There is, of course, in this process a risk that decisions will be taken prematurely before the issue is ripe for decision. But the risk of delay may be greater. If the law of aerial warfare had been codified in a generally acceptable way in the 1920s and '30s, would it have endured under the stress of the Second World War? Would it have deterred the strategic bombing of cities? I don't know, but the example underlines the risks and the benefits of the codification of combat law. One thing is clear: leaving the development of that law to custom is to leave the decision to be taken in the heat of battle by those who are fighting wars—and it tends to produce the lowest common denominator.

The outcome of the present Geneva negotiations on the laws of war remains in the balance. The delegation of the United States remains reasonably optimistic that the results will be positive. Perhaps more important, we remain committed to doing all in our power to produce in Geneva general agreement on terms acceptable to our government, to our allies, to our potential adversaries, and to as many other governments as possible, since a more narrowly acceptable agreement would have little value to us. We believe the challenge is worthy of our best efforts.

Major General Vague: Our next speaker is Sir David Hughes-Morgan, a key member of the UK Delegation to the Geneva Conference for three years and presently legal advisor to the UK Land Forces. I am sure that he will explain to you with his naval background, as well as his army background, how it is that a perfectly decent British general named Cornwallis, in excessive reliance upon the British Navy, took up a defensive position on a peninsula!

The New Law of Geneva

Brigadier Sir David Hughes-Morgan, Bt., CBE

The Geneva Diplomatic Conference has been meeting for some twenty-six weeks. That is long enough for many words to be written, and they have been; and for even more words to be said, and they most certainly have been. So I hope that I will be forgiven (and possibly I may even be applauded) if I do not attempt to cover all the new law which is being considered at Geneva.

Of course no new law has yet been made. There remain two critical stages: First, the final plenary session of the Conference will have the opportunity of rejecting and amending Articles. There are, in fact, Articles which cry out for
deletion and others which positively shriek for amendment. I regret that I am not optimistic that the plenary meeting will make all the required deletions and amendments, although one lives in hope.

Second, before the work done at Geneva becomes law, is the matter of ratification. The Geneva Conventions of 1949 were not ratified by the United States until 1955 and my own country did not ratify until eight years after the Conventions were signed. In many respects the contents of those Conventions were less controversial than the provisions now being discussed at Geneva; and I fear that many states will have objections to ratification of the two Protocols as a whole. One has to envisage that many ratifications will be made subject to reservations, which will hinder any clear expression of the new law of Geneva.

One provision that may give rise to difficulty is Article I of the First Protocol. It was discussed at length in 1974, and Committee I finally adopted, and the Conference in plenary session welcomed, although not without opposition, an amendment which applied the First Protocol (and presumably the Geneva Conventions themselves) to all "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes." To a majority of states present at the Conference this formulation seems politically desirable; it is not nearly so attractive to a lawyer. If the amendment becomes law, then for the first time it will be necessary to make a judgment on the character of a conflict and the motives of the combatant parties in order to decide whether the provisions of international humanitarian law should be applied. It will be difficult for those engaged in the conflict to make an objective judgment, particularly since one party to the conflict will be a state and the other some form of revolutionary organization normally within the territory of that state. The state will characterize its enemy as rebels and will refuse to acknowledge that the struggle is one to which the amended Article I applies. A totally opposite view will be expressed by those in revolt. It seems unlikely that any state which, in the eyes of its opponents, operates a colonial or racist regime will ratify the Protocol without reservation on this Article. In these circumstances, and bearing in mind that, with no major exception, every colonial empire has already been dismantled, it would seem doubtful that this Article will provide any greater protection to victims of armed conflict.

The Conference had also devoted substantial time to considering provisions for the better protection of civilians against the effects of hostilities. In international conflicts there exists a well established customary rule that civilians must not be made the object of attack directed exclusively against them. In Articles 43, 46 and 47 of the First Protocol the Committee has adopted rules which prohibit making civilians or civilian objects the direct object of attack in any circumstances. But the Protocol goes further and contains provisions which require commanders to take steps which will to some extent protect civilians in populated districts from incidental results. In any city, town or...
village, military objectives can only be attacked individually, the area itself may not be treated as a single military objective. If this Article becomes law, it follows that weapons systems in future conflicts must be capable of a very substantial degree of accuracy. In the case of aerial bombardment, it will be necessary to use bomb-sights or other devices which can produce the accurate delivery required by the Article; laser or television guided bombs or rockets may provide an ideal solution, but one which involves considerable expense. Artillery, so far as the guns themselves are concerned, has the degree of accuracy necessary, although this form of attack may only rarely be used against military objectives in areas which remain populated at the time of attack. Nevertheless, the Article may require some development in the accuracy of plotting the target and directing fire thereon. Unguided rockets would in most circumstances be prohibited from use against targets in populated areas. This may have the advantage of banning one favorite terrorist weapon.

The Article also specifically prohibits attacks of any nature "which may be expected to cause incidental loss of civilian life or damage to civilian objects which is excessive in relation to the concrete and direct military advantage anticipated." This is an important provision which for the first time in any international convention refers to what has become known as "the rule of proportionality." This so-called rule was hardly voiced before the Vietnam conflict and certainly was not considered to be part of international law during the Second World War. In many respects such a rule can be of considerable value. It is obviously wrong that a combatant should be permitted to kill, say, 5,000 civilians in order merely to incapacitate one soldier. But in other circumstances it is likely to be very difficult to apply. The commander is given no criteria whereby he can determine whether the injury to civilians would be excessive, other than the military advantage which he hopes to gain by making the attack. This is a comparison of two wholly dissimilar factors; it is, perhaps, rather like trying to judge an apple in relation to a banana. One thing is certain: world opinion will judge the commander on ex post facto results; it will not take into account the possibility of faulty intelligence or honest mistake.

The First Protocol also contains provisions protecting from attack foodstuffs, food producing areas, crops and livestock, dams, dykes, nuclear power stations and, indeed, the natural environment itself. But it is provided that when any of these objects is used in specified ways in support of the war effort, it may be attacked. It could be argued that the time spent in formulating these Articles is not justified by the result for, if the objectives in question are not so used, they are probably already protected as civilian objects.

The danger in building these splendid edifices of specific protection is that in so doing one may weaken the general rule. For example, the Second Committee has produced Articles on the protection of civilian wounded and sick, civilian medical units and civilian medical personnel. I emphasize "civilian"
here because the military are already protected under the First Geneva Convention. But having regard to the existing customary prohibition against attacks on civilians, and the detailed provisions in the Fourth Geneva Convention relating to their protection when in the hands of an adversary, it may be wondered why there is any need to give such specific protection to certain classes of civilians. One can only suppose that it has been the wish of the Committee to emphasize the degree of protection to be accorded. Since such emphasis has no effect in law, I assume that it is hoped that it will have some effect in practice. But, if it is to have any practical effect, it seems to follow that it is anticipated that the general rules protecting all persons not taking part in hostilities will be disregarded.

Committee III has also been considering the degree of protection which ought to be given to combatants. Close analysis will reveal that these Articles do not add much to the existing rules contained in the regulations annexed to the Fourth Hague Convention of 1907. One change which has been made reverses the decision in the *Skorzeny* trial, which supported the view that the wearing of enemy uniforms is permissible before battle. Of course majority opinion in continental Europe was to the effect that the *Skorzeny* decision was incorrect, so perhaps this change is not particularly remarkable. The Committee has nearly agreed on an Article prohibiting perfidy in battle, but this seems to go little further than Article 23(b) of the Hague regulations, which forbids treachery. One particularly unfortunate proposed change in the law is the approval by the Committee of the unchivalrous practice of shooting at aircrew descending by parachute from a disabled aircraft if it seems likely that they will land in friendly territory. This particular provision is one which, one hopes, will be reversed in plenary.

So far I have to a certain extent been critical about what has been done in Geneva. In fact the Geneva Conference has been of value. The exchange of views is itself useful and the provisions already adopted, even when only reemphasizing existing law, may result in that law being more fully applied in future conflicts. Perhaps the most important aspect of it is that, for the first time, a large number of states taking part comes from the Third World. They previously played no major part in formulating the international law of armed conflict, so that the present law of armed conflict can be said to have been drafted in the context of conventional wars in Europe. But now that the whole world is getting into the act no country will be able to say that it has not had an opportunity of making new law according to its own requirements, that it did not participate in the formulation of rules.

Finally I have to go back 200 years and consider this vexed question, the bombardment and burning of Norfolk. I suppose the first question is whether this was lawful at that time. To answer this really needs a historian. It seems to me to be difficult to establish the relevant norms of law which existed on the 1st of January 1776; and, of course, there is a great danger in applying concepts
which, although clear to us today, had not been formulated at the time. I wonder if our ancestors asked themselves two hundred years ago whether the situation in North America was governed by international law on the one hand or by municipal law on the other; I suspect that they did not. They may well have thought that there was fighting going on and that it was necessary to apply certain standards of civilized and gentlemanly conduct, rather than apply formal legal rules. The 18th century ideal was the ideal of a gentleman, of a civilized man, who did not behave in the same way as his medieval and Renaissance ancestors. So while it might not have been considered "unlawful" to burn Norfolk, voices were heard to say that it was not civilized behavior. The same thing happened when my predecessors, in their red coats, later burned Washington. This was said to be a lawful act of retaliation for the burning of settlements in Canada. But in the Annual Register, published the following year in London, one can find pages of criticism—based not so much on illegality, as on breaches of the standards of decent behavior which ought to be expected of English gentlemen.

If one looks at the bombardment of Norfolk according to present day rules of international law, some justification can be found in the Ninth Hague Convention of 1907. Article 3 of that Convention authorizes the bombardment of undefended towns by a naval force if the local authorities decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force concerned. At Norfolk the Royal Navy wanted water and it may be that the bombardment became justified when the colonists refused to supply it. Of course this would probably not justify the subsequent burning of the town by landing parties; all that can be said in that context is that the colonial forces apparently considered it equally proper to set fire to the parts of the town in their hands.

The Ninth Hague Convention would seem to become inoperative should the first Protocol under discussion at Geneva become law. As I have mentioned, that Protocol contains an absolute prohibition on attacks directed against civilian objects, which would make it unlawful to bombard if a requisition is not met or indeed for any other reason. Of course, this Protocol would only apply in the case of an international conflict, but I have no doubt that your Founding Fathers would have been quick to take advantage of Article I in its present amended form. They might not have referred to alien occupation or a racist regime but they would certainly have taken their stand on the reference to "fighting against colonial domination." I would not like to say that Lord North would necessarily have accepted this position but I think that international legal opinion might well have decided against him.

Major General Vague: Assuming that the first three speakers were able to codify the rules of humanity as they apply to civilians, the next two speakers will explain how we propose to make sure that the military follows those rules. The

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