The Limitations on Methods and Means of Warfare

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"The employment of certain agents, instruments, and methods of warfare has given rise to many disputed questions."

T.J. Lawrence

That matter of fact quotation dates from the year 1910, when it was used to introduce a discourse on the present subject. One could be forgiven for wondering whether, despite the experiences of the intervening 70 years and the earnestness with which we have sought to clarify the law, we have yet managed to find ways of satisfactorily avoiding the likelihood of "disputed questions" continuing to arise well into the foreseeable future.

War is a very ancient custom — one which, although now stripped of most of its former legal character and respectability, we do not appear able to cast away. In consequence, the law of armed conflict has lost none of its importance.

What follows is not intended to be a technical treatise, it is a simple account of the nature of the law of armed conflict and a brief commentary on recent efforts to develop and to reaffirm certain of its more significant rules.

The term "methods and means of warfare" is of fairly recent vintage. One can sense vaguely, rather than know confidently, what it signifies. Coined along the way and adopted during their deliberations by the drafters of Protocols I and II additional to the Geneva Conventions of 1949 for the protection of war victims — who neglected to define its meaning with any degree of precision — the term appears to embrace strategies and tactics, and every other measure by which, with the use of manpower and weaponry, an armed force may carry on hostile operations against its opponents. But one is not sure.

Let us, however, return to that problem after a brief survey of the nature and development of the law of armed conflict — of which the rules imposing the limitations on methods and means of warfare constitute one branch.

The law of armed conflict (in the past more usually known as the law of war) is that part of international law which regulates the conduct of armed hostilities. The law of armed conflict does not contemplate the legality of recourse to war, nor does it have any bearing on the right to threaten or use force in international affairs. Questions surrounding those matters are the subject of other parts of the law. The province and function of the law of armed conflict is limited and specific. It has been described in these terms:

"The truth is that when war enters on the scene all law that was previously

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1. Lawrence, The Principles of International Law (1923), 489.
concerned with the dispute retires, and a new law steps in, directed only to secure fair and not too inhuman fighting."

As that comment clearly indicates, the law of armed conflict comes into play whenever war begins and it remains in force whilst ever a state of war exists. The law of armed conflict applies not only in declared wars but in all armed conflicts, without regard to any of the circumstances which provoke their outbreak or justify their being waged. That a war or other situation of armed conflict arises as the result of aggression is immaterial to the application of the law of armed conflict.

The law of armed conflict imposes duties and confers rights. It binds all belligerents, whether they assent or not. Its obligations and benefits apply equally to all parties to a conflict, and impartially to its victims, without regard to the causes that they espouse or that are attributed to them.³

Unlike most other parts of international law, the law of armed conflict binds individuals as well as States. In particular, the law of armed conflict binds members of armed forces, who ignore it at their peril. Members of armed forces who are guilty of acts of commission or omission contrary to the rules of the law of armed conflict may be tried by the authorities of their own State or, in some circumstances, by the authorities of other States.⁴

It is said that three principles underlie the law of armed conflict and continuously condition its evolution. These are, in the order in which they are most often stated, the following:

1. the principle of necessity, by virtue of which a belligerent has the right to apply any amount and any kind of force necessary to compel the submission of the enemy with the minimum expenditure of time, material and money;
2. the principle of humanity, which forbids the application of such amounts and kinds of force as are superfluous to the purpose of overwhelming an adversary; and
3. the principle of chivalry, which demands a certain amount of fairness and mutual respect between adversaries.⁵

Derived from the second of these principles, but no less relevant, are four subsidiary principles enumerated in the preamble to the Declaration of St Petersburg (1868). These are:⁶

— that the only legitimate object . . . during war is to weaken the military forces of the enemy;
— that, for this purpose, it is sufficient to disable the greatest possible number of men;
— that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; and

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³ A principle beyond dispute, recognised by the preamble to Protocol I.
⁴ See, eg, the provisions of Article 49 of the First Geneva Convention of 1949 and, more particularly, Article 85 of Protocol I.
⁵ British Manual of Military Law (1914), 234, in which Oppenheim put forward his view. The current British Manual of Military Law (Part III), contains the same statement.
⁶ This is a virtual reproduction of the text of the preamble to the Declaration — which may be found in Schindler and Toman, The Laws of Armed Conflict (1973).
— that the employment of such arms is contrary to the laws of humanity. It seems, moreover, that, when it comes to making war, there a number of "immemorial" prohibitions, widely if not universally accepted in all ages and in all societies, eg, the well-known prohibitions against the use of poison and against resort to treachery.\(^7\)

Such principles and immemorial prohibitions are the foundations upon which is built the law of armed conflict.

The rules that make up the law of armed conflict fall naturally into either of two categories:

— those governing the conduct of hostile operations and the choice and use of weapons (Hague Law), and

— those prescribing the treatment to be accorded victims of war, in particular, the wounded, sick and shipwrecked, prisoners-of-war, and civilians who find themselves in the hands of a power to which they do not belong (Geneva Law).

To tag them by the two names — "Hague" and "Geneva" — is a convenient way of acknowledging not only that the rules in each category have differing purposes, but also that, broadly speaking, they are the products of different processes of development.

By the middle years of the nineteenth century war had ceased to be the sport of princes, and a number of new influences had begun to make themselves felt in international affairs. There had been a change in the character of armed forces with the establishment of national standing armies and, therefore, a change in the nature of warfare itself. Obvious gaps and various conflicts within the body of the prevailing customary laws and usages of war were a cause for uncertainty and dissatisfaction. If national laws could be rationalised, and codified, why not international laws? Simultaneously, resulting from the spread of the notions of humanism, people began to entertain the conviction that "the progress of civilisation should have the effect of alleviating as much as possible the calamities of war".\(^8\)

Thus, although unable or unwilling to engineer the elimination of war, nations found themselves able and willing to look at ways of regulating its conduct. There was — what we can call, looking back from this distance — a positive flurry of debate and negotiation extending over fifty years. In the end, the community of nations contrived to codify many of the existing recognised customary rules of armed conflict and, where to do so seemed necessary, and was feasible, to devise other new rules. The law of armed conflict became the first part of international law to be codified.

Designed to alleviate the suffering of the wounded on the battlefield, the "first" Geneva Convention was adopted in 1864. In subsequent years, the idealism (and, one should add, respectfully, the pragmatism) of the ICRC has ensured not only the adoption of other Conventions for the alleviation of suffering but also the regular periodic revision and extension of these Conventions. The "first" Geneva Convention of 1864 marks the foundation of Geneva Law. Geneva Law now in force consists of the four Geneva Conventions

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7. Westlake, op cit, p. 57.
8. See, eg, the views of Schindler and Toman, op cit, vii and viii.
of 1949 for the protection of war victims and certain provisions of the Protocols of 1977 additional to them.

The codification of Hague Law can be traced back to 1868 when, to all appearances, it began spontaneously. Meeting at the invitation of the Czar, Alexander II, the European powers agreed to prohibit the use of explosive bullets. This agreement, the Declaration of St Petersburg, the first of its kind, depended upon acceptance of the view that the mere efficacy of a weapon does not justify its use. It was less of an advance than may be thought. The explosive bullet in question was a weapon which, although it had been developed, no State wished either to employ, or to have employed against its forces. However, the Declaration of St Petersburg, in setting the "technical limits at which the necessities of war ought to yield to the requirements of humanity" did far more than ban a bullet. It gave expression to principles which were to become a yardstick for testing the legitimacy of other things done in war.

The Czar had promoted the negotiation of the Declaration of St Petersburg. He was to be a moving force behind later events as well, in particular, the convening of the conference of 1874, which adopted the Declaration of Brussels, a draft convention purporting to state in an acceptable and agreed form what were the laws and customs of war then in force. Thereafter, his successor, Nicholas II, was responsible for the convening of the First and Second Peace Conferences, held at The Hague in 1899 and 1907, respectively.

These Peace Conferences ignored, as impossible, the task of agreeing on measures for general disarmament. Instead, they devoted their energies to the formulation and adoption of a series of declarations and conventions, some (on the basis of the St Petersburg principles) proscribing the use of particular weapons and means of attack regarded as obnoxious, others codifying the rules according to which, thereafter, warfare was to be conducted. Arguably, the most important achievement of the Peace Conferences was the adoption in 1907 of the fourth Hague Convention, to which are annexed the "Regulations Respecting the Laws and Customs of War on Land" (the Hague Rules). Despite their title, the Hague Rules specify a number of universal principles and rules which are relevant and applicable wherever war takes place.

Under no illusions about the predictable shortcomings of the agreements which they had adopted, the authors of the Hague Conventions and Declarations intended that Hague Law (including the Hague Rules) should be periodically revised. History suggests that this was an exercise which States were not unhappy to avoid. The only concerted effort made before the Second World War (an attempt, in 1923, to draft rules of aerial warfare) failed. The, almost al fresco, adoption of the Geneva Gas Protocol in 1925 added to Hague Law but

10. The Peace Conference had a variety of references available to it. Apart from the text of the Declaration of Brussels, there was the code of Instructions, drafted by the jurist Lieber and adopted by the United States in 1863, the Oxford Manual and the Declaration of St Petersburg. The texts are reproduced in Schindler and Toman, op cit.
11. As to possible short-comings, one should take careful note of the preamble, including the so-called de Martens clause which prefaces the fourth Hague Convention: "On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgement of military commanders.
can hardly be regarded as a planned measure in this process of development. After the Second World War the United Nations declined to consider revising Hague Law: for the stated reason that to do so could be construed as displaying a want of confidence in the expectation that the United Nations, through the Charter, would be able to maintain world peace and security.

Events during both World Wars and the lesser conflicts in the years after 1945 left little doubt that, without revision, Hague Law was, at best, inadequate. Increasingly it was seen as unable to cope with, especially, modern high-technology warfare. Its chief perceived defect (although it has others) is that it failed to confer explicit protection on civilians and civil populations. Hague Law requires that civilians be spared the effects of war, but does not spell out the ways in which that is to be ensured. Geneva Law also fails in this respect. It does not regulate the conduct of war but merely provides for the succour of its victims. In fact, Geneva Law can rarely prevent suffering, only palliate it.

The United Nations and the ICRC, appalled by the catalogue of abuses of human life and dignity in the seemingly endless contemporary wars and conflicts besetting the world, began to bring their respective influences to bear. Ultimately, at the behest of the ICRC, the Swiss Government convened a conference, now familiarly known as "the Humanitarian Law Conference". This conference, during the period 1974/1977, considered proposals to extend the protections conferred by Geneva Law and to develop and to reaffirm important parts of the Hague Law — including, most importantly, those parts of it which impose "limitations on methods and means of warfare" — in order to abate the violence of war and its effects on civilians.

The result of the Humanitarian Law Conference was the adoption of Protocols I and II additional to the Geneva Conventions of 1949. Now in force, after ratification by upwards of 25 States, but still not ratified by the major powers and their allies, the Protocols would merge Hague Law and Geneva Law into one body, known as "Humanitarian Law". The purpose of the Protocols and the impact that each is meant to have on international law needs to be fully understood. Protocol II develops and supplements the provisions of Article 3 common to all four of the Geneva Conventions of 1949. The purpose of Protocol II — and, in this, it breaks virgin ground — is to provide a reasonably comprehensive code of internationally acceptable rules for the regulation of the conduct of the Parties in what have lately been called "non international armed conflicts" — that is to say, internal conflicts in the nature of civil war. The purpose of Protocol I is quite different.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and 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."

12. The conference which drafted the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare had been convened by the League of Nations to consider supervision of the international trade in arms and ammunition. The convention drafted in connection with the latter subject was never adopted. Earlier efforts to reach agreement to proscribe the use of gases had failed. The first effort, after the peace treaties, the Treaty of Washington, 1922, did not come into force when France refused to ratify it — for reasons unrelated to its prohibition of the use of gas.

13. See the Preamble and Article 1 of this Protocol.
Designed to apply in international armed conflicts (which it defines as including wars of national liberation) its provisions supplement the Geneva Conventions and, in fact, add to and modify Hague Law in several respects. If one studies the Hague Rules it soon becomes apparent that, broadly speaking, their main purposes were four in number. First, they were to identify and define the duties and rights of those who may lawfully participate in war. Second, they were to stipulate those means by which war may lawfully be conducted. Third, they were to describe the circumstances and manner in which places may or may not be bombarded or besieged. Finally, they were to regulate the making of truces, capitulations and armistices and the military government of occupied territory.

Presumably on the basis of such an analysis, one contemporary writer, Professor Schwarzenberger, has commented that Hague Law "constitutes probably the furthest advance yet made in restricting wartime sovereignty in the interest of civilization . . . (leading) to a differentiation between lawful and unlawful objects of warfare ratione loci, instrumenti vel personae". In other words, he says, if one ignores the rules relating to capitulations, armistices and belligerent occupation, one can see that the limitations imposed under Hague Law have been formulated having regard either to the character of place, the nature of the devices and the means of destruction employed in combat, or, the identity and character of the persons participating in or affected by warfare.

The Humanitarian Law Conference was determined to make even further advances "in the interest of civilization" and the rules which it eventually adopted follow that pattern of place, devices and means of destruction, and the person — although in a different order.

In drafting Protocol I, the Conference did not purport to embark on the wholesale revision of Hague Law. On the contrary, it concentrated on a limited number of areas. Its intention was to restate and to extend certain cardinal Hague Rules (which could be made more effective if expressed in clearer terms, free of ambiguities) and to formulate a parcel of other rules, based on customary law principles, in order to regulate the ways in which attacks and assaults may be carried out. The overall purpose was to spell out a regime which would temper the violence of war and limit the risk of loss and injury to civilians who play no part in fighting. When adopted, these revised and new rules were divided into three separate "Hague Rule" groups, but with some departures from the original pattern. Those departures are not especially important.

The first group, under the formal heading "Methods and Means of Warfare", consists, essentially, of restatements of certain well recognised Hague Rules. These include fundamental general rules and particularly rules relating to perfidies, ruses, quarter and sparing the defenceless, unarmed and helpless.

The second group, under the formal heading "Combatant and Prisoner-of-War

14. See Article 1 of this Protocol.
15. The fourth category of rules is ignored in this paper but was given some attention by the Humanitarian Law Conference, albeit indirectly. See, eg, Article 75 of Protocol I, which applies universally. The Fourth Geneva Convention of 1949 had already made inroads on this part of the Hague Rules.
17. Articles 35-42 of Protocol I.
Status”, consists of rules which define, with greater precision than before, those forces and, hence, those individuals, who may lawfully engage in combat during hostilities. They spell out the obligation of individuals to identify themselves as combatants and lay down the circumstances in which failure to do so will deprive an individual of his right to prisoner-of-war status upon capture.¹⁸

The articles comprising the third, and by far the largest, group appear under the heading “Civilian Population”. They prescribe a variety of rules for the protection of civilians as individuals and the civilian population as a collective entity. The obligations which these articles impose range from the creation of restrictions upon the manner in which it is lawful for those who plan and execute attacks to commence and to carry out hostile operations likely to affect civilians, to the stipulation that authorities must take active steps to guard their own populations from the consequences of military operations.²⁰

Which exactly were the “certain cardinal Hague Rules” revised by the Humanitarian Law Conference? The chief of them was Article 22 which, repeating a well-recognised rule of customary law,²⁰ provides that “the right . . . to adopt means of injuring the enemy is not unlimited”.²¹ Doubtless founded on notions of both chivalry and humanity, it must be regarded as the primary principle of the law of armed conflict. In fact, reading the Rules seriatim, one cannot escape the feeling that Article 22 was always so regarded. The articles which follow it are more specific, their particularity in marked contrast with the generality of Article 22.

The next such cardinal Hague Rule was Article 23(e), providing that, in addition to the prohibitions provided by “special Conventions”, it is especially forbidden to employ “arms, projectiles and materials calculated to cause unnecessary suffering”.²² This language is an imitation of part of the preamble to the Declaration of St Petersburg. The “special Conventions” referred to are, obviously, the ones concerning the use of weapons, entered into at St Petersburg and The Hague (related to, notably, explosive bullets and dum-dum bullets). Article 22(e) has been said to “enshrine” a principle that had been enunciated at St Petersburg: the employment of weapons which uselessly aggravate suffering or render death inevitable is contrary to the laws of humanity.

Intentionally or otherwise, the Humanitarian Law Conference added new dimensions to Articles 22 and 23(e) and, into the bargain, supplemented the result by adding a third, apparently new, rule. Thus, Article 22 underwent a

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¹⁸. Articles 43-47 of Protocol I.
¹⁹. Articles 48-60 of Protocol I.
²⁰. There has never been any dispute about its origins and force. This rule can be found in the Oxford Manual (Article 4) and the Declaration of Brussels (Article 12). The texts are in Schindler and Toman, op cit.
²¹. The authentic text of the Hague Rules is in French. It has been translated into English in a variety of ways — eg, the current British Manual of Military Law (Part III), renders it thus: “Belligerents have not got an unlimited right as to the choice of means of injuring the enemy”. The text quoted is from Schindler and Toman, op cit.
²². The authentic text uses the term “maux superflus”, which has been translated both as “unnecessary suffering” and as “superfluous injury”. Both are equally correct as “maux superflus” has no precise equivalent in English. For that reason, Article 35.2 of Protocol I refers to “superfluous injury or unnecessary suffering”. This is not seen as making any change in the law, merely giving a more accurate rendering of the French into English.
"sea-change" and emerged (as Article 35.1 of Protocol I) reading "... the right ... to choose methods or means of warfare is not unlimited". Article 23(e) emerged (as Article 35.2) prohibiting the employment of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering". The new rule, in Article 35.3, forbids the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".

Modeled on the wording in the ENMOD (Environmental Modification) Convention this last-mentioned rule might be regarded as novel. However, on another view, it might just as easily be seen as little more than a specific statement of the old customary law principles and rules which proscribe devastation and laying waste unless they serve a clearly justifiable and definite military end. Incidentally, Article 35.3 is likely to be the subject of some interpretative differences, especially in light of the variety of statements of understanding about its meaning recorded during the process of negotiation.

All of that apart, the phrase "methods and means of warfare" appears first in Article 35. It appears also in Article 36. Article 51.2, which prohibits indiscriminate attacks, defines such attacks by reference to "a method or means of combat". Article 51.5(a) refers to "bombardment by any method or means ...". Article 54.1 describes starvation as "a method of warfare". In one way or another the phrase "methods and means" is well entrenched in Protocol I.

The traditional phrase "means of injuring the enemy", although admittedly vague, had always seemed comfortable and comprehensible — even if perhaps because of its familiarity. The meaning it had conveyed to the author of this paper was tied to the notion of acts committed with the direct intention of visiting physical harm (including death) on the person of any individual belonging to the forces of the enemy. Ordinarily these acts would be committed by the use of weapons. It was a short step from there to accepting that the enemy was also equally susceptible to injury in a different sense — e.g., if his fortifications and installations and supplies, and so forth, were damaged or destroyed by bombardment, burning or other "means". One could not quarrel about Article 35 if it used words which did no more than convey those same notions. But, as Article 36 suggests, there is a great deal of difference between, e.g., a means of injuring the enemy and a method of injuring the enemy, or a means of combat and a method of combat.

Article 36 obliges States contemplating the study, development, acquisition or adoption of a new weapon, a new means of warfare or a new method of warfare, to determine whether the employment, in some or all circumstances, of that new weapon, new means or new method of warfare would be prohibited by Protocol I or by any other rule of international law.

Such an obligation hardly seems too onerous, if the basic rules in Article 35 are valid and are to be observed in good faith. Indeed, one might even call it redundant, because it is a natural corollary to Article 35. It does, nevertheless,

23. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977, (1977) 16 ILM 88, which prohibits the use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party to the Convention.
impose upon States something much more than a mere theoretical moral obligation. It requires all States consciously (and conscientiously) to examine the implications of each step in their continuing efforts to develop and expand their arsenals and the overall capacity of their forces to wage war successfully.

But that is not the real issue! The real issue is this: What do expressions such as "methods and means of warfare" signify? The author of this paper put that very question bluntly to Committee III of the Humanitarian Law Conference. He received no answers, only bland assurances that the adoption of these words would increase the protections given by Humanitarian Law. When he asked "how", there was no answer at all! No-one else took up the issue; the phrase "methods and means" passed into law — undefined. As a term it remains undefined by Protocol I.24

This is no place to describe the possible origins of the phrase. However, it was probably in correspondence circulated by the ICRC before the Humanitarian Law Conference. Picked up unconsciously by individuals and accepted as seemingly very satisfactory, the term probably obtained acceptance through frequent use. At least, this writer so suspects. His notes on the subject, as prepared and used during the Humanitarian Law Conference, are attached for consideration by any reader who wishes to pursue the subject.

In view of the variety of contexts into which, in Protocol I, the words "methods" and "means" have been adopted and, in view of the clear desire of the overwhelming majority of States at the Humanitarian Law Conference to expand the protections afforded by the law, one has to conclude that the term "methods and means of warfare" must have a very wide meaning: a meaning such as that suggested at the outset in this paper — something like: "all strategies and tactics and every other measure which, by the use of manpower and weapons systems, an armed force may employ". Whether the adoption of such an interpretation will help relieve human suffering hereafter remains to be seen.

Assuming that the law has been widened in this way, let us examine two areas — rights proscribing the use of particular weapons and rules governing the conduct of combatants.

Efforts to ban weapons have rarely been very successful or, if successful, useful.25 For example, the Declaration of St Petersburg, in effect, proscribed one anti-personnel weapon. This was a relatively minor explosive device which no-one really welcomed. But the Declaration left open the right to use more powerful explosive projectiles which they all wanted — shells — and did not prevent the continuing use of anti-personnel hand-grenades. Dum-dum bullets (proscribed at The Hague in 1899) cause wounds no more horrifying than do modern high-velocity small-arms ammunition. In any event, dum-dum bullets (under the less emotive names of "expanding" or "soft-nosed" bullets) are in common use in metropolitan police forces — because they are said to be more effective agents for disabling an individual without risk to others! The

24. The subject of "methods and means of warfare", including this author's questions as to the meaning of that expression, is the subject of analysis and comment by Professor Kalshoven (1978) 9 Neth. YB of Int Law, pp 146 et seq. (Although this author would not accept Professor Kalshoven's criticisms of what this author said at the Humanitarian Law Conference, this is not an appropriate forum to discuss that issue.)

25. For a brief account of the failures, see Fenwick, op cit, 667-72.
prohibition of the use of projectiles solely to diffuse harmful gases was ignored in
the First World War. The temporary prohibition of the dropping of explosives
and projectiles (i.e., bombs) from balloons was never extended, and aerial
bombing is a common practice in most wars.

It is easy enough to make the cynical comment that States will never agree to
forego the use of weapons unless those weapons are militarily useless anyhow, or
else have become obsolete or ineffectual. It is to be hoped that the recently
adopted international agreement for limitations on the use of certain conventional
weapons — it owes its existence to efforts which began at the Humanitarian Law
Conference — will succeed. The parties to that agreement have covenanted to
ban fragmenting weapons which inflict wounds with particles that are not
detectable by X-rays, to limit the use of air delivered incendiary weapons, and to
regulate the circumstances under which mines and booby-traps may be laid. If
this multi-tiered agreement finds acceptance and general observance, it, with the
Geneva Gas Protocol will be of unique value to humanity. Whatever its defects,
at least the prohibition on the use of gas has been observed (with, until recently,
only two confirmed but relatively minor exceptions). But, whether this has been
out of respect for law, or as the result of a balance of terror, is by no means
clear.

Current allegations regarding the use of chemical agents and, perhaps, gas, in
the Middle East raise doubts about the future observance of the Geneva Gas
Protocol. Moreover, whilst many States interpret the Geneva Gas Protocol as
prohibiting the use of agents such as tear-gas in war, those same States use tear
gas often enough in case of riot and disorder in their domestic affairs. It is by no
means easy to predict the future of weaponry limitations or even to find logic in
their nature.

It seems apt to refer again to Lawrence, with whose words I prefaced this
paper. His comment was as follows:

"The attempts which have been made to forbid the introduction of new
inventions into warfare, or prevent the use of instruments that cause
destruction on a large scale, are doomed to failure. Man always has
improved his weapons, and always will as long as he has need for them at
all. But we can hope for a general recognition of the inutility as well as the
cruelty of adding torture to disablement. Suffering there must be, as long as
there is war. But unnecessary suffering ought to be, and can be, abolished."

If Articles 35 and 36 do no more than bring that last thought closer to fruition,
the formulation of Protocol I will not be wasted. However, neither of those

which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980.
Adopted simultaneously were three Protocols. The first on "Non-Detectable Fragments", the
second on "Prohibition or Restrictions on the Use of Mines, Booby-Traps and Other Devices", the
third on "Prohibition or Restrictions on the Use of Incendiary Weapons". The Conference
also adopted a resolution which appeals to governments to exercise care in developing
"small-calibre weapon systems" in order to avoid increasing the injurious effects of such
weapons.

27. Gas was used by Italy against Ethiopia in 1935-1936. Although the Nazis used gas for the
genocide of civilians during the Second World War, it was not used in battle — see, eg,

28. Lawrence, op cit, 533.
articles will prevent war, nor will they persuade States to disarm or to abandon efforts to increase the efficiency and economy of their arsenals.

If it is assumed, as this paper assumes, that war will be a continuing feature of international affairs, it becomes material to consider the way in which other Hague Rules which have now been "refurbished" by Protocol I will affect us in the future.

Article 23 of the Hague Rules, apart from its reference to arms, projectiles and materials, forbids killing or wounding treacherously and killing or wounding those who have abandoned their arms or have surrendered. Further, it forbids declaring that no quarter will be given and prohibits the improper use of flags of truce and enemy flags, uniforms and insignia. Article 24 of the Hague Rules states that the use of ruses for gaining intelligence is allowable. Later articles create a code to regulate both the conduct of espionage on the battlefield and the treatment of captured spies.

All of these provisions were considered by the Humanitarian Law Conference and, in a sense, rewritten. In overall terms the new version of the law is more specific than the old but has much the same effect. However, whilst some old uncertainties may have disappeared, one cannot be sure that new ones have not appeared to take their places. For example, the old concept of "treachery" has not been replaced. It remains unaltered but is supplemented by a new concept in a new rule, a rule (Article 37.1) which prohibits killing, wounding or capturing "by resort to perfidy". Perfidy is an old term but one which really defies definition. In an endeavour to avoid this problem, Article 37.1 suggests that an individual has the right to trust his enemy to observe the rules of armed conflict. Although the old adage that "all is fair in love and war" was never more than half true, the pressures of armed conflict and the desire for victory can lead even a worthy individual to twist the rules in order to outdo an adversary. Confidence in the enemy? Soldiers will laugh at that notion. They will always, indeed, will usually be trained to, believe that, even if he does not ignore the rules, the enemy can never be trusted. Article 37.1 of Protocol I is inadequate and unrealistic. It is bound to have a cool reception, more especially since it is modified by Article 44.3 in favour of irregular combatants.

If anything, articles like Article 37 heighten uncertainty. The Hague Rules dealt with treachery (the cousin of perfidy) in one place and ruses and intelligence gathering in another place. Protocol I deals with them together. Article 37.1 forbids perfidy. Article 37.2 acclaims that ruses are not prohibited. Article 37.2 really tells us that acts which do not infringe international law, and are not perfidious, are lawful. One would have thought that was self-evident. Ruses may possibly be regarded as "methods of warfare", even "methods of combat" but, without a definition, who knows?

The new rules regarding sieges and bombardments, and that is what the rules grouped under the heading "Civilian Population" are about, very largely repeat what all right-minded people believe should be the state of the law.

There is now a "basic rule" (spelt out in Article 48) that, during operations, armed forces must actively distinguish between civilian populations and combatants and between civilian objects and military objectives and, accordingly, may direct their use of violence only against proper military targets. Not really new, but a salutary warning to all armed forces, this provision does not
give directly the right to use violence. That right, where it exists, depends on other rules of international law. Hague Law, Geneva Law, and Humanitarian Law merely indicate the limitations and conditions which must be observed when States do resort to violence.

As a consequence of these limitations and conditions, indiscriminate attacks not directed against specific military targets are wholly unlawful. The employment alike of "methods or means of combat" which cannot be directed at specific military targets or of "methods or means of combat", the effects of which cannot be limited, is prohibited. That is to say, there can be no indiscriminate bombing or shelling without regard to the effect it will have upon civilians and their property. Moreover, attacks which will lead to disproportionate and excessive casualties amongst civilians or which will cause unjustified loss and damage to civilian objects are also unlawful.

There is nothing especially surprising in the adoption of these rules. However, their being stipulated in detail in an instrument acceptable to the majority of members of the international community, holds the promise that, even if we cannot avoid wars, we can at least limit their effects.

The prohibition of attacks directed against "civilian objects" and specific objects of a cultural or religious character, the prohibition of the use of starvation of civilians and the rules for the protection of food producing areas, the natural environment and of hydroelectric and nuclear installations have two facets. They tend to preserve the world's shrinking assets. They also serve to insulate civilians from the effects of war.

There is one other comment to be made. Neither Hague Law nor Humanitarian Law is designed to control nuclear warfare or the use of nuclear weapons. Rightly or wrongly, Protocol I seems to have been negotiated on that understanding, even despite the recognised urgency of the need for agreements on nuclear disarmament and for the prohibition of the development and use of other weapons of mass destruction, e.g., chemical and biological weapons. A recent work describing the achievements of the Humanitarian Law Conference makes this point and explains the position in some detail.

There are two schools of thought regarding the legality of nuclear weapons. The one school maintains that their use would be unlawful as contrary to fundamental principles of law (such as those in Protocol I which we have been considering). The other school maintains that notwithstanding these principles nuclear weapons and their use remains lawful, since they are not the subject of the specific proscriptions necessary to outlaw the use of any weapon.

Perhaps, if nuclear war erupts, it will be fought according to rules which are in fact an adapted version of the law of armed conflict. That issue, already the subject of speculation, demands attention.

In conclusion — this has to be said:

29. Articles 48-60 of Protocol I really constitute a code for the conduct of operations which imposes duties on States, military authorities at several levels, civil authorities and individuals. This code supplements existing protective rules rather than making up a new regime.
31. For a general examination of this subject from the United States viewpoint see Builder and Graubard, The International Laws of Armed Conflict: Implications for the Concept of Assured Destruction (1982).
32. Bothe, Partsch and Solf, op cit, 184.
"War is the means to an end, not an end in itself. The object of war is not to destroy the enemy but is to overcome him by force and, having done so, to restore peace. Centuries of human experience have led to the conclusion that the use in war of excessive violence leading to the destruction of life and property to an extent exceeding that minimum which is necessary to deprive the enemy of his capacity and will to resist is not only wasteful, but even amoral."

In order to overcome the enemy and to compel his submission it is necessary to weaken his powers to resist. These powers are vested in his armed forces and the installations, equipment and material at the disposal of those forces, all of which may be attacked, destroyed or captured. Troops may be killed or disabled, they may be taken captive or have their morale weakened. Supplies and sources of supply may be destroyed or seized. The law of armed conflict and, in particular, the rules which impose limitations on methods and means of warfare govern such matters. To be effective, those rules must be universally agreed, uniformly interpreted and invariably observed.

If we agree that war is only a means to an end, we should have in mind Sir Keith Hancock's remark, concerning Ghandi's technique of non-violence: Ghandi had discovered that "As your means are, so will your ends be also." If we desire to continue civilization, let our conduct of war be governed by the constraints of civilization.

Notes on use of the word "methods"

1. This brief survey examines the ICRC documentation beginning with that presented to the first Experts' Conference of 1971. Although the ideas, and perhaps the language, of the present ICRC draft clearly received an airing and may have been given full approval at an earlier stage (including at the meeting of Red Cross Experts at The Hague, 1971) it is probably irrelevant for present purposes to investigate in detail all the events which took place before 1971.

2. However, it is to be noted that, with a memorandum dated 19 May 1969 addressed to parties to the Geneva Conventions seeking views on ways of obtaining better protection for victims of armed conflicts and development of the law, the ICRC enclosed an Annex which made reference to "weapons and methods" (see documents entitled "VIII-Annexes" CE18b p 69 presented by the ICRC to the Experts' Conference, 1971). The agenda for the Experts' Conference, 1971 (ibid p 85) also contained an item "Reaffirmation and determination of the rules . . . prohibiting certain methods of warfare". The agenda for the Red Cross Experts' 1971 meeting at The Hague, 1971 contained an identical item (ibid p 90).

3. In the document entitled "IV-Rules Relevant to Behaviour of Combatants" (CE 4b) also presented by the ICRC to the Experts' Conference, 1971, after reproducing Article 23(e) of the Hague Regulations, the ICRC commented, inter alia, that whilst that rule required combatants to "forego the use of certain weapons and certain methods of warfare", the rule evidently "leaves a rather broad latitude for evaluation". The ICRC concluded (p 6) that "it appears . . . the Hague Rule should be retained. But since it covers explicitly only arms, projectiles or material, might it not be given a more general scope by extending it to take in all means or methods calculated to cause unnecessary suffering?" (emphasis added). The document does not appear elsewhere to mention the word "methods".

4. The Report of the Experts' Conference, 1971 contains several incidental references to "methods", the word being used in a variety of contexts. For example, the heading of Chapter IV of the summation of debate in Commission II on "Rules Applicable in Guerilla Warfare" (p 70) is "Methods of Warfare" but the paras under this heading contain no reference to weaponry.

5. Additionally, the Report of Commission III, Part I entitled "Protection of Civilian Population Against Dangers of Hostilities" at p 74 (para 420) mentions, as a matter of substance debated by the Commission, "illicit methods, concerning weapons, famine and terrorisation". In introducing debate on bombardments the ICRC expert also referred to "illicit means and methods" (p 82 para 473), and at least 3 proposals CE/COM III/33 (Brazil), CE/COM III/36 (Spain) and CE/COM III/44 (Mexico, Sweden, Switzerland, United Arab Republic and The Netherlands — refer pp 94, 95 and 98 respectively — contain varying uses of the words "method" or "methods". However, the Report does not appear to contain any reference to discussion of, or agreement upon, the meaning then ascribed to this expression.

6. Article 30 of the draft Protocol presented by the ICRC to the Experts' Conference, 1972 (see the Report Vol II p 5) contained provisions equivalent to
those contained in Articles 33 and 34 of the draft Protocol presented to the Diplomatic Conference. This draft (Article 30) was placed in Part III of the draft Protocol entitled "Combatants" and contained the expression "particularly cruel methods and means". This draft Protocol did not appear to use the word "method", whether in the singular or plural, in any other provision. In introducing debate on this Part, the ICRC, according to the Report, stated that it "wished to reproduce the Hague Rules with very few changes" but that the Part "also contributed to the development of the law . . . by modernizing the wording."

7. The Report does not suggest that use of the word "methods" was given any particular scrutiny. There are two passages which seem directly relevant (Report Vol I p 129), however they do not suggest any debate having taken place concerning the word itself, its significance or the extension in the law which it affects. An examination of the proposals lodged at the Conference (Annex A) suggests a general indifference to or unawareness of these latter issues.

8. The ICRC commentary (CDDH/3, p 41) is of little assistance. The commentary asserts that "Articles 10.1, 12.1, 15.1, 15.2, 20 and 24, inter alia, are instances of the application of the present provision (ie Article 33.1), in as much as they limit the choice of methods and of means of injuring the enemy". A reading of the provisions cited does little more than suggest that the word "methods" really equates to the word "attack" (although perhaps not necessarily in the terms of its definition adopted by Committee III in its draft of Article 44.2). On this basis it seems that in this context the meaning of the word remains vague; it is not apparently a term of art, and, unless it has some special use in military terminology, appears to do more than act as a short hand way of expressing the complex notion of "attacks (involving the use of weapons(?))" in every aspect of warfare.

9. It must be concluded that the word "methods" should not be accepted in Article 33, unless its meaning is clearly defined, since its use in this area is neither accepted nor traditional and it may cloud the law. Its use in the Protocol, in Article 33 or elsewhere, certainly marks a very considerable extension of the law and in the prohibitions the Protocol will impose.