Common Article 3 to these Conventions dealing with civil conflicts, but it has certainly become more difficult to resolve in the light of the changing face of warfare. The Hague Regulations did not contain any definition of the situations in which they were to apply. From their very title and content,[77] it was clear that they applied in cases of wars between States. As the concept of war was familiar and well defined in international law at that stage, the applicability of these rules was not an immediate problem. However, things changed rapidly, and for various reasons, States began to deny the existence of a state of war.[78] The Geneva Conventions recognized this and extended the coverage of the Conventions, by Common Article 2, 'to all cases of declared war or of any other armed conflict . . . even if a state of war is not recognized by one of them.' By this time it was also accepted that the Hague Regulations as a matter of practice applied to all cases of armed conflict without any requirement as to recognition of war or belligerency.[79]

However, there was still the issue as to the meaning of 'armed conflict'. One possibility is that the Conventions only apply in situations which would otherwise have amounted to war.[80] However, this is an unnecessarily restrictive approach in light of the humanitarian nature of the Conventions. Pictet states in his commentary that any difference between two States which results in the intervention of members of the armed forces comes within the scope of Art. 2.[81]

The problem of the lack of humanitarian rules in civil conflicts was also addressed for the first time by the Geneva Conventions. In the face of consider-

[75] For a discussion of the proceedings of the Diplomatic Conference with respect to Protocol II and the unsatisfactory outcome, see Bothe *et al.*, *op. cit.* 604 ff.

[76] Bothe *et al.*, *op. cit.* 50, n.19a, states: 'The opinion that the three categories of conflict are merely exemplary (see Australia CDHH/SR.22, para.24) have neither a basis in the wording of Art. 1 nor in its drafting history.'

[77] For the text of the Hague Regulations, see Friedman, L., *The Law of War: A Documentary History*.

[78] For an outline of some of these reasons, see Pictet, J., Commentary On The IV Geneva Convention (1958) 17-8.

[79] *E.g.* Greenwood, C., 'The Concept of War in Modern International Law'(1987) 36 *International and Comparative Law Quarterly* 283, 295; Schindler, D., 'State of War, Belligerency and Armed Conflict' in Cassese, A.(ed.) *The New Humanitarian Law of Armed Conflict* 3-4.

[80] *E.g.* Draper, G., *The Geneva Conventions of 1949* 73-4.

[81] Pictet, J., *op. cit.* 20.

able opposition,[82] Common Article 3, which provided a code of minimum conduct in such hostilities, was agreed to in the Plenary meeting of the Conference. Clearly, in light of the implications for State sovereignty, the issue as to the scope of Article 3 was controversial. The eventual compromise was that Article 3 was to apply to 'armed conflict not of an international character', with no definition of armed conflict and no indication of the necessary minimum level of hostilities required before the Article applied.[83]

Difficulties in relation to the field of application were encountered when the international community convened in order to discuss further new rules for internal conflicts, which became Protocol II. The problem was far more significant in relation to this Protocol. It appears to be accepted that Common Article 3 of the Geneva Conventions reflects the present position at customary law.[84] However, that is not the case in relation to many of the provisions of this Protocol. Many of these are in fact an advance on the customary law position, and states were less inclined to accept these new obligations in relation to a wide range of conflicts. The solution arrived at by the negotiating parties was to narrow the field of application of Protocol II in two ways. First, there is the requirement that the armed forces of a High Contracting Party are involved in a conflict before the Protocol is applicable and that the opposition be either armed forces or dissident armed groups who are 'under responsible command, [and] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations . . .'[85]

Secondly the Protocol does not apply to

> situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[86]

In considering the scope of Protocol I and wars of self-determination there were thus a number of possible approaches. The limitations of Protocol II could be applied to such wars with the result that a narrower range of conflicts could be covered [87] and these conflicts would gain the more stringent protections of Protocol I. On the other hand, the definition of the scope of the Protocol could remain the same as for the Geneva Conventions.

Australia, along with several other States,[88] supported Article 1(4) on the basis

[82] For an account of the differences and the proceedings of the Diplomatic Conference on this Article, see Pictet, J., *op. cit.* 26 ff.

[83] Amendments to Article 3 were discussed, which although not finally adopted, provide some guidance as to the conditions upon which the application of the Convention might depend. See Final Record Of The Diplomatic Conference of Geneva of 1949, Vol.II-B. 121.

[84] In the *Nicaragua* case, the I.C.J. was faced with difficulties in applying the Geneva Conventions to the dispute resulting from the reservation to the jurisdiction of the Court by the U.S. The Court said it could resolve the issue on fundamental general principles of humanitarian law, and stated in relation to Common Article 3: '. . .the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles . . .There is no doubt that, in the event of international armed conflicts, these rules [Article 3] also constitute a minimum yardstick,in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity".' 1986 I.C.J. 14, 113-4.

[85] Art. 1(1) Protocol II.

[86] Art. 1(2) Protocol II.

[87] It is these limitations on the field of application of this Protocol that has led to much criticism: *e.g.* Kalshoven, F., *op. cit.* 112.

[88] *E.g.* the statement of the British delegate to the Diplomatic Conference in Official Records,

that it only applied to wars which reached a high level of intensity. However, the wording of the Article does not refer to levels of intensity. Perhaps the resolution to this problem lies elsewhere. That is, before the Geneva Conventions and the Protocol become applicable, irrespective of questions as to whether there is an armed conflict within Art. 2, the authority representing a people must under Art. 96(3) of Protocol I undertake to apply the Conventions and the Protocol by means of a unilateral declaration addressed to the depositary.

(iii) *Accession to the Protocols*

Article 96(3) was designed, amongst other things, to resolve the problem which has been referred to earlier: creating legal relations between a State and peoples engaged in a war of self-determination. The problem is perhaps less acute in relation to colonial conflicts as the Friendly Relations Declaration states that the territory of a colony has a separate and distinct status from the territory of the State administering it. This appears to be now accepted as a principle of customary international law. The difficulty remains unresolved with regard to the status of other peoples exercising their right of self-determination at international law. Art. 96(3) resolves the issue from the point of view of the assumption by such peoples to rights and obligations under the Protocol and the Geneva Conventions and states:

> The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, 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.

Art. 96(3) was also designed to clarify the position in relation to the application of the Geneva Conventions to a dispute which fell within Art. 1(4) of the Protocol and the relationship between the Protocol and the Geneva Conventions. However, the argument has been advanced[89] that this Article, along with the requirements which have to be met in order to acquire combatant status, may also help indirectly to resolve any perceived problems with the definition of armed conflict in relation to wars of self-determination. In order for a people to comply with the provisions of Art. 96(3), they will have to exhibit a high level of organization. This level of organization is required to actually lodge the necessary declaration as well as to enable the lodging authority to be in a position to comply with the obligations that result from this act of depositing, namely to comply with all the laws of armed conflict. This approach appears to shift the factor which determines whether the Protocol applies, at least in respect of wars of self-determination, from the level of intensity of the conflict to a consideration of the level of organization of the party involved.[90]

Fourth Session (CDDH/SR 36) Vol. vi, 46.

[89] Schindler, D., 'Different Types of Armed Conflict', in *Internationalized Civil War* 140.

[90] Aldrich, G., *op. cit.* 701-2.

Several States,[91] including the United Kingdom, limit the reference in Art. 96(3) to an authority representing a people as restricted to an authority recognized by the relevant inter-governmental organization. This restriction is warranted, in their opinion, by the negotiating history of Art. 1(4).

DEFINITION OF COMBATANT

One of the fundamental rules of the law of armed conflicts is that which provides for the acquisition, by persons participating in the hostilities, of the status of privileged combatant. In the event of capture, such combatants have the right to be treated as prisoners-of-war. This is a highly prized status and, as we have seen, the new rules for the acquisition of such a status were the source of the most controversial issues in the negotiation of Protocol I. The issue had implications of great significance for civilians, as well as for persons taking an active part in the armed conflict. For a number of reasons, outlined below, it was argued that persons engaged in wars of self-determination should be entitled to the protection of the rules of privileged combatancy without meeting the same standards in distinguishing themselves from the civilian population as regular combatants. Any lowering of standards required a careful balance to be drawn between protecting such irregular combatants and protecting civilians. Civilians were extremely vulnerable already in such conflicts, and it was highly undesirable that their protection should be sacrificed to the cause of the combatant. Many States pushed the argument that any change in the rules was undesirable allegedly for these humanitarian reasons. It appears, however, that their motivation was substantially political. This is by no means a novel situation. The law of armed conflict has always experienced difficulties in devising rules for irregular combatants.[92]

When the Diplomatic Conference convened in 1974, much debate focussed on the question of the position of guerrilla fighters and the conditions they must meet to attain combatant status. There were a number of reasons given as to the need for change.

First, if the scope of the law of armed conflicts is expanded to include wars of self-determination, then in order to make the rules workable in relation to these

[91] Such States included Brazil, Turkey and Indonesia.

[92] This was one of the reasons for the failure of the Brussels conference of 1874. At that time the divisions were between powerful military States such as Prussia which wanted to restrict combatant protection to regular, organized and disciplined armed forces, and those States, such as Belgium, the Netherlands and Switzerland, that saw themselves as likely to be involved in guerrilla-style struggles for independence against occupying forces.

These latter States wanted some measure of protection for combatants operating outside the traditional armed forces. The result, which found expression in Articles 1 and 2 of the *Hague Regulations* of 1907, was very much in favour of regular armed forces. A limited concession was made for the recognition of privileged combatant status for a *levee en masse*, that is, persons who spontaneously take up arms in occupied territory.

After the experience of resistance forces in the Second World War there was pressure to expand such protections. The Third Geneva Convention, by Art.4 A(2), added to the class of persons entitled to the status of privileged combatants. However, there was no relaxation of the conditions they had to fulfil in order to acquire this status. It remained difficult from a practical perspective for fighters engaged in such disputes to satisfy these conditions. For an historical analysis of the treatment of guerrilla fighters by the Law of War, see Draper, G., 'The Status Of Combatants And The Question Of Guerilla Warfare'(1971) 45 *British Yearbook of International Law* 173; see also Rosas, A., *op. cit.* 219 ff.

conflicts it is necessary to take into account their particular characteristics. To expect guerrilla forces to meet the same requirements as the organized forces against which they are engaged in conflict is unrealistic. Put in another way, if wars of self-determination are regarded as wars of self-defence and not covered by the prohibition against the use of force in the Charter, then the methods they use should be recognized.

As has been stated:

> Articles 1(4) and 96(3) establish abstract political principles concerning the status of the armed struggles for self-determination which can qualify as international armed conflicts. The concrete application of the principles advanced by these provisions are the conditions under which the combatants of liberation movements enjoy the combatants' privilege.[93]

Moreover, in order to encourage the fighters engaged in these disputes to apply the laws of armed conflict, it was thought that some incentive had to be provided. If the standards they had to meet to gain prisoner-of-war status were too high, although theoretically they would remain under the obligation to comply with all the rules, they would be less likely to do so.

On the other hand it was argued that the safety of civilians in situations of armed conflict had always depended on maintaining this distinction between combatants and civilians. To lower the standards required of combatants to distinguish themselves from the civilian population was to blur this distinction and make it difficult or even impossible for the commander in the field to apply the distinction in practice, with the inevitable consequences for civilians.[94]

The changes to the standards are contained in Articles 43 and 44(3) of Protocol I. By Art. 43, all armed forces, groups and units of a party to the conflict 'which are under a command responsible to that Party for the conduct of its subordinates' are combatants for the purposes of the Protocol. In addition these forces must be subject to an internal disciplinary system and apply the laws of armed conflict. By Art. 44(3), all members of such forces are entitled to be treated as prisoners of war as long as they

> distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflict where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself , he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

There was a further incentive provided by Art. 44(4) for guerilla forces to comply with the rules. Although failure to comply with these minimum requirements by combatants resulted in the loss of prisoner-of-war status, such combatants were still entitled to be granted equivalent protections in captivity as those provided by the Protocol and the Third Geneva Convention.

Article 44 significantly changed the existing rules in various other ways.

[93] Bothe *et al.*, *op. cit.* 243.

[94] See, for example, the statement of President Reagan, *op. cit.*, citing this lowering of standards for irregular combatants as another reason why the Protocol should not be ratified by the United States. See also Letter of Submittal from Secretary of State George P. Schultz, S.Treaty Doc.No.2, in which he states at p.IX: 'As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States' announced policy of combatting terrorism.'

Combatants are no longer required to carry arms openly at all times, as was the previous rule under Art. 4(a)(2) of the Third Geneva Convention. This takes account of the realities of guerilla warfare. It is the practice for such fighters to resume their everyday life in between engagements with the enemy.

However, by far the most controversial change is the one set out above in Art. 44(3). Where, owing to the nature of the hostilities, armed combatants cannot distinguish themselves from the civilian population, such combatants do not lose their combatant status by failing to do so whilst engaged in a military operation preparatory to an attack, provided they comply with the lesser requirements set out in Art. 44(3) (a)&(b) above.

There was almost universal acceptance at the Diplomatic Conference that the circumstances envisaged by this new rule were very limited and could only arise in occupied territories and in conflicts covered by Art. 1(4).

There were, however, considerable differences as to the meaning to be applied to the phrase in Art. 44(3)(b), 'engaged in a military deployment preceeding the launching of an attack'. Two possible interpretations were put forward. One was that the necessity to carry arms only arose at the last moment before attack. The other interpretation was that the phrase referred to 'any movement towards a place from which an attack is to be launched'.[95] The latter interpretation is the one accepted at the conference by the majority of Western Delegations including the United States. It appears, however, that the United States has changed its position on this matter in the meantime and now supports the narrow interpretation.[96]

Article 44 effected another significant change to the legal rules governing the distinction to be drawn between combatants and civilians. Previously, the failure by superior officers to ensure that this rule was complied with attracted no sanctions. Although breach of this requirement might affect prisoner-of-war status for individual combatants, it was not a rule of international law that commanders in the field had to ensure that this distinction between civilians and combatants was drawn. However, the Protocol makes such a failure an offence on the part of Parties and commanding officers under Articles 87 and 88 of the Protocol. This new rule is a significant achievement in the attempt to improve the level of protection provided by the law for civilians in armed conflicts.

Do these changes outlined above have such serious implications for civilians as to justify the rejection of the Protocol?

The present writer's view is that they do not. As one commentator has stated, treaties are not to be interpreted by a 'worst case' approach.[97] There are positive advantages to civilians in the codification of the principle of distinction and in the

[95] Australia supported the wider interpretation in Committee. The United States expressed this declaration at the time of signing Protocol I. For a full explanation of the position taken by States on this issue see, Bothe *et al.*, *op. cit.* 254.

[96] Gasser, H. P., *op. cit.* 921: 'The President's letter of transmittal and the State Department's report give the odd impression that the American Government has relinquished this sensible interpretation of the rule and instead now understands it to mean that a combatant must distinguish himself only in the last moment before the shot is fired.' See also Solf, W. A., *op. cit.* 262, where the author is highly critical of this tactic of placing the worst possible interpretation on treaty provisions in order to defeat their ratification.

[97] Gasser, H. P., *op. cit.* 921

lowering of standards for the recognition of combatant status in some very restricted circumstances. It is true that in relation to international conflicts, to change the rules would be highly undesirable. The principle of distinction is a principle of customary international law accepted in relation to such disputes on the basis that armed forces clearly distinguish themselves from civilians in accordance with the standards set out in the Third Geneva Convention. To continue to require compliance with these standards in international disputes works to the advantage of civilians, as the easier it is for a commander to draw this distinction the more likely it is to be fully complied with. However, previously, in the internal conflicts covered by the new rules, commanders in the field were under no positive obligation of international law to attempt to distinguish combatants from civilians, and it was extremely difficult to do so, as States discovered to their cost, in terms of morale and international opprobrium, in such wars as that in Vietnam. Furthermore, the existing rules provided no motivation for guerilla forces to attempt in any way to distinguish themselves from the civilian population. In fact, it was to their advantage from a military point of view to merge as far as possible with the civilian population. The results for civilians were catastrophic. To provide the incentive of combatant status to guerilla fighters rather than the prospect of being treated as a criminal must operate to the advantage of civilians. As stated earlier, a balance must be struck in devising new rules between many different interests. The interests of the regular forces engaged in such disputes are also served by these changes to the law. Henceforth, in civil disputes to which the provisions of the Protocol are applicable all members of the armed forces qualifying as combatants must be treated as prisoners of war.

CONCLUSION

The law of armed conflicts attempts to provide rules for a form of activity which would seem by its very nature to be incapable of regulation. However, the laws of armed conflict, although frequently honored in the breach rather than in the observance, have been effective in the past to ameliorate the horrors of war. The enforcement of the rules remains a constant problem. Compliance does not depend on fear of prosecution for breach, but rather on the demonstrated willingness of States to abide on the whole with their international obligations. A comparison can be drawn with the lengths States are prepared to go to in order to justify their resort to force as self-defence rather than as a breach of the Charter's prohibition. Any new rules for humanitarian protection are primarily intended to raise the consciousness of States and participants.

Australia should forthwith ratify both the Geneva Protocols. To fail to do so is to allow short-sighted, short-lived political considerations to outweigh the responsibility of advancing the improvement of the principles of humanitarian law. As stated in the context of Art. 1(4):

> The issue which must be faced is whether a theoretical provision relating to certain armed struggles for self determination which is unlikely to be implemented outweighs the many positive improvements embodied in Protocol I for strengthening the protection of victims of war.[98]

[98] Solf, W. A., *op. cit.* 283.