in the military is because it is necessary in time of war. We really don’t need it in time of peace! The force that is robbing and murdering innocent civilians is an undisciplined force and is simply a less efficient military force. Third, and I think that this was brought home to us, if we needed it brought home, very forcibly in our last conflict in Vietnam, compliance with the rules of civilized behavior enhances our political support both at home and abroad. So today, with the help of the distinguished panelists before you, we will discuss the development of these rules.

The first speaker is Professor Mallison, Director of the International Law Program at George Washington University, and a professor at the school. He has twice held the Chair of International Law at the Naval War College, and his subject will be: “Background and Perspective: Protection of Civilians in Time of War.”

The Humanitarian Law of Armed Conflict
Concerning the Protection of Civilians

PROFESSOR W. T. MALLISON

I. Introduction: Principles and Purposes of the Law of Armed Conflict

No person concerned with rational decision-making and aware of the threat posed to the continued existence of the human race by modern weapons of mass destruction combined with rapid missile delivery techniques can doubt the desirability of eliminating armed conflict as an instrument of national policy. As long as armed conflict is conducted by states, however, the international law which is applicable to it will be required to permit efficient use of military

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(1) Were the colonists obligated to permit food and supplies to go to the civilians on board the ships if required for their survival? (2) Was the attack targeted on military objectives? (3) Was the attack ordered to punish the colonists for refusing to permit the transfer of food to the ships, or was it an attempt to obtain food and supplies necessary for the survival of the civilians aboard the ships? (4) Was the attack lawful in 1776? (5) Would it be considered lawful today?
force while preserving humanitarian values and making these two apparently irreconcilable objectives as mutually consistent as possible. This difficult task requires deep insight into the operations of the international juridical process along with a basic understanding of the technological aspects of contemporary armed conflict and a fundamental commitment to humanitarian values.

Because of the need to provide protection for noncombatants in armed conflict situations, attempts have been made historically to formulate limits in law upon the use of governmental coercion and violence. Such violence has frequently been carried out through the destruction of human and material values which is not justified by military necessity or which does not advance a lawful military objective, and the legal limitations upon its use reflect the common interest of states in avoiding violence as an end in itself. The humanitarian law of international conflict (traditionally termed the law of war) has been developed by states to impose restrictions of degree and kind upon such violence.

One of the principal purposes of the humanitarian law is to protect civilians from the more destructive consequences of armed conflict. Civilians are usually defined as individuals who are not members of the armed forces and who do not participate in military operations. Civilians who need protection in international conflict include: those who are living under belligerent occupation and those who are living in territory which while not under the control of an enemy, is subject to enemy attack. Civilians who need protection in widespread internal conflict or civil war comprise a third distinct category.

The law of armed conflict applies to intensive and extensive internal conflicts as well as to international ones. Because it is a practical law designed to protect human values, it is applied to *de facto* conflict situations. Both historically and presently, the existence of a declaration of war or of a so-called technical state of war is irrelevant.

II. The Contemporary Humanitarian Law of Armed Conflict

The contemporary humanitarian law of armed conflict may be said to date from Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, and its Annexed Regulations,¹ which comprise a multilateral treaty that is still binding on the United States and other states which were independent in 1907.

During the Second World War, even the limited provisions of Hague Convention IV and its Annexed Regulations, were violated by the practices of both the Nazis and the Japanese militarists. The Geneva Diplomatic Conference of

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¹36 U.S. Statutes at Large 2227 (1910).
1949 met in the shadow of those grim events and aimed at preventing the repetition of the horror which characterized that war. The resulting four Geneva Conventions for the Protection of War Victims are currently effective multilateral agreements with substantially the same parties as the United Nations Charter.

Article 2, which is a common article in all four of the Geneva Conventions of 1949, indicates that the Convention must not only be applied in declared wars but in "any other armed conflict" as well. Further, the Civilians Convention provides:

The Convention shall also apply to all cases of partial or total occupation of a High Contracting Party, even if the said occupation meets with no armed resistance. (Emphasis added.)

Thus the former requirement of a militarily effective occupation as a prerequisite to the application of the legal protections for civilians has been eliminated. There is no longer a distinction between the invasion phase and the establishment of a belligerent occupation regime. The authoritative I.C.R.C. Commentary on the Civilians Convention states:

Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Convention in its dealings with the civilians it meets.3

It is undoubtedly a sorry commentary on the condition of the human race that the prohibitions of Article 32 are deemed necessary. This article provides in part:

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies . . . to murder, torture, corporal punishment, mutilation. . . .

Unfortunately, the experience of World War II as well as more recent events indicate the urgent need for such prohibitions.

Common Article 33, which also reflects the wartime experience, provides in part:

Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. . . .

Reprisals against protected persons and their property are prohibited.

The article sets forth the only prohibition upon "terrorism," although many articles prohibit actions which may accurately be characterized as state terror. The permissible extent of and the limitations upon the use of reprisals against civilians was a major issue in the post-World War II war crimes trials.

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16 U.S. Treaties and Other Int'l Agreements at 3114, 3217, 3316, and 3516 (1956).

Common Article 3 of each of the four Geneva Conventions also provides certain rules which must be applied, as a minimum standard, in internal conflicts. A government and a revolutionary movement are typically involved in such a conflict. This article has been aptly described as a "mini-convention" on civil wars. It specifies that persons who take no part in the hostilities (including members of armed forces who have surrendered or are sick or wounded) must "in all circumstances" be treated humanely, without any adverse distinction based on considerations of race, color, religion or faith, sex, birth or wealth, or any similar criteria. The article also provides that the application of its provisions shall not affect the legal status of the parties to the internal conflict. This is necessary since without it a government would be concerned that a revolutionary movement might obtain a more recognized position under international law by being accorded the elementary humanitarian standards prescribed.

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The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts which has been meeting in Geneva for the past few years will convene in the scheduled final session in 1977. The purpose of the Conference is not to replace, but to supplement the Hague Regulations and the four Geneva Conventions of 1949. Two draft agreements or protocols are under consideration.\(^4\) Draft Protocol I is designed to be applicable in international conflicts, while draft Protocol II is to be applicable in internal conflicts. The Diplomatic Conference now has the opportunity to provide more significant and practical protection for civilian persons. For example, in view of the mass aerial bombardments to which civilian populations have been subjected since 1949, there is need for a more precise codification of the customary law prohibition upon direct attacks on the civilian population. This prohibition should be formulated in a manner which takes into account legitimate military necessity by prescribing that the presence of civilians will not be permitted to immunize what is otherwise a lawful military objective. The development of modern systems of aerial navigation which ensure close adherence to projected bombing flight paths combined with the development of precision guided munitions (the so-called smart bombs) may have vitiated whatever merit the claim that mass aerial bombardment is militarily necessary may have had. There is also an opportunity to codify the

customary law rules concerning proportionality in military attacks by prohibiting the launching of an attack which may be expected to cause ancillary destruction of civilian values that would be excessive in relation to the specific and direct military advantage anticipated. The adoption of provisions such as these would provide practical protections for civilians in the sense that they would be enforceable in armed conflict situations. If these recommendations are effectuated, they would mark a concrete step forward in the international humanitarian law pending achievement of the longer range public order goal of the abolition of armed conflict.

III. Conclusion: Enforcement of the Humanitarian Law of Armed Conflict

Finally, enforcement of the humanitarian law of armed conflict should be considered. Since this law has been created and agreed to by states, it seems reasonable to expect states to comply with it. Such compliance, however, is not the invariable rule. There are, consequently, substantial enforcement and sanctions problems in this branch of international law just as there are in domestic criminal law.

The Common Article I of the four Geneva Conventions of 1949 which deals with enforcement provides:

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

This was a novel provision in international law in that the state parties to the agreement not only assented to its provisions themselves, but also undertook to ensure compliance by other states as well. This means that if any state violates a provision of the four existing Geneva Conventions and any other state does not take urgent measures "to ensure respect" for the Convention which is violated, the latter is also in violation of the Convention. The provision was intended to impose enforcement obligations on the great powers. It is unfortunate that they have not been more diligent in recognizing and honoring these obligations.

In an era of sophisticated weapons technology, it is increasingly clear that a major improvement in the humanitarian law and accompanying legal institutions may be the essential condition for the survival of the human race.

Major General Vague: Our next speaker is a second refugee from the Navy. His background and experience on the subject of multilateral negotiations establishing norms for humanitarian law is certainly the highest. He is Chairman of the United States Delegation to the Geneva Conference on International Humanitarian Law Applicable to Armed Conflict. I might say that he is the top career lawyer today in the Department of State, Ambassador Aldrich.