THE RIGHT TO LIFE DURING ARMED CONFLICT

An Examination of the Relationship Between Human Rights and Humanitarian Law

Graduate Paper
International Human Rights
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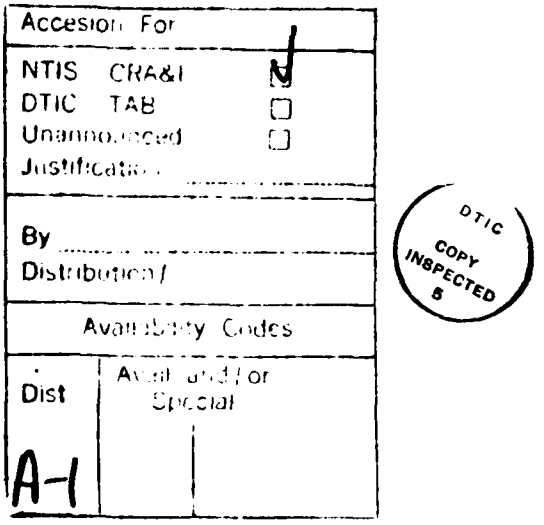
Kill the poys and the luggage!! 'tis expressly against the law of arms.

HENRY V, (Act 4, Scene 7)



I. Introduction

On October 25, 1983, a United States Navy A-7 "Corsair" attack/bomber from the aircraft carrier USS Independence bombed a complex approximately one-half mile east of the capitol city of St. Georges', Grenada, West Indies, during the United States' military intervention on the island.[1] The particular target on that date was a compound that contained several structures, including two forts: Fort Matthews and Fort Frederick. The Fort Frederick facility itself consisted of several buildings, two of which were particularly noteworthy: the Richmond Hill Prison and the Richmond Hill Mental Hospital

The aerial assault began after United States ground forces (members of a special Navy commando team on a mission to rescue Sir Paul Scoon, the Governor General of Grenada) reported being fired upon by soldiers of the Peoples' Revolutionary Army (PRA) near Fort Frederick. The United States asserts that on the date in question, the PRA was utilizing a group of buildings located inside the battlements between Fort Frederick and Fort Matthews as one of its regional headquarters and that artillery fire was being directed from this area into the residence of Governor General Scoon[3]. Furthermore, according to the U.S., the headquarters

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1. J. GERSTENZANG, The Associated Press Wire Service, Oct 31, 1983, Dateline: Washington (Monday, PM Cycle). See also: U.S. Officer's Briefing: New Report on Grenada. S.F. Chronicle, Nov 9, 1983 at 22, Col 1.
2. N.Y. Times, Nov. 1, 1983 at 1, Col 1.
3. J. GERSTENZANG, supra note 1 quoting a Department of Defense briefing given by Major J. R. Shields.

housed armed PRA members and served as a military command post. The location of this facility was a mere 143 feet away from the mental institution.[4] The A-7 Corsair bombed the fort, and its PRA military command post. Unfortunately, during the attack a bomb struck the mental institution. Seventeen patients of the mental institution were killed and a further six were injured.[5]

Following the attack, the Disabled Peoples' International (DPI)[6] filed a complaint against the United States with the Inter-American Commission on Human Rights[7] on November 5, 1983,

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4. Letter from U.S. Dept of State to the Inter-American Commission on Human Rights (Sept 21, 1984) at 2, as cited in D. WEISSBRODT & B. ANDRUS, The Right to Life During Armed Conflict: Disabled Peoples' International v. United States, 29 HARV INT'L L. J. 59 at 61 (Winter, 1988).

5. Scoon Tells Congressmen U.S. Troops Should Stay, Washington Post, Nov 6, 1983, at A18, (quoting a briefing given by U. S. Army Spokesman Lt. Col. Andrew Perkins). See also: Reporter's Notebook: Darkness and Light on the Isle of Spice, N.Y. Times, Section A, at 18, Col. 1. It should be noted that the DPI Petition to the Inter-American Commission (see Notes 6 - 8 and the accompanying text) reported that only sixteen deaths at the hospital resulted from the bombing. I have been unable to reconcile the differences in the accounts of this incident.

6. Disabled Peoples' International (DPI) is a nongovernmental organization representing advocacy groups of and for disabled people in 75 countries. In addition to advocating the rights of the disabled, DPI works to develop self-help training seminars, exchanges, and other projects for disabled people. Human Rights Internet, HUMAN RIGHTS DIRECTORY, North America 94 (1984).

7. The Inter-American Commission on Human Rights is part of the Organization of American States (OAS), charged with promoting respect for human rights. The Commission's authority stems from the Charter of the Organization of American States, (Apr. 30, 1948), articles 51 and 112, 2 U.S.T. 2394, T.I.A.S. No. 6847, 721 U.N.T.S. 324, and the American Convention on Human Rights, (Nov 22, 1969), articles 31 through 51, OAS Doc. OEA/ser.K./XVI/1.1, doc. 65 rev. 1 corr. 1 (1970) (entered into force July 18, 1978), reprinted in 9 I.L.M. 673 (1970). The Commission examines communications alleging violations of human rights obligations contained in the American Convention and the American Declaration of the Rights and Duties of Man, OAS Res. XXX, OAS Doc. OEA/ser.L./V/1.4 (1963) (adopted by the Ninth

on behalf of the "...unnamed, unnumbered residents, both living and dead, of the Richmond Hill Insane Asylum, Grenada, West Indies."[8] The complaint alleged an "unjustified violation of the right to life, liberty and security of the person pursuant to article 1 of the American Declaration of the Rights and Duties of Man" (American Declaration)[9]. In April 1986, the Commission

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International Conference of American States, March 30-May 2, 1948), reprinted in T. BUERGENTHAL, R. NORRIS & D. SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS 333 (2nd ed. 1986).

Only those states which have ratified the American Convention are bound by its provisions. The U.S. signed the American Convention and it was transmitted to the Senate for their advice and consent by President Carter, however, the Senate has not acted upon that request. Buergenthal, Inter-American System for the Protection of Human Rights, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439-440 (T. Meron ed. 1984). All members of the OAS, even those not signatories to the American Convention, are bound by the OAS Charter, the American Declaration, and the Statute of the Inter-American Commission on Human Rights, 1960 Annual Report of the OAS Secretary General, OAS Doc. OEA/ser.D./III.12, at 19-21 (1961), reprinted in L. SOHN & T. BUERGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 194 (1973).

Petitions to the Inter-American Commission may be submitted by any person, group, or nongovernmental organization, and need not be submitted by the victim or the victim's representatives. The Statute of the Inter-American Commission on Human Rights, supra, Article 1.

8. Petition Submitted to the Inter-American Commission on Human Rights by Disabled Peoples' International, Human Rights Committee, and International Disability Law, Inc. on Behalf of Unnamed, Unnumbered Residents, Both Living and Dead, of the Richmond Hill Insane Asylum, Grenada, West Indies (Nov 5, 1983).

9. Id. at 1 and 2. Article 1 of the American Declaration provides: "Every human being has the right to life, liberty and the security of his person." DPI further alleged a violation of article 11 of the American Declaration because of unsanitary living conditions at the bombed institution. Petition of DPI at 3-4. Article 11 states: "Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources." DPI, since its initial petition has dropped any claims under this provision and has conceded that since the time of the initial filing, the United States has provided the government of Grenada with both funds and materials for the care of the patients at the Richmond Hill Insane Asylum. Letter from Disabled Peoples' International

found the DPI petition admissible.[10]

Of particular import in Disabled Peoples' International v. United States, is that the Commission has been called upon by DPI to interpret article 1 of the American Declaration in light of "principles of humanitarian law" and to determine whether the right to life provision of that article extends to civilian victims of an armed conflict. In the words of Professor Weissbrodt, depending on how the Commission "construes the factual circumstances surrounding the bombing of the mental institution, the Commission could ultimately find that the bombing violated the mental patients' right to life and hold the United States government responsible for the resulting injuries and deaths."[11] Put-

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to the Inter-American Commission on Human Rights (Feb 4, 1986) at 5. See also TREASTER, Since the Invasion, A Grenada in Flux, N.Y. Times, Oct 25, 1987, Section 4 at 3, col. 2 which refers to the new mental institution built in Grenada with funds provided by the United States.

10. Disabled Peoples' International v. United States, Case 9213 (United States), Inter-Am. C.H.R., OAS Doc. OEA/ser.L./V/II.67, doc.6 (1986). Complaints submitted to the Commission must set forth a prima facie case that a violation of one of the rights enumerated in the American Declaration or the American Convention has occurred. FARER & ROWLES, The Inter-American Commission on Human Rights, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 47, 60 (J. Tuttle ed. 1978). If a petition does not state facts that constitute a violation of the American Declaration or American Convention, the Commission must declare the case inadmissible. Regulations of the Inter-American Commission on Human Rights, article 38, reprinted in T. BUERGENTHAL, R. NORRIS & D. SHELTON, supra note 7, at 355, 361.

11. D. WEISSBRODT & B. ANDRUS, supra note 3 at 60-61. If the Commission makes an adjudicatory finding against the U.S., it can recommend that the U.S. government pay damages to the victims or take other appropriate measures. If the U.S. fails to do so, the Commission can report its findings to the OAS General Assembly. The full extent of the Commission's powers are specified in Article 20 of the Commission's Statute. Article 20 provides:

> In relation to those member states of the Organization that are not Parties to the American Convention on Human

ting aside the United States' specific arguments in response to the petition for the moment,[12] this case presents a unique

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Rights, the Commission shall have the following powers in addition to those designated in Article 18:

a) to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man;

b) to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights, and;

c) to verify as a prior condition to the exercise of the powers granted under subparagraph b above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

12. Professor Weissbrodt related that the United States' principal argument in response to the DPI petition concerned its admissibility before the Commission. The argument against admissibility consisted of two parts. First, that the petitioners had not exhausted their remedies under domestic jurisdiction as required by Article 37 of the Commission's regulations. The second argument by the U.S. was that the Commission lacked the competence (jurisdiction) over the subject matter of the petition. This second argument began with the proposition that as a matter of general international law, an organization such as the Commission has no authority to decide a particular issue without the express consent of each State involved. In the United States' view, as related by Professor Weissbrodt, the Commission could not find in the petitioners' favor unless the Commission concluded that the United States violated the law of armed conflict, a subject the member States did not consent to place within the Commission's jurisdiction. Consequently, the United States would believe that the Commission would have to find the petition inadmissible. Unlike the Inter-American Court of Human Rights, the Commission has no express authority to make direct interpretations of treaty law other than the American Convention and the American Declaration. Letter from U.S. Dept of State, August 1985 at 2, cited in D. WEISSBRODT & B. ANDRUS supra note 3 at 65. Professor Weissbrodt's article notes that DPI did not ask "the Commission to apply directly treaties concerning humanitarian law. Rather it askes the Commission to construe article 1 of the American Declaration in conformity with other relevant international rules protecting the human person." Id. Thus, the Commission would not be called upon to render a judgment based

opportunity to examine the relationship of human rights (particularly in this case, the "right to life") and humanitarian law.

II. The Development of Human Rights and Humanitarian Law

At first glance it might seem that human rights, and the law of armed conflict cannot in any way be related. Indeed, prior to the 1950's, the law of war and the law of human rights were felt to have developed separately and were considered by various scholars of international law to be unrelated.[13] It was felt that international law was comprised of two parts: the law of war and the law of peace. The law of human rights was felt to be a part of the law of peace. The law of war was said to regulate the relations between nations by providing rules for the protection of certain categories of enemy personnel in time of war. In contrast, human rights law initially developed as a part of the constitutional law of the individual states, and was concerned with the relations of the state to its own nationals.

There has been much debate since then to determine what is the nexus between the two areas. One viewpoint holds that

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upon humanitarian law, but would utilize humanitarian law principles as a method of interpreting the applicability of article 1 of the American Declaration during armed conflict.

13. See e.g. R. QUENTIN-BAXTER, Human Rights and Humanitarian Law -- Confluence or Conflict? 9 AUSTRALIAN Y.B. INT'L L. (1985).

humanitarian law is but a part of the law of human rights.[14] Others suggest the opposite is true.[15] One scholar even proposed the creation of a new field of law to incorporate both areas.[16] All the viewpoints mentioned undoubtedly have some justification, but none is entirely satisfactory. To date, human rights conventions have influenced humanitarian law, but the converse has not been true. However, it is likewise true that humanitarian law does not derive all of its rules from human rights. At this point in time it seems that human rights and humanitarian law have converged to a certain degree. Both seek to protect the person, and both contain certain common principles. But each area encompasses rules and principles not found in the other. It may be that the only way to examine the relationship between human rights and humanitarian law is, as Professor Schindler suggested[17], to consider both topics as independent parts of

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14. See e.g. A. ROBINSON, Human Rights in the World, (1972)
15. H. MEYROWITZ's work as cited in D. SCHINDLER, Human Rights and Humanitarian Law, 31 AM U.L.REV at 942 (1982).
16. J. PICTET, THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW (1966)
17. D. SCHINDLER supra at note 15.

"international law, with common aims, some common principles, and overlapping areas of concern and effect." It is thus worthwhile to examine how these areas have developed.

There can be little doubt that it is in time of armed conflict that human rights come under the severest attack. It is also the most difficult time to assure their protection. The experiences of the Second World War, together with evidence of what has happened in the various armed conflicts that have taken place since 1945 in Korea, Vietnam, the Middle East, Africa and elsewhere, suggest that in time of conflict, whether international or non-international, human rights are among the earliest casualties. However, since time immemorial attempts have been made to control the horrors of war and to maintain that even in such situations man must comply with certain overriding principles, whether they be described to the law of God, chivalry or of humanity.

Even in classical times there was some measure of recognition that when conflicts occurred, there were still some people who might be considered as outside the scope of the conflict and entitled to protection. At the outset then, it is necessary to realize that the definition of human rights in relation to armed conflict is wider than is normally assumed. Human rights in this context refer to the rights of the individual combatants, of those like the sick and wounded or prisoners who are hors de combat, of those who attend to the needs of the latter, and of the rights of civilians.

According to several military manuals[18] on the law of armed conflict, this law is based on rules of chivalry, humanity and necessity, concepts of which are not easy to define. It is no

18. See e.g. U.S. Air Force Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations, (1976); U.S. Dept. of Army, Field Manual: The Law of Land Warfare, (FM 27-10, 1956).

easier, though, to find a universal definition of human rights.

By and large, it may be said that what we now know as the modern law of armed conflict is to be found in the Hague Conventions of 1907, commonly known as the Hague Law, and the Geneva Conventions of 1949, as amended by the two Additional Protocols of 1977, and known jointly as the Geneva Law. To some extent, the Hague Law is really concerned with humanizing armed conflicts and introducing proposals for the protection of those who are hors de combat (although Protocol I of 1977 relating to International Armed Conflict, which deals to a limited extent with means and methods, may in fact weaken the protection of the victims of war by doing so).

Prior to the adoption of these conventions, there were isolated agreements from the latter part of the nineteenth century on which dealt with the law in a piecemeal fashion, and there were also various rules and principles which had become accepted as part of customary law, as is made clear by the so-called "Martens" Preamble to the 1907 Hague Convention IV, on the Law and Customs of War on Land:

> Animated by the desire to serve...the interests of humanity and the ever progressive needs of civilization ...the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

The earliest attempts at humanizing armed conflict commenced with the situation in feudal times, when the modern state system was beginning to develop and armed conflict was becoming a type of contest played according to rules. At that time, however, such rules as there were remained uncodified, but were generally accepted by knights as rules of chivalrous conduct to be observed among themselves. In fact, in both England and France there were courts of chivalry to ensure that the rules were observed and commanders were more than willing to try offenders against these rules,[19] regardless of the nationality of the offender or his victim. There was, in other words, something similar to a rule of law prevailing among the orders of knighthood.

Over the course of the next two centuries, princes began to lay down rules governing the conduct of their forces and imposing duties of humanity with regard to the treatment of civilians. While these developments were taking place, there was also a growing belief in the need to care for those who were hors de combat by reason of wounds. By the middle of the sixteenth century it was fairly well established that doctors could not be taken prisoner and that wounded soldiers should be provided medical aid and transported back to their army. There seems therefore, to have been an effort made to achieve some recognition for human rights, at least insofar as the sick and wounded were concerned,

19. G. HERCZEGH, Development of International Humanitarian Law, (1984).

and along lines which are accepted in the Red Cross agreements of today. It is unclear however, whether these apparently humanitarian arrangements were solely the result of the philanthropic sentiments of the commanders involved, or whether they resulted from the more practical realization that caring and providing for the enemy's wounded could be expensive. So while philanthropy forbade the abandonment of the enemy wounded, common sense dictated that the "burden" of paying for the nursing of the wounded could be thrown upon the enemy by repatriation.

It was not until after the experiences of Florence Nightingale in the Crimea and the publication of Henri Dunant's account of his experiences at the battle of Solferino, that an attempt was made to fashion an international agreement for dealing with the wounded.[20] Shortly thereafter the first Geneva Convention on the Red Cross was adopted, introducing as a matter of universal international law, recognition for the human rights of the sick and wounded, as well as for those who attended them.

During the American Civil War, the first attempt to codify the law of armed conflict in a manner that would regulate the means of conduct while seeking to preserve respect for human rights was undertaken by Professor Lieber, whose Code received official promulgation by order of President Lincoln. For the first time a government issued instructions to its army relating to its conduct in the field which purported to be expressive of generally ac-

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20. Id. at 21.

cepted practice, and on which it was in fact based. Apart from dealing with such matters as martial law and the treatment of deserters, the Lieber Code also concerned itself with the proper treatment of prisoners of war and the wounded, as well as the behavior of an army of occupation and the need to maintain the rule of law insofar as that was compatible with military necessity. From the point of view of what we now know as human rights, it prescribed among other things, that

> military necessity does not admit of cruelty--that is the infliction of suffering for the sake of suffering or for revenge...the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit...protection of the inoffensive citizen of the hostile country is the rule... The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished....Salver...exists according to municipal or local law only. The law of nature and nations has never acknowledged it...Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free..., even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come...under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have by the law of postliminy, no belligerent lien or claim of service. All wanton violence committed against persons in the invaded country,...all robbery...or sacking, even after taking a place by main force, all rape, wounding, maiming or killing of such inhabitants, are prohibited under the penalty of death...Crimes punishable by all penal codes, such as arson, murder, maiming

> assaults, highway robbery, theft, burglary, fraud, forgery and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.[21]

While the Lieber Code was generally recognized by most nations as being expressive of the law of war and of limits imposed by it, it was not adopted by any other country. Nevertheless, it formed the basis of the Final Protocol of the Brussels Conference called in 1874 by Czar Alexander II, which produced a Project of an International Declaration concerning the Laws and Customs of War.[22] This was primarily concerned with jus in bello as between the armies, affirming the customary rule that the laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy, and indicating some of the activities, such as a refusal to give quarter, which were expressly forbidden. It also provided that since "prisoners of war are lawful and disarmed enemies...they must be humanely treated". Perhaps more important from the point of view of the preservation of human rights in time of armed conflict, the Project laid down that "family honor and rights, and the lives and property of persons, as well as their religious convictions and their practice, must be respected".

While developments were taking place concerning the regulation

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21. Promulgated as General Orders No. 100, 24 April 1863. Lieber Instructions, Articles 16, 22, 37, 42, 43, 44 and 47. Reprinted in D. Schindler & J. Toman, The Laws of Armed Conflicts (1973) at 3.

22. Id at 27.

of hostile activities between the armed forces and directed to the protection of non-combatants, more detailed regulations were drafted and adopted with regard to the treatment of the wounded and sick, as well as the shipwrecked. Broadly speaking, it was the intention of all such agreements that those who were hors de combat by virtue of the conflict and were no longer able to take an active part in hostilities should be treated with humanity and protected from the rigors and dangers inherent in active warfare. Moreover, provision was made for the care of such persons and the immunity from attack of those responsible for their treatment. In addition, the Geneva Conventions of 1864 and 1868 were drawn up in the knowledge that the International Committee of the Red Cross was available to assist in caring for the sick and wounded with the presence of this neutral body likely to ensure respect for the provisions of the Conventions.

The most important provision of the Hague Regulations, and one that underlies the whole of the law of armed conflict, is the assertion that belligerents do not possess unlimited discretion as to the means they may employ for injuring the enemy, and the concomitant provisions that they may not harm one who has laid down his arms or "employ arms, projectiles, or material calculated to cause unnecessary suffering". The significance for the individual of this latter provision is modified somewhat, since the concept of "unnecessariness" refers not to the suffering actually endured by the individual, but to suffering which is beyond the mere disabling of the victim. It is for this reason that the

Regulations repeat what had been established in feudal times--that quarter must not be denied to those willing to lay down their arms. Closely related to this ban on unnecessary suffering is Declaration IV, 3, adopted at the 1899 Hague Conference[23], which forbade any use of the "Dum-Dum Bullet", that is to say, bullets which expand or flatten easily on impact with the human body. From the point of view of placing a person hors de combat, an ordinary bullet suffices. One that flattens or expands on impact causes injury gratuitously and unnecessary to this purpose.

It is only in an incidental fashion (and only by giving the concept its broadest meaning) that the Hague Regulations dealt with human rights, apart from the relations between the armed forces. The Hague Regulations may be said to have recognized cultural rights by requiring those responsible for conducting sieges or bombardments to take "all necessary steps... to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, (and) historic monuments", and imposed a duty upon the besieged to "indicate the presence of such buildings or places by distinctive and visible signs, which (were to) be notified to the enemy beforehand". The rights of civilians were only taken into consideration in the section of the Regulations dealing with military authority over the territory of the enemy. In the first place, an occupant was required to take all steps in his power to preserve public order and safety. In addition, he was forbidden to force the population to provide information

23. Id at 103.

concerning its own nations' army or defences, and he was similarly forbidden to compel the inhabitants to swear allegiance to him. At the same time, "family honor and rights, the lives of persons, and private property, as well as religious convictions and practices" were to be respected, and private property was to be immune from confiscation. In order to preserve the economic stability of the civilian population in occupied territory, the occupying authority was required to assess taxes and other imposts in accordance with the law of the true sovereign, and his right to go beyond this was limited to the needs of the army or of the administration of the territory. The occupant's right to take requisitions was limited and he was only permitted to seize state property. Perhaps among the most important of the human rights of the population to be respected was that of the individual liability for wrongdoings, so that "no general penalty, pecuniary or otherwise, (was to) be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible".

Of the other Conventions adopted at the Hague in 1907, perhaps the only one that is important from the point of view of the preservation of human rights is Convention No. IX concerning Bombardment by Naval Forces.[24] The Convention appears to be almost self-contradictory. It clearly declares that the "bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden", but states that if a naval

24. Id at 591.

force sought to requisition money or supplies for its immediate use and this requisition was refused, that even an undefended place might be subjected to bombardment. However, such a bombardment would only be lawful if due notice had been given, which would have enabled the civilian population to depart. As with Convention No. IV, this Convention too provides for the protection of cultural establishments. It also provides that whenever a bombardment is decided upon, regardless of the reason, "if the military situation permits, the commander of the attacking force, before commencing the bombardment, must do his utmost to warn the authorities". Not only is it clear that military discretion was regarded as more important than the preservation of human values, but Convention IX, as Convention IV, also contains an all participation clause. That is to say, not only does the general rule of treaty law apply so that only the parties to the treaty are bound, but the Conventions would not apply in any war if any of the belligerents, however small or insignificant or nominal its participation, were not a party to the particular Convention involved. In such cases, whatever human right is preserved by the Convention, it would only be protected to the extent that a belligerent commander was prepared of his own good grace to recognize its importance.

After the end of the First World War, there was little development in the law of armed conflict that might be considered as being concerned with human rights. In 1922, by the Treaty of

Washington[25], submarines were forbidden from attacking merchant vessels unless the crew and passengers had first been placed in safety. Subsequently, within the Treaty of London of 1930, it was pointed out that:

> For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.[26]

This restriction on naval warfare applied equally to surface vessels and submarines, and if fully observed, would virtually

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25. Id at 657.
26. Id at 661,662.

prevent any attack upon a merchant vessel by a submarine. It is perhaps of interest to point out that, in its Judgment, while the Nuremberg Tribunal confirmed the illegality of unrestricted naval warfare directed against merchant shipping[27], which automatically meant ignoring the right to life of survivors, it nevertheless refused to condemn Donitz or Raeder for their orders to the German fleet, because of the similar orders issued on behalf of the Allies. Once again, military necessity prevailed over respect for human rights.

The use of aircraft and the introduction of aerial bombardment during the First World War drew attention to lacunae in the law of armed conflict, for all that had come out of the Hague Peace Conferences of 1899 and 1907 was a Declaration forbidding the launching of projectiles from balloons.[28] In 1923, therefore, a Commission of Jurists drew up the Hague Rules of Air Warfare.[29] Even though these were never adopted by States, they are important since the general view was that they were expressive of customary law. From the point of view of human rights, although the use of incendiary or explosive projectiles by or against aircraft was not forbidden, "aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants (was) prohibited". In fact, only bombardment of military objectives was considered lawful, and if a lawful objective could not be attacked

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27. Cmd. No. 6964, at 108 (1946).
28. Schindler & Toman, supra note 21, at 133.
29. Id at 139.

without the indiscriminate bombardment of the civilian population, no aerial bombardment was to take place. On the other hand, "in the immediate neighborhood of the operations of the land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population". While it was recognized that the rights of civilians might have to give way to military necessity, the draftsmen of the Rules seem to have been far more concerned about preserving cultural monuments and went so far as to provide for the establishment of security zones around such installations. Perhaps the most significant provision of the Hague Air Rules in relation to human rights was the provision that the occupants of a disabled aircraft seeking to escape by parachute were immune from attack during their descent. This practice was not incorporated into a treaty until 1977, in Article 42 of Protocol I. Despite the numerous instances of this and the other Rules being disregarded, it should not be overlooked that in both World Wars, and particularly during the First World War, the old rules of chivalry involving some measure of respect for human rights were often observed between the airmen themselves.[30]

30. See e.g. Spaight, Air Power and War Rights 20-21, 109-120 (1947).

Of more significance than the Hague Rules was the Geneva Protocol of 1925, which prohibited the use of asphyxiating, poisonous or other gases and of bacteriological methods of warfare. Although the it was felt by many that in view of the large number of States that had ratified this Protocol, that the use of gas as a weapon was contrary to customary law, the United States refused to accept this view until 1975, and even then reserved the right, as so many others had done, to use it in retaliation. Moreover, the United States refused to agree that this type of warfare could not be used if civilians were employed to screen attacks or to control rioting prisoners of war, and even claimed that it remained legal for the purpose of clearing a field of fire. The general view today, however, is that gas is forbidden, certainly against civilians, and almost certainly against troops.[31] While it may be true that at least the use of pre-1945 gases as a weapon was somewhat uncertain in view of the weather vagaries, there seems to be little doubt that the ban on this weapon stems from humanitarian rather than militarily utilitarian motives.

Perhaps the greatest contribution in the treaty field to the preservation of human rights was the Pact of Paris (Kellog-Briand Pact) adopted in 1928. By this Pact, war as an instrument of national policy was declared foresworn, although there were sufficient reservations from leading powers in connection with their

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31. See e.g. Nonstrategic Nuclear, Chemical and Biological Operations, Air Command and Staff College (Associate Program) Materials, AIR UNIVERSITY PHAMPLET 35CL358711 (1987) and citations noted therein.

claim to a right of self-defense to render the ban somewhat artificial. Moreover, the definition of self-defense was based on individual state-interpretation, so that in some cases it was so extensive as to almost run counter to the Pact. Thus, Great Britain maintained that the Pact did not prevent military action on behalf of the British Empire interests in the Mediterranean area, and particularly in the vicinity of the Suez Canal. If the interpretation of the Pact adopted by the Nuremberg Tribunal that aggressive war was rendered a crime[32] is accepted, a strong blow would have been struck for the human right to life since all states are assumed to be law-abiding and purport to be so. Reality indicates, however, that this is far from being the case. In fact, even the declaration by the United Nations that aggression is a crime expressly excludes from this ban armed conflicts alleged to be fought on behalf of a national liberation movement seeking to overthrow imperialist, neo-colonialist and racist regimes. Since self-determination has been elevated to the level of the first and principal of all human rights by the two international Covenants in this field[33], it may have been safe to presume that the right to self-government takes precedence over the right to life.

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32. Cmd. No. 6964 at 38-42 (1946).
33. Article 1 of the International Covenant on Civil and Political Rights and Article 1 of the International Covenant on Economic, Social and Cultural rights.

Perhaps the first major indication that there was a new approach to the importance of protecting human rights in time of conflict, at least the rights of the general population as distinct from those of the fighting forces, appeared in the various statements made on behalf of the Allies during the Second World War. These pronouncements, while often criticized as propounding principles of law de novo and ex post facto, in many ways suggested a reassertion of the principles which found their legal expression in the London Charter,[34] which set up the International Military Tribunal at Nuremberg. Apart from the condemnation of aggressive war as a crime, it condemned such traditional war crimes as murder, deportation to slave labor and plunder of property. The London Charter also specified crimes against humanity, namely murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, or persecution on political, racial or religious grounds, provided that such crimes were in execution of or in connection with any crime within the jurisdiction of the Tribunal, regardless of whether they were legal by the domestic law or not. By tying the offense to matters already within the jurisdiction of the Tribunal, the Charter tended to reduce the scope of the offense, and in its Judgment, the Tribunal virtually ruled that, at least insofar as it was concerned, a crime against humanity would have to amount to a war crime.[35] When, at the instruction of the General Assembly

34. Schindler & Toman, supra note 21, at 689.
35. Cmd. No. 6964, at 65 (1946).

of the United Nations, the International Law Commission drew up its statement of Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, it confirmed that crimes against humanity were to all intents and purposes war crimes under another name; for having listed what it considered to amount to such crimes, the Commission stated that this was the case only "when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime".[36]

From the point of view of the modern law of armed conflict, the most important documents to be considered when examining the reality of human rights during war are the 1949 Geneva Conventions and the Protocols supplementary thereto of 1977.[37] The first three of the 1949 Conventions relate almost exclusively to the rights of service personnel, and those who for the main part might be described as camp followers. Broadly speaking, the aim is to ensure the protection of life and limb of those who have been

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36. Schindler & Toman, supra note 21 at 701, 702.

37. Geneva Convention (I) for the Amilioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1949); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (1949); Geneva Convention (III) Relative to the Treatment of Prisoners of War, (1949); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, (1949); Protocol I Relating to the Protection of Victims of International Armed Conflicts, (1977); and Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts, (1977).

rendered hors de combat by wounds, sickness, shipwreck or capture. Apart from provisions concerning health, welfare, feeding and medical treatment of these individuals, the Conventions also lay down that they must not be subjected to torture, nor made the object of reprisals; that women must be specially respected and protected; that all those in enemy hands must be protected from ignominy, attack or ridicule; and that in the event of there being need to subject such persons to punishment, this may only be done after a proper trial, by a proper judicial tribunal, applying what may be described as those principles of the rule of law which are respected in modern Western societies. In addition, the Conventions provide that no person in enemy hands may be subjected to biological experimentation, nor willfully left without medical attention or exposed to contagion or infection. Moreover, reflecting the new understanding of the universal application of human rights and their protection, it is expressly declared that there may be no priority in treatment other than on medical grounds, and there must be no "adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria". To a great extent, it may be said that these Conventions merely amount to a codification and reaffirmation of what had long been recognized as law concerning the sick, wounded and shipwrecked, brought up to date in the light of the experience of the Second World War and the war crimes committed between 1939 and 1945, and written in language which reflected the new concern with international protection of human rights. On one level, each

of the Conventions went beyond these traditional ideas. In what has come to be known as common Article 3, they introduced a minimal humanitarian consideration into non-international conflicts. They made these protective elements applicable not only to combatants who might be captured, and who in a non-international conflict would often, because of the ideological hatreds engendered, require special protection, but extended the protection even to civilians. All persons falling into the hands of the adverse party are to be protected, again without any adverse distinction, against

> violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

In addition, the wounded and sick -- even those belonging to rebel formations or, equally, government people in rebel hands -- are to be collected and cared for.

The greatest departure made by the Geneva Law of 1949 and which may be regarded as a manifesto of human rights for civilians during armed conflict is the Fourth Convention Relative to the Protection of Civilians. During the Second World War, as became particularly clear in the evidence presented at the war crimes trials, those whose human rights were most likely to be trampled upon in wartime were civilians--not those subjected to bombing, but those who found themselves in enemy hands and who, unlike the wounded, sick and shipwrecked, lacked any Protecting Power authorized to supervise and protest the conduct they received. The Convention extends to all those in the hands of a party to a conflict, so that it covers both enemy and neutral subjects; but they are only protected if their home State is a party to the Convention, and in the case of neutrals, they are only protected if their home State is not diplomatically represented with the occupying authority. Failing this, the only protection they may enjoy is that provided by customary law. While the presence of a

Protecting Power offers some opportunity for ensuring that the human rights of those protected are indeed respected, of more importance is the substance of the rights which are available for protection. Insofar as medical rights are concerned, the Convention is really little more that an adaptation of the provisions in the other Geneva Conventions relating to the sick and wounded of the armed forces. The Fourth Convention makes it clear, however, that no medical officer attending a civilian, regardless of the nationality of that civilian--and there must be no adverse discrimination by the doctors or the Occupying Power--can be punished for the services he renders.

The purpose of the Fourth Convention was to prevent a repetition of the situation resulting from the Nazi occupation of Europe during the Second World War, when nationals of the occupied territories were subjected by their countries' enemy to every form of indignity and cruelty known to man. The Convention's provisions are intended to ensure that civilian nationals of a party to a conflict falling into the hands of an enemy, whether in the terri-

tory of that enemy or in territory occupied by him, preserve their dignity as human beings and, to the extend possible in view of the war situation, retain and enjoy those rights which are normally considered as belonging to human beings, regardless of race, nationality, sex, political belief, or any other special characteristic.

Apart from providing for proper medical care for civilians caught in a war situation, the Fourth Convention details arrangements that should be made to look after orphaned children and those who have become separated from their families, including requirements for their education in a fashion that will preserve their cultural and linguistic identity, thus preventing any repetition of the Nazi processes of cultural genocide. Other Nazi practices that were to be forbidden in the future include a ban on both physical and mental coercion against civilians, especially if this is in an effort to secure information from them. Perhaps

more important is the provision that the taking of hostages, which had been practiced throughout occupied Europe, is forbidden, as is the imposition of collective punishments. For the future, occupying authorities were bound to recognize the principle of individual responsibility while such inhuman practices as corporal punishment, torture, mutilation and medical experimentation are all forbidden. If these provisions are indeed followed in a future armed conflict, the activities that were associated with the Nazi concentration camps and the Holocaust will become matters of the past. It must not be overlooked, however, that in many of the conflicts that have taken place since 1949, be they in Indo-China or in Africa, the depth of ideological hatred has been such that while the parties have paid lip-service to the Convention and even acceded thereto, the practice has been far from what the Convention requires.[38]

While the Civilians Convention contains detailed provisions

38. Various periodicals have reported accounts from refugees from Vietnam and Kampuchea which indicate that policies of near genocide have been pursued in those countries.

regarding repatriation and internment, and provides for the sustenance of all non-nationals finding themselves in the hands of an occupant, it also forbids the occupant from changing the local law or seeking to punish the inhabitants for what it, the occupant, regards as crimes committed against itself before the occupation commenced. At the same time, it seeks to guarantee that persons tried for offenses against the occupant will receive a fair trial in accordance with the rule of law and, to make sure that this is in fact the case, a representative of the Protecting Power is entitled to be present at any trial for an offense carrying a sentence of death or two years imprisonment or more. A problem arises with regard to the execution of a death sentence. In order to allow full opportunity for appeal and requests for clemency, the Convention provides that no death sentence may be carried out until six months have elapsed, and if it is considered necessary for security reasons to shorten this period, the Protecting Power must be informed and given an opportunity to make representations. There are some countries, however, where to suspend execution of a death sentence is considered to increase the anguish associated with the penalty, and these countries seek to fulfil the appellate

processes as speedily as possible. The likelihood of a six months delay is thus unreal in such countries. Here there is a possible conflict between differing views of humanitarian principles.

The war crimes trials after the Second World War indicated that the worst atrocities were not committed at the front or against prisoners, but were rather those which were perpetrated against helpless civilians. Forced labor of enemy civilians brought into Germany proper was responsible for innumerable deaths, with the occupant often transferring his own population as settlers into places that the forced laborers had left. This accomplished a dual purpose: it removed enemy civilians to assist in the German war effort, while at the same time providing for an ultimate take-over or subversion of enemy territory. These practices are now forbidden and rank among those grave breaches of the Convention which render the perpetrators liable to punishment not only by their own country, but by any country into whose hands they fall. Moreover, the parties to the Convention have undertaken to search for any persons accused of such offenses and alleged to be in their territory, and, if they themselves are unwilling to institute proceedings against them, they are obligated to hand them over to any party to the Convention which has made out a prima facie case. Perhaps the simplest way of indicating the nature of the human rights which the Convention seeks to protect is by reproducing the test of Article 147 defining grave breaches (Article 148 forbids any agreement between parties which would seek to grant absolution in respect to such breaches):

> willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

It would be naive to imagine that the mere postulation of rights in a treaty is in any way a guarantee that these rights will in fact be enjoyed. The Convention purports to achieve compliance by providing for its own dissemination by way of inclusion in military and, hopefully, civilian programs of instruction, on the assumption that knowledge of what rights are guaranteed by law will result in a wider observance of those rights. The Civilians Convention, however, only protects non-nationals in the hands

of an Occupying Power. Despite all the talk about the importance of human rights, and despite the knowledge of what happened, for example, to German dissidents and "undesirables" during the Second World War, nationals only enjoy the limited protection afforded them by other international agreements on the preservation of human rights to which their home State may be a party. Such international agreements, however, allow for derogations in time of emergency, and the question whether an emergency warrants derogation tends to be a matter of self-interpretation.[39]

When public opinion, and later the United Nations, became interested in the preservation of human rights, the emphasis was upon the rights of the individual, so much so that the usual manner to describe such rights was by reference to the rights of man. This emphasis seems to have shifted to the rights of groups and of peoples, with the individual becoming less significant. In addition, to some extent the concept of what constitutes human rights has changed. Today, the idea has developed into what might be described as the rights necessary to enable people to enjoy a full and happy life in the widest possible sense. While the law

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39. See e.g. Green, "Derogation of Human Rights in Emergencies", 16 CAN. Y.B. INT'L LAW, 92,102-104 (1978).

of war has always recognized an immunity for places of worship, as well as for those, like schools, clearly intended for civilian non-combatant use, nowadays the protection of such inanimate objects has been much extended, so as to protect those objects which are considered as essential if the role that culture has to play in this connection is recognized.

With this end in view, in 1954 the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict was drawn up. The parties,

> convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its own contribution to the culture of the world, (affirm) that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.[40]

In the event of armed conflict, such cultural property is to be marked with an identity emblem defined in the Convention, and is

40. Schindler & Toman, supra note , at 529, 531.

to be immune from attack. As a further step to preventing cultural genocide, a Protocol attached to the Convention forbids the exportation of cultural property from occupied territory and enjoins the parties after the conflict to return such property wrongly exported.

Since 1945, most conflicts which have occurred have been of a non-international character, in the sense that two or more sovereign States have not confronted each other, at least not directly, even though they may have fought through surrogates or on behalf of a surrogate. This has meant that the individuals engaged in these conflicts have for the most part, been unprotected. International law has traditionally regarded conflicts within a territory and only involving a government and its citizens -- however the citizens might choose to describe themselves -- as being within the government's domestic jurisdiction and outside the scope of the law of armed conflict. The only protection offered such nationals by the Geneva Conventions has been through the common Article 3 provisions in all four of the Conventions, and this article has not operated to protect nationals held or captured by their own country in an international conflict. When the International Committee of the Red Cross decided to recommend the updating of the 1949 Conventions, it took the opportunity to try and fill this void. It did so in a way that would appeal to and

would reflect the views of the majority of the States in the world, most of which came into existence either after 1945 or 1949, during the retreat from colonialism.

The first session of the Geneva Conference on Humanitarian Law in Armed Conflict took place in 1974[41], and the only article that was approved dealt not with what would normally be described as human rights, but with extending human rights into a field which would not normally be protected by international law. The participants found it possible to differentiate among conflicts between governments and their peoples. As the result of Article 1 of Protocol I, international conflicts now include those "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." This means that at least some wars which would traditionally have been regarded as civil wars are now within the purview of international law. The participants are therefore protected by the rules of the law of war and enjoy such human rights as are granted to the forces in the field and those hors de combat under the Geneva Conventions, and presumably under such customary rules of law as are to be found in the Hague Regulations.

Another important feature of Protocol I is that, for the first time since the Hague Conference of 1907, an attempt has been made to make the methods and means of warfare subject to recognition of the human rights of non-combatants. For those accepting the

Protocol, it is now prohibited to employ means and methods of combat which may be expected to cause widespread, long term and severe damage to the natural environment. Attacks which are likely to cause excessive injury to civilians or damage to civilian objects, as compared to the concrete and direct military objective anticipated, are described as indiscriminate and forbidden. In fact, if it becomes apparent that this is likely to have been the case, the attack in question must be suspended or cancelled. The starvation of civilians as a method of warfare is forbidden, and objects such as foodstuffs, livestock, drinking water installations and the like, which are indispensable to the survival of the civilian population are immune from attack. The same immunity attaches to works and installations containing dangerous forces, that is to say, dams, dykes and nuclear electrical generating stations, if the forces released by an attack on such installations are likely to cause severe losses among the civilian population.

As regards the rights more generally considered as being human rights, Protocol I provides special protection for women and children. Surprisingly, in view of its recognition of modern trends, while specifically protecting women from rape, the Protocol makes no special provision for the protection of men, though it does forbid any form of indecent assault against protected

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41. D. SCHINDLER, supra note 15.

persons. The Protocol is supplementary to the Geneva Conventions, so that all the protection afforded by them remains in place, and it is made clear that forbidden acts are proscribed for both military and civilian personnel. It is expressly stated that:

> The following acts are and shall remain prohibited at any time in any place whatsoever, whether committed by civilians or by military agents:
> (a) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation;
> (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
> (c) the taking of hostages;
> (d) collective punishments; and
> (e) threats to commit any of the foregoing acts. [42]

The Article stipulating this goes on to provide for a trial fully in accordance with the "generally recognized principles of regular judicial procedure". As if to make assurance doubly sure, this Article appears under the rubric of fundamental guarantees, as part of the section of the Protocol devoted to the treatment of persons in the power of a party to the conflict, thus indicating

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42. Protocol I, Article 75(2), (1977) reprinted in 16 I.L.M. 1391 (1977).

that they are valid in one's own, as well as in occupied territory and applicable to one's own nationals, as well as to those belonging to the adverse party. Moreover, it expressly states that these guarantees are in addition to "other applicable rules ... relating to the protection of fundamental human rights during international armed conflict."[43] The general applicability of these rules to all persons in the power of a party to the conflict and at all times is emphasized by the provision that persons accused of war crimes or crimes against humanity are to be tried in accordance with the applicable rules of international law, even if they are accused of grave breaches of the Conventions or the Protocol.

Prisoners of war, the wounded and sick are in the direct power of their captors and are therefore in need of special protection, for they are the most obvious objects of attack. The medical experiments at Auschwitz and the accusations that have been made with regard to the taking of blood from enemy captives for the use of one's own personnel have resulted in a need to spell out in some detail what medical rights now exist. In addition to specifying that medical treatment shall be in accordance with the needs of the patient and generally accepted medical standards, it is "in particular, prohibited to carry out on ...persons (who are in the power of the adverse party, or who are interned, detained or otherwise deprived of liberty as a result of an international armed conflict), even with their consent: (a) physical mutila-

43. Id, Article 72.

tions; (b) medical or scientific experiments; (c) removal of tissue or organs for transplantation", unless required for the benefit of the patient.[44] Blood for transfusion and skin for grafting may be given, so long as they are given voluntarily and without any inducement or coercion, and only for therapeutic purposes, and so long as a proper register of all such donations is maintained and available at all times for inspection by the Protecting Power. In view of the ban on other transplants, it would appear that a captive could not even consent, for example, to a kidney transplant carried out for the benefit of his own brother.

It has already been indicated that, insofar as the law of armed conflict it concerned, much reliance is placed on the threat of condign punishments as the means for insuring respect for the human rights laid down by that law. Protocol I goes further than the Geneva Conventions and widens the scope of grace breaches that are now liable to such punishment, and concerning which the parties have undertaken to cooperate with each other in connection with criminal proceedings and in regard to extradition. There is also envisaged, when sufficient ratifications are received and on an optional basis, the establishment of an international fact-finding commission which will be able to look into any facts alleged to be a grave breach and to facilitate, through its good

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44. Id. Article 11.

offices, the restoration of an attitude of respect for the Conventions and the Protocol. At various places, the Protocol provides that the breach of certain specific articles amounts to a grave breach, and Article 85 adds a number which are relevant from the point of view of human rights: transfer of parts of its own population by the Occupying Power into occupied territory and deportation or transfer of parts of the population of the occupied territory; unjustifiable delay or repatriation of prisoners of war or civilians; practices of apartheid, intentional attack upon "clearly -recognized historic monuments, works or art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement"; and depriving protected persons of the rights of fair and regular trial.

On the face of it, therefore, the Geneva Conventions together with Protocol I would appear to guarantee to those who are hors de combat, whatever the reason and whatever their status, those rights which are now considered to be fundamental to all people by virtue of their being human.

Since Protocol I concerns itself only with international armed conflicts, the International Committee of the Red Cross sought, through the medium of Protocol II[45], to extend some protection to those involved in a civil war not amounting to a war of national liberation for the achievement of self-determination. The provi-

45. Protocol II, reprinted at 16 I.L.M. (1977) at 1442.

sions of Protocol II are similar to those in Protocol I, although somewhat modified, with regard to objects essential to the sustenance of the civilian population, like foodstuffs; the protection of cultural monuments; the general protection of the civilian population from the effects of conflict; and the treatment of the sick and wounded, although the rights of medical persons to treat, for example the rebels is limited by the provisions of national law. More importantly from the view of the protection of human rights is Part II of the Protocol dealing with the humane treatment. It lays down that all who are not actively engaged in the conflict are entitled to respect for their honor, person, convictions and religious practices and must be treated humanely and without any adverse distinction. It is prohibited to order that there shall be no survivors, while murder, mutilation, torture, corporal punishment, violence to the life, health and physical or mental well-being of persons are forbidden. Also prohibited are collective punishments, the taking of hostages, acts of terrorism, humiliating and degrading treatment, including rape, enforced prostitution and indecent assault, together with slavery and the slave trade. Children must be properly cared for, and none under the age of fifteen should be recruited. Persons who are detained for any reason must be treated with humanity, and their medical and other needs must be guaranteed. In addition, persons charged with offenses related to the conflict are entitled to a proper and fair trial, and no one under the age of eighteen, regardless of

whether his crime amounted to a war crime, may be executed, nor shall a death sentence be carried out on pregnant women or mothers of small children. Perhaps most important from the point of view of rehabilitating the society affected by the conflict is the provision that at the end of the hostilities the authorities shall endeavor to proclaim the broadest possible amnesty for those involved in the conflict.

As with the Conventions and Protocol I, respect depends upon those called upon to carry these obligations into effect. In the case of Protocol II there is nothing concerning breaches, supervision or punishment. There is not even an obligation upon the parties to make the contents of the Protocol known to their people so that they may be aware of their obligations and rights should a non-international conflict arise. All that is provided is that the "Protocol shall be disseminated as widely as possible".

Cynics might rightly assert that there seems little purpose in providing for respect for human rights in the law of armed conflict, for when a conflict erupts, it is because the rule of law has broken down between the parties. There is no point, in such circumstances, they might assert, in relying on the international agreements relative to human rights for in emergency these are subject to derogations. However, unlike the international agreements relative to the preservation of human rights in peacetime, the law of armed conflict lays down penal measures for those who offend gravely against human rights. It would appear,

therefore, that paradoxical though it may seem, there is more chance for the effective enforcement of human rights and punishment for offenses against them in time of armed conflict than there is during peace. But in any event, they are both vital parts in the composition of modern international law.

III. Humanitarian Law and Disabled Peoples' International v. United States

As noted earlier, The United States government's argument during the Admissibility phase of the Commission's proceedings challenged the Commission's competence (jurisdiction) to decide an issue of humanitarian law. This argument largely rests upon the notion that humanitarian law is codified in the various treaties and thus would require the Commission to make direct treaty interpretations. Clearly, however, as noted above, humanitarian law grew from, and built upon customary practices. The notion that the Commission has the competence to use humanitarian law principles as a method of interpreting the applicability of Article 1 of the American Declaration during armed conflict is not so outrageous. It must be noted that the American Declaration does not provide for the derogation of the rights specified during armed conflict. In that regard it is similar to most other international human rights instruments, with the notable exception of the European Convention for the Protection of Human Rights and

Fundamental Freedoms. That instrument expressly permits a derogation from the right to life during armed conflicts, but the derogation is very limited and implicitly incorporates the norms of humanitarian law. Convention for the Protection of Human Rights and Fundamental Freedoms, article 15, paragraph 2, (entered into force Sept 3, 1953) 213 U.N.T.S. 221. The American Convention, on the other hand, expressly disallows derogation from the right to life in times of war, public danger or other emergency within article 27, paragraph 2.

Even allowing, however, that the Inter-American Commission correctly decided the issue of admissibility, humanitarian principles will not provide an easy resolution to this petition. The Inter-American Commission should have little difficulty in determining that principles of humanitarian law applied during the United States' military intervention in Grenada. Furthermore, it should not be overly difficult for the Commission to determine the existence of a customary norm from humanitarian law which prohibits the unnecessary killing of civilians during an armed

conflict. The difficulty for the Commission will clearly lie in attempting to apply this norm to the situation at Richmond Hill from both a factual context and by the necessity to balance this norm with the longstanding principle of military necessity noted earlier. If an armed conflict exits, a belligerent is justified in applying the amount and kind of force necessary to achieve the submission of the enemy in the shortest period of time and with the least risk to himself. Concededly, military necessity does not exempt combatants from any restriction upon their use of force. The norm of military necessity must be balanced with the principle of proportionality -- which holds that the destruction of a military objective must not be effected at the price of disproportionate suffering among the civilian population.[46] Similarly, the norm of military necessity is limited by the principle of distinction -- that civilians and civilian property must be treated differently from combatants and military objectives.[47] Determining the existence, however, of a norm and being able to apply it are entirely different issues. Professor Weissbrodt's commentary on this situation relies heavily upon the provisions of Protocol I to supply the rules and principles the commission can then apply.[48] Protocol I has not been ratified by the United States, and it is unlikely that the U.S. will do so in the future. There are several reasons for this, only some of which were specified in President Reagan's forwarding correspondence of Protocol II to the Senate for advice and

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46. See D. WEISSBRODT AND B. ANDRUS supra note 4 at 71. Also: U.S. Air Force Pamphlet 110-31 supra note 18.
47. G. HERCZEGH, supra note 19 at 139.

consent.[49] There is no basis for Professor Weissbrodt's conclusion that the U.S. rejection of Protocol I "had nothing to do with the provisions protecting civilians." The general principles of customary law are there without question, the difficulty will be in determining their content and specificity in a particular setting.

Similarly, the resolution of the factual discrepancies will be a monumental task for the Commission. At the outset it must be recognized that the parties view the factual setting of the attack entirely differently. The Associated Press reported the United States' announcement on October 31, 1983, that "We were not aware there was a civilian hospital there." Similarly, the Defense Department report of that same date noted that the hospital had been designated as a military area occupied by Grenadian forces, and had not been clearly marked as a civilian hospital warranting any special protection. Various accounts of the attack noted that some PRA soldiers had occupied the mental institution to fire at the U.S. forces, were flying a flag in front of the building as a rallying point for its forces, and had armed both patients and staff as well.[50] The Canadian new magazine, MACLEAN'S, reported that Alice Celestia, a nurse at the facility, absolved the United States of any blame for the attack since in her view, "there was

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48. D. WEISSBRODT & B. ANDRUS, supra note 4 at 76,77.
49. 23 WEEKLY COMP. PRES. DOC. 91 (Feb. 2, 1987) at 92.
50. See e.g. Images from an Unlikely War; a Report from the Battle, TIME MAGAZINE, Nov 7, 1983, at 30.

no way the Americans could have known they were shelling a hospital." The DPI petition disputes these accounts. Consequently, the Commission will have to resolve specific factual discrepancies almost six years later. Once having determined the facts, the Commission will then have to apply those facts to the existing customary norms and determine whether or not the U.S. action in bombing the hospital was a "deliberate attack on civilians, ... an indiscriminate attack with civilian casualties, ... a military mistake, or ... a legitimate military attack resulting in collateral injuries to civilians." D. WEISSBRODT & B. ANDRUS, supra note 4 at 78. The United States' position is obvious. Whether the Commission will concur remains to be seen.