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Chapter X
Noncombatant Persons

A Comment to Chapter 11 of the Commander's Handbook on the Law of Naval Operations

by
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Introduction

In the history of the development of the law of armed conflict, the year 1987 stood out in more than one respect. It was the 10th anniversary of the adoption, on 8 June 1977, of two Protocols Additional to the Geneva Conventions of 12 August 1949, one (Protocol I) relating to the protection of victims of international armed conflicts and the other (Protocol II) relating to the protection of victims of non-international armed conflicts.[1] The Netherlands ratified both Protocols, thus joining the growing number of states parties to these instruments.[2] President Reagan announced his decision to submit only Protocol II for Senatorial advice and consent.[3] Last but not least, all U.S. naval commanders received as Naval Warfare Publication 9, 1987, a brand-new *Commander's Handbook on the Law of Naval Operations*.

Among the many recent publications about the state of and developments in the law of armed conflict, the *Handbook* is of special interest because, as an official U.S. publication following so shortly the President's announcement, it may be expected to reflect the views of the present U.S. administration on the state of the law. This is not merely a matter of academic interest; the law of armed conflict relies for its continued existence and further development as much on custom as on the conclusion of treaties, and the part of the *Handbook* relating to the law of armed conflict may be taken to represent United States *opinio juris* in this regard.

As we shall see, the "views of the present U.S. administration" are a mixture of rules in treaties to which the United States is a party, rules of international customary law, and those new rules in Protocol I which the present U.S. administration has chosen to consider as positive developments. Obviously, the United States is not legally bound to apply any rule of the last-mentioned category. Conversely, its unilateral espousal of such new rules cannot effectuate a legal obligation upon its potential adversaries, whether

parties to Protocol I or otherwise, to respect these rules in their relations with the United States.

The focus in the present comment is on Chapter 11 of the *Handbook*, with its deceptively simple title "Noncombatant Persons." Like the rest of the *Handbook*, Chapter 11 earns high marks for brevity; it is, in effect, a great deal shorter than the relevant provisions of treaties in force taken together. This exercise in abbreviation carried a double risk: for one thing, the drafters may have left out subject matter that might be regarded as of vital importance to U.S. naval commanders; for another thing, the necessary condensation of often complex treaty language into simpler, ostensibly clearer phrases may at times have resulted in what an outsider might consider an inadmissible loss of legal precision. The question needs to be examined as to what extent the drafters have succeeded in avoiding these risks.

Section II of this essay takes a first look at the term "noncombatant persons" as used in the *Handbook*; it introduces the applicable treaties and goes into the question of what appears to be the scope of application of Chapter 11. In sections III and IV, the various categories of "noncombatant persons" pass in review, in the same order as they appear in the *Handbook*: the civilian population in general in section III; other categories of persons in section IV. Focal points are: conditions for recognition and protection as a "noncombatant person," factors entailing loss of protection, and the treatment of the persons in question. Also in section IV, some attention is devoted to protective signs and symbols, the use of distinctive signals and means and methods of identification in general. A brief concluding section rounds off these comments.

II. "Noncombatant Persons"[4]

The Term "Noncombatant"

Although the term used in the title of Chapter 11 of the *Handbook* may appear simple enough, surely a "noncombatant" does not represent a simple notion at all. The term is used to indicate a broad range of people with very different characteristics. This is apparent from the introductory paragraph 11.1 of the chapter, which states in part:

> Noncombatants are those individuals who do not form a part of the armed forces and who otherwise refrain from the commission of hostile acts. Noncombatants also include those members of the armed forces who enjoy special protected status, such as medical personnel and chaplains, or who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture.

When a lawyer is told that something "is" this but "also includes" something else, alarm-bells start ringing in his mind: are the notions thus brought together under one heading really similar in all relevant respects? His alertness grows when he notices that an earlier chapter of the *Handbook*

(Chapter 5, to which paragraph 11.1 refers) uses much more cautious language. Paragraph 5.3, on Combatants and Noncombatants, begins by stating, in much the same words as those used in paragraph 11.1, that: "The term noncombatant is primarily applied to those individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts." It then explains that, "[i]n this context, noncombatants and, generally, the civilian population are synonymous." Paragraph 11.3 adds that, "[t]he civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities."

After this elucidation of what is offered as the primary meaning of the term, paragraph 5.3 informs the reader that "noncombatants" may also have entirely different connotations:

> The term noncombatants may, however, also embrace certain categories of persons who, although attached to or accompanying the armed forces, enjoy special protected status, such as medical officers, corpsmen, chaplains, and war correspondents. The term is also applied to armed forces personnel who are unable to engage in combat because of wounds, sickness, shipwreck, or capture.

Treaties Relating to "Noncombatant Persons"

Without entering for the moment into the details of the various statements in paragraphs 5.3, 11.1 and 11.3, it appears useful to identify at the outset the treaties especially relevant to the present inquiry. It is surely a trite observation that, unfortunately, the law of armed conflict does not provide just one set of rules governing the position of all "noncombatants" as "people not involved in the fighting," in the sense as used in the *Handbook*. Indeed, with one exception, the treaties in force do not use the term at all.[5]

The majority of the treaties concerned belong to what is commonly known as the "law of Geneva," that is, the long list of conventions starting, modestly enough, with the ten articles of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, of 22 August 1864,[6] which over the course of time came to provide for the protection of an ever-widening circle of war victims. The Convention on the wounded and sick soldiers in the field of 1864 was followed by the wounded, sick and shipwrecked at sea in 1899;[7] prisoners of war in 1929;[8] and last but not least, civilians, mainly though not exclusively those in enemy or enemy-occupied territory, in 1949.[9]

While the "law of Geneva" knew this regular, step-by-step development, another part of the law of armed conflict, governing conduct during hostilities and commonly referred to as the "law of The Hague," was codified in a rather distant past, by the Hague Peace Conferences of 1899 and 1907.[10] After this feat the "law of The Hague" was for a long while left alone (and to customary development). Major parts of this body of Hague law eventually came to be included in the "reaffirmation and development of international humanitarian

law applicable in armed conflicts" of the 1970s that resulted in the adoption, in 1977, of the two Additional Protocols referred to above.

For purposes of the present comment the following treaties are of particular significance:

- the four Geneva Conventions of 1949 for the protection of war victims, viz., the First Convention (wounded and sick on land); the Second Convention (wounded, sick and shipwrecked at sea); the Third Convention (prisoners of war); and the Fourth Convention (civilians);
- the Hague Regulations on land warfare, of 1899/1907, together with the Hague Convention (IX) on naval bombardment; and
- the Additional Protocols of 1977.

Examination of the relations between the various types of "noncombatant persons" listed in the *Handbook* and the categories of persons specified in the relevant treaties will be the main purpose of the next sections.

Scope of Application of Chapter 11

A preliminary point is the scope of application of Chapter 11 (and presumably, of the entire Part II of the *Handbook*, on the "Law of Naval Warfare"), both as regards time and place.

Part II of the *Handbook* refers throughout to "armed conflict," without any attempt at definition. In the law of armed conflict, the term encompasses both international and internal armed conflicts. Since 1949, Art. 3, common to the four Geneva Conventions, makes separate provision for the latter type of armed conflict. In 1977, Art. 3 was supplemented by Protocol II. While the conduct of hostilities in an internal armed conflict need not be very different from the same sort of activities in an international one, the law differs significantly. One such difference is that the law relating to internal armed conflicts, whether in its 1949 or 1977 versions, does not recognize a separate category of "combatants," as those persons who, in contradistinction to the rest of the population, "have the right to participate directly in hostilities."[11]

Chapter 11 and Part II in general do not differentiate between the two types of armed conflict and appear to have been written with an eye to international armed conflicts in particular. Yet, the U.S. Navy may become involved in an internal armed conflict in two different situations: when the United States itself becomes the scene of such a conflict, or when it steps into an internal conflict elsewhere. The first case is probably so purely hypothetical that provision need not be made for it in a *Commander's Handbook on the Law of Naval Operations*. On the other hand, in United States practice, active involvement in other nations' conflicts is not a rare occurrence at all.

Outside intervention in an internal armed conflict habitually gives rise to interesting legal questions: when does this or the other part of the law of armed conflict apply, and to whom? Does it matter whether the intervention

is on the side of the incumbent authorities or on the other side? Refreshingly, the *Handbook* leaves all these more or less pedantic questions for what they are and confines itself to one maximum solution: when the U.S. Navy is involved in a shooting war, it shall apply the rules governing international armed conflict. One can only be gratified with such an outright choice for the rules providing greatest protection to "noncombatant persons" and other war victims.[12]

Another matter is the territorial scope of application. Part II being concerned with "Naval Warfare," one might think of the sea as the natural theatre of naval operations. Yet, a perusal of the text leaves little doubt that it is designed to be applied on a far broader basis and, in effect, on land and in the air as much as at sea. A case in point is Chapter 11, which gives a good deal of attention to the protection of the civilian population against the effects of hostilities, as well as to the situation of persons parachuting from disabled aircraft and who may or may not land in territory controlled by their own forces. Conversely, the whole of Part II pays surprisingly little attention to hospital ships.

One may perceive in this wide scope of application of Part II, and of Chapter 11 in particular, a recognition that "naval operations" include those of the naval air arm, amphibious forces and the marines, and that these do quite often extend to land. It remains to be seen whether the chapter has not thereby come to include details that might be regarded as superfluous, and to neglect issues that could be vital.

III. The Civilian Population

General Protection against Effects of Hostilities

As related in the previous section, paragraphs 5.3, 11.1 and 11.3 of the *Handbook* introduce the civilian population as the "noncombatant persons" of choice. The phrase "civilian population," as defined in paragraph 11.3, represents the broad mass of all those who, although themselves in no way directly involved in the fighting, are likely to be adversely affected by it. These people stand in need of "general protection against the effects of hostilities," no matter when and where these evil effects occur.

In the traditional dichotomy between the "law of The Hague" and the "law of Geneva," general protection of the civilian population belongs to the former. Yet, the treaties adopted by the Hague Peace Conferences of 1899 and 1907 deal with the subject in a rather stepmotherly fashion. They provide two sets of rules, one of which deals summarily with certain military operations likely to affect the civilian population (notably, bombardments and sieges).[13] The other set of rules defines the legal character and effects of belligerent occupation and goes into the relations between the occupying power and the authorities and inhabitants of occupied territory.[14]

A striking feature of the old rules on sieges and bombardments is their silence on the plight of the civilians themselves as human beings exposed to the effects of such warlike activities. This wall of silence surrounding the civilian population as potential victims of hostilities suffered a first, modest, breach in 1949 with the adoption of the Fourth Convention Relative to the "Protection of Civilian Persons in Time of War." For present purposes, it may suffice to refer to Part II, General Protection of Populations Against Certain Consequences of War, that serves to provide some protection, in particular, to certain specially vulnerable categories of civilians. The "consequences" in question may arise as much from the conduct of war on land as from activities at sea as, for example, naval blockade.[15]

While "general protection of the civilian population against the effects of hostilities" long remained a neglected and, hence, somewhat indeterminate notion in the past, its contours became more sharply defined after World War II. The first occasion was the XXth International Conference of the Red Cross, held in 1965 in Vienna. It adopted a resolution which "solemnly declares" four "general principles of the Law of War." Of relevance here are the twin principles "that it is prohibited to launch attacks against the civilian populations as such," and "that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."[16]

The United Nations General Assembly subsequently affirmed three of the four principles, including the two principles on protection of the civilian population, by a unanimously adopted resolution of 19 December 1968.[17] As this commentator wrote earlier:

> Although the General Assembly of the United Nations does not possess any formal legislative powers in matters of international law, the unanimous reaffirmation of the principles in question as valid norms of international law can certainly be regarded as an authoritative statement of the law. From this moment it has become very difficult for a Member of the United Nations to deny the validity of the principles spelt out in the Resolution, and of the principle of distinction in particular.[18]

As the drafting history of the 1977 Additional Protocols shows, no "Member of the United Nations" nor, for that matter, any other state has ventured to deny the validity of the principles. On the contrary, Protocol I enshrines them. Moreover, the Protocol expands them into a set of detailed rules.[19]

The *Handbook* reiterates the three principles of December 1968 in paragraph 8.1, Principles of Lawful Targeting, of Chapter 8, The Law of Naval Targeting. In order to examine what it has to say in detail about the protection of the civilian population, it is necessary to pay somewhat closer attention to the two principles concerned, beginning with the principle prohibiting attacks on the civilian population.

Civilian Population Not the Object of Attack

Clearly, this prohibition is not, on principle, subject to any considerations of policy, opportunity, or whatever. The only conceivable exception might perhaps lie in acts of reprisal against the enemy civilian population, a form of action that customary international law cannot with certainty be stated to forbid. Protocol I aims to seal this gap by categorically prohibiting reprisals against civilians, civilian objects in general (Arts. 51, 52) and a long list of specially protected civilian objects in particular (Arts. 53-56). These prohibitions are the outcome of difficult negotiations at the Diplomatic Conference of 1974-1977, and they have since remained the subject of sharp criticism from some quarters.

None of the states becoming party to Protocol I has made an express reservation to the provisions at issue. Close to a formal reservation comes the "understanding" of Italy, to the effect that it shall react to grave and systematic violations of Arts. 51 and 52 by all permissible means under international law, with a view to preventing further violations. Fortunately, this poorly masked threat of reprisal is preceded by a formal acceptance of the competence of the International Fact-Finding Commission, to be established in accordance with Art. 90, to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol."[20]

It is a matter of some considerable regret that the *Handbook* states bluntly, in subparagraph 6.2.3 (Reprisal) of Section 6.2 (Enforcement of the Law of Armed Conflict), that "[r]eprisals may be taken against enemy armed forces; *enemy civilians, other than those in occupied territory*; and enemy property." It is not at all certain that this statement is in conformity with customary international law. While the prohibition of such acts cannot be stated with certainty either, the most that can be said is that the law is in a state of indecision. In these circumstances, the blunt affirmation in a brand-new military manual of a major military power of an unquestioned right of reprisal against the civilian population represents a most unwelcome contribution to the "development of international humanitarian law applicable in armed conflicts."

An additional point of criticism is that the list in paragraph 6.2 of the "various means available to belligerents under international law for inducing the observance of legitimate warfare" does not include recourse to an outside fact-finding mechanism. Evidently, as the United States is not presently becoming a party to Protocol I, it is not in a position to accept the competence of the Art. 90 Commission. Yet, the road to *ad hoc* neutral enquiry is always open, and the *Handbook* should make the point explicit. Instead, it simply lists as the first available means of law enforcement: "Publicize the facts with a view toward influencing world public opinion against the offending nation." This may be quite a useful means against the offender once the facts have

been established, but this is precisely where the shoe pinches. Giving publicity to non-established facts is no more than making allegations.

After this short excursion into the field of reprisals, as a possible exception to the principle that the civilian population shall not be the object of attack, we return to the main principle. Application of the principle may in practice be thwarted by the practical difficulty of determining civilian status. As will be seen hereafter, Art. 50 (1) of Protocol I prescribes that whenever there is "doubt whether a person is a civilian, that person shall be considered to be a civilian."

While this rule, if faithfully applied, may largely solve the problem with respect to individuals, another matter altogether is the character of "the civilian population" as a group of persons. Will, for instance, the inhabitants of a town or village continue to enjoy immunity from attack when they have some few soldiers quartered among them? And what of a refugee camp where a good number of the inhabitants are found to be combatants, fully equipped as such?

In an attempt to resolve this issue, Art. 50 (3) of Protocol I provides that: "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character." This may be the correct solution when, in such a mixed situation, civilians constitute the overwhelming majority. But what if the balance between civilians and combatants is less evidently in their favor? From a military point of view, the immunity of some few civilians cannot forever shield an important military objective from attack.

Protocol I tackles this dilemma in more than one way. First, Art. 51 (7) issues a stern warning against misusing the civilian population to "render certain points or areas immune from military operations."[21] The point is reinforced by the obligation of belligerent parties to protect civilians under their control by taking "precautions against the effects of attacks." Art. 58 (which bears this caption) requires, as self-evident measures, that each party shall take, "to the maximum extent feasible," the removal of civilians from the vicinity of military objectives, and, the other way round, military objectives from civilians.[22]

Obviously, there can be no firm guarantee that this will be done. What, therefore, if one side disregards the prohibitions set forth in Art. 51 (7), so that the other side cannot carry out an attack on a military objective without at the same time seeming to perpetrate an "attack on the civilian population?" To this pressing question, Art. 51 (8) gives a rather evasive reply. The crux of the matter is that "the parties" are reminded of their "obligation to take the precautionary measures provided for in Article 57."[23]

Civilian Population to Be Spared As Much As Possible

This brings us to the other fundamental principle at stake, viz., the

obligation of belligerent parties, in carrying out military operations, to spare the civilian population as much as possible. Art. 57 (1) states the principle: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." Art. 57 (2) to (4) demonstrates clearly that the protection offered by this principle is, in contrast with the first principle, essentially relative in nature, as situations may arise where civilians simply cannot be spared.[24]

The order of preference in Art. 57 is, however, clear: first, try to avoid any incidental loss or collateral damage; if this is impossible, then at least try to minimize it; and in the last resort, refrain from pressing an attack that would cause excessive, that is, disproportionate damage to the civilian population.

These are no mean requirements to put to the military. Yet, they do not appear to be beyond the capacities of a well-trained, well-disciplined armed force, and they doubtless represent the right attitude of mind for any self-respecting soldier. They are even entirely commendable from the point of view of economical use of military means. At the same time, translation of the juridical phraseology of the Protocol into practical, easily understandable terms is of course necessary.

The Handbook on General Protection

In the *Handbook* the detailed rules on protection of the civilian population are spread over several sections. Confining ourselves for the moment to Chapter 11, the relevant paragraphs are 11.2 and 11.3. Paragraph 11.2, Protected Status, purports to deal with general aspects of the protection of all "noncombatant persons." Whether this is correct for all categories shall be examined *infra*. Applied to civilians, the rules it contains fairly accurately reflect some main aspects of the law as codified in Protocol I. It mentions the requirement of advance warning, adding that: "Such warnings are not required, however, if mission accomplishment, including the security of attacking forces, is premised on the element of surprise." It places on record the "affirmative duty" of "a party to an armed conflict that has control over civilians . . . to remove them from the vicinity of targets of likely enemy attack and to otherwise separate military activities and facilities from areas of [civilian] concentration." It affirms that: "Deliberate use of [civilians] to shield military objectives from enemy attack is prohibited." And it concludes that: "The presence of [civilians] within or adjacent to a legitimate target does not, however, preclude its attack."

Although all this may appear acceptable enough, it is far from giving the full story. In effect, the opening sentence of paragraph 11.2 sets the wrong tone, in that it provides:

> The law of armed conflict prohibits making noncombatant persons the object of intentional attack and requires that they be safeguarded against injury not incidental to military operations directed against combatant forces and other military objectives.

While this is a correct statement as far as it goes, the point is that it does not go far enough. Lacking is the recognition that civilians must be "safeguarded," first and foremost, against injury that *is* "incidental to military operations directed against combatant forces and other military objectives." Paragraph 11.2, in short, does not take up, or even refer to, the problem of incidental loss and collateral damage, let alone recognize proportionality as the ultimate standard of justifiable injury to civilians.

For this, the reader must look elsewhere in the *Handbook*, notably in paragraph 8.1.2.1, Incidental Injury and Collateral Damage, of Chapter 8, The Law of Naval Targeting. Here, the naval commander is urged to "take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the absolute minimum consistent with mission accomplishment and the security of the force," and he is required to "determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him." The commander is moreover required to "decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage."

This represents a clear attempt to summarize the law relating to protection of the civilian population. The text is open to the criticism that it lays too heavy an accent on "mission accomplishment." This undefined concept, that has no place in positive international law, may all too easily be misused as an excuse for otherwise unjustifiable acts of war affecting the civilian population.

This being said, the inclusion of the paragraph in a part of the law that came to be clarified only with the adoption of Protocol I, is warmly welcomed. The same goes for paragraph 8.1.2, Civilian Objects, specifying certain limitations on the right to attack objects of special importance to the civilian population. The present commentator merely wishes to add that he would have preferred to see both paragraphs repeated in Chapter 11; after all, the distinction between "naval targeting" and "noncombatant persons" is not rigidly maintained elsewhere either.

Returning once again to Chapter 11, paragraph 11.3 states:

> Unlike military personnel . . . civilians are immune from attack unless they are acting in direct support of the enemy's war-fighting or war-sustaining effort. Civilians providing command, administrative, or logistic support to military operations are subject to attack while so engaged. Similarly, civilian employees of naval shipyards, merchant seamen in ships carrying military cargoes, and laborers engaged in the construction of military fortifications, may be attack [sic] while so employed.

This statement too, is open to criticism. First, it creates the erroneous impression that in given situations, civilians may be deliberately chosen as the target of attack even though they are not taking a direct part in hostilities. A more accurate statement would be that in such situations, civilians are more than normally exposed to the risks of war because they happen to be in, on, under, or near an object that is open to attack as a military objective.[25] In such situations, the applicable principle is that they "must be spared as much as possible"—not that they provide fair game.

Over and above this fundamental criticism, the above phrases suffer from an apparent tendency to construe the law—and thereby to influence practice—in a sense that goes to the detriment of the civilian population. One can accept use of the phrase, activities "in direct support of the enemy's war-fighting effort." To add "war-sustaining effort" is going too far, however, as this might easily be interpreted to encompass virtually every activity in the enemy country.

"Civilians" and "Civilian Population"

In the above, the notions of "civilian" and "civilian population" were taken for granted. Internationally accepted definitions for each of these notions were introduced in Protocol I. According to Art. 50 (2), "[t]he civilian population comprises all persons who are civilians." A civilian is, according to Art. 50 (1), "any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." This definition-by-reference may be reduced to the statement that the civilian population comprises all those persons who are not members of the armed forces. (The latter notion is taken here in a broad sense, including armed groups such as militias, volunteer corps and organized resistance movements that, although not forming part of the regular armed forces, respect certain specificied conditions, with recognizability as a most essential one among them).[26]

The second sentence of Art. 50 (1) emphasizes that: "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." It is a matter of some regret that this important provision is not reflected in the *Handbook*. Not that the rule represents any great innovation in the law of armed conflict; surely, it could hardly be otherwise. Yet to remind military commanders of this necessary premise in their contacts with unknown persons remains extremely useful.

Up to a point, the definition in Art. 50 (2) is accurately reflected in the text of paragraph 11.3 (as quoted in section II *infra*). The most obvious deviation resides in the qualifying phrase "and not otherwise taking a direct part in hostilities." Paragraph 11.3, sub para. 2, is even more explicit:

> Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons or destroy enemy property lose their immunity and may be attacked. Similarly, civilians serving as lookouts, guards, or intelligence agents for military forces may be attacked.

Similar language is not found in Art. 50. On the other hand, Art. 51 (3) provides that: "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."

This sentence differs in more than one respect from the language in paragraph 11.3 of the *Handbook*. First, while the latter text carries the suggestion of a permanent loss of status and protection, Art. 51 (3) makes abundantly clear that the loss of protection is dependent on, and does not outlast, the activities at issue. In other words, the law is that a civilian who participated directly in hostilities but who has terminated his participation, is once again fully entitled to protection as a civilian and, hence, immune from attack (although he is liable to be punished for his hostile acts).

To be in accordance with the rule in Protocol I, the loss of immunity in paragraph 11.3 should not be understood as a permanent loss of status but, rather, as a temporary suspension of protection. The *Handbook* could be clearer on this score.

Another notable aspect is the terms by which paragraph 11.3 sets out to make the abstract notion of "direct participation in hostilities" more tangible. That "taking up arms or otherwise trying to kill, injure, or capture enemy persons" are listed under this heading may seem acceptable enough. Yet, the "enemy persons" may themselves be engaged in an unlawful act against civilian life or property, thereby justifying an act in self-defense on the part of the threatened civilians. Does the *Handbook* simply assume that U.S. naval personnel will not engage in such evil ways? A stern warning against any such conduct justifying forceful counter-measures on the part of the victims might be in order.

The next specific act mentioned in paragraph 11.3, "trying to destroy enemy property," is altogether too broad and vague to justify, in all cases, loss of protection as a civilian. It is just about as easy to think of instances where this consequence is justified, as of other ones where this is certainly not the case. The phrase should either be specified or deleted.

Is it correct to assert, as paragraph 11.3 does, that "civilians serving as lookouts, guards, or intelligence agents for military forces may be attacked"? This is yet another example of a statement that is simply too sweeping to guarantee that civilians shall not be attacked without just cause.

The present commentator regrets the apparent tendency in Chapter 11 to construe "direct participation in hostilities" in such wide terms. It is, of course, acknowledged that the concept is notoriously difficult to construe, and that the task of doing so falls to the competent national authorities. As the late Professor Waldemar A. Solf wrote, "As the interpretation of these

terms may affect matters of life or death, it is indeed regrettable that the ambiguities are left for resolution to the practice of States in future conflicts."[27]

A good starting point for a narrower construction might be in the following quotation: " 'Direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[28]

Levee en masse

Reference should be made here to the *levee en masse* as a special case warranting attacks on civilians. Ever since the Hague Regulations on land warfare, 1899, the law has recognized that: "Inhabitants of a nonoccupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units" are not liable to punishment for their warlike acts and, when captured, are entitled to prisoner-of-war status, "provided they carry arms openly and respect the laws and customs of war."[29]

The difference between participants in a *levee en masse* and the civilians of Art. 51 (3) lies not so much in the treatment they will get while engaged in active hostilities. They are all equally open to attack. However, when they fall into enemy hands while so engaged, members of the former category are not liable to be punished for their warlike acts and are entitled to prisoner-of-war status, whereas persons of the latter type are not entitled to either prerogative. Again, when the enemy gets hold of persons of either category only after they returned to normal "civilian" life, he must leave the participants in the *levee en masse* untouched but may still put the other individuals on trial.

In view of the apparent broad scope of application of the *Handbook*, and keeping in mind the possibility of U.S. forces taking part, for example, in an amphibious operation that the inhabitants of the territory concerned may be expected to regard as an invasion, the *levee en masse* should not remain unnoticed.

Protection under the Fourth Convention

As noted earlier in this chapter, a separate Convention for the protection of civilians saw the light in 1949. Part II of this Fourth Convention deals, as its title indicates, with the "general protection of populations against certain consequences of war." The consequences envisaged here are not, however, the effects of hostilities on the civilian population in general but, rather, the risks threatening certain especially vulnerable categories of civilians, such as wounded, sick and aged persons, children under fifteen, expectant mothers, and mothers of children under seven. The risks in question

may arise as much from the conduct of war on land as from activities at sea as, for example, naval blockade.

In this respect, reference may be made once again to Art. 23.[30] This Article outlaws the infliction of a total blockade in complete disregard of the fate of the civilian population. In the *Handbook*, subparagraph 7.7.3, Special Entry and Exit Authorization, of paragraph 7.7, Blockade, briefly refers to this matter, stating that "neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded should be authorized to pass through the blockade cordon."

Another fleeting reference to a subject dealt with in Part II of the Fourth Convention is found in subparagraph 6.2.2, The International Committee of the Red Cross (ICRC). It mentions the task assigned to the ICRC under the Geneva Conventions, *inter alia*, of "offering its 'good offices' to facilitate establishment of hospitals and safety zones." This reflects the possibility, recognized in Art. 14, for parties to a conflict to establish hospital and safety zones, so organized as to protect especially vulnerable categories of people from the effects of war.

Part III of the Fourth Convention, entitled "Status and Treatment of Protected Persons," provides for the protection of those civilians who are considered "protected persons" under Art. 4.[31] The protection of this Part extends to persons who find themselves, for whatever reason, in enemy territory or in territory under enemy occupation. For either situation, Part III contains elaborate sets of rules. One section deals at length with the treatment of internees, laying down rules that closely resemble those applicable to prisoners of war.

While the *Handbook* does not pay express attention to belligerent occupation, Chapter 11 does contain a paragraph 11.9 on Interned Persons. Rigorously condensing the vast mass of treaty provisions to a few clear lines, it succeeds remarkably well in bringing out the essence of the "humane treatment" due such "protected persons."

Civilians Under Special Protection

The law of armed conflict singles out for special protection certain specified categories of civilians, either because they are regarded as especially vulnerable or on account of the functions they perform. The *Handbook* also, in various chapters, pays occasional attention to the situation of these persons.

As the rules relating to the protection of these diverse categories of civilians are closely linked to those on the status and protection of members of the armed forces who qualify for special protection, they are dealt with in the next section.

IV. Other "Noncombatant Persons"

Medical Personnel and Chaplains

After the civilian population, paragraph 11.1 lists "medical personnel and chaplains" as a first category of "members of the armed forces who enjoy special protected status." Paragraph 11.5 enlarges upon the point: "Medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties and may not be attacked." As regards chaplains, the Section specifies that in order to "enjoy protected status equivalent to that of medical personnel," they must be "engaged in ministering to the armed forces."

While paragraph 11.5 provides an undivided list of the medical personnel who all qualify for the same protected status, the treaties in force recognize certain distinctions. For present purposes, importance attaches to the distinction between permanent and temporary personnel. Art. 24 of the First Convention defines the position of the permanent military medical staff and chaplains, as follows:

> Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

As regards the situation at sea, Arts. 22 and 36 of the Second Convention provide similar protection for "the religious, medical and hospital personnel" of military hospital ships.

The above persons are, so to speak, "noncombatants" by profession. They are, by virtue of their function, permanently precluded from taking an active part in hostilities. There can be little doubt that the term "noncombatants" in Art. 3 of the Hague Regulations ("The armed forces of the belligerent parties may consist of combatants and noncombatants") refers to the medical personnel and chaplains of the armed forces in the first place.

Almost but not entirely on a par with these prototypical "noncombatants" are the temporary paramedical personnel. Art. 25 of the First Convention provides that:

> Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands.

While a strong preference for non-violent behavior or even a sense of vocation may have prompted these "members of the armed forces" to apply for such special training, they enjoy noncombatant status only on a temporary basis, when they are actually employed in one or other of the above functions.

At other moments they may be occupied in a normal combatant capacity, and may then act as such with impunity.

Comparing the above treaty provisions with paragraphs 11.1 and 11.5 of the *Handbook*, it appears that the *Handbook* unacceptably oversimplifies matters. Mention of the permanent and temporary medical personnel in one breath leaves the reader with the false impression that like the auxiliary personnel, members of the permanent medical staff depend for their protected status on "being engaged exclusively in medical duties," a misunderstanding that could and should be avoided.

The ground-rule for the treatment of (permanent or temporary) medical personnel and chaplains is already given in the above treaty texts: they must be "respected and protected." It follows that they shall not be the object of attack. An obvious precondition is that they are recognized in their quality as medical personnel or chaplains. As to this, a surgeon who performs an operation in a military field hospital without wearing the "armlet bearing the distinctive emblem" prescribed by Art. 40 of the First Convention, will not lightly be mistaken for someone who is "taking a direct part in hostilities." On the other hand, uniformed auxiliary medical personnel searching for wounded in the field run a serious risk of being mistaken for unprotected combatants if they fail to wear the "white armlet bearing in its centre the distinctive sign in miniature" as prescribed in Art. 41 of the First Convention. Subparagraph 11.10.6 correctly reflects this point.

The Conventions do not state in so many words that permanent military medical personnel and chaplains, and the temporary personnel while engaged in a paramedical function, shall themselves refrain from taking an active part in hostilities. Yet this is an evident condition for effective immunity from attack. A chaplain who, arms in hand, leads an attack (as seems to have happened in Viet Nam) cannot (and probably does not) expect to be respected as a "noncombatant." On the contrary, his active participation in hostilities constitutes an unlawful act of war and, hence, a war crime.

Medical or paramedical personnel who perpetrate a similar act under the cover of the red cross or red crescent may, under the terms of Art. 85 (3) (f) of Protocol I, be guilty of an act of perfidy amounting to a grave breach of the Protocol. This point is stated in paragraph 12.2 (Misuse of Protective Signs, Signals and Symbols) of Chapter 12 (Deception During Armed Conflict) of the *Handbook*. The paragraph explains that acts of the above type "undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities."

Another matter altogether is that medical personnel may be armed and "use the arms in their own defence, or in that of the wounded and sick in their charge" (Art. 22, First Convention). Paragraph 11.5 correctly specifies that the arms must be "small arms." It adds that the arms may also serve

"for protection from marauders and others violating the law of armed conflict." One senses here a typical reflection of the asserted constitutional right of all Americans to carry a weapon in self-defense. While "protection from marauders" seems all right, the present commentator has some difficulty with the added category of "others violating the law of armed conflict." His fear would be that such a vague phrase might easily lead to confusion.

Upon capture, permanent military medical personnel and chaplains "shall be retained only in so far as the state of health, the spiritual need and the number of prisoners of war require;" thus retained, they shall not themselves be deemed prisoners of war (Art. 28 of the First Convention). Those who are not retained "shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit" (Art. 30). Temporary personnel, on the other hand, "shall be prisoners of war, but shall be employed on their medical duties in so far as the need arises" (Art. 29).

As against all this, paragraph 11.5 simply states that: "Medical personnel and chaplains falling into enemy hands do not become prisoners of war." And the next sentence draws the equally sweeping conclusion that, "[u]nless their retention by the enemy is required to provide for the medical or religious needs of prisoners of war," they all "must be repatriated at the earliest opportunity."

Not specifically mentioned in the *Handbook*, but falling in the same class and under the same protections as the permanent military medical personnel, are their civilian colleagues on the staff of duly recognized Red Cross, Red Crescent or other voluntary aid societies (Art. 26 of the First Convention), the religious, medical and hospital personnel of other than military hospital ships (Arts. 24 and 36 of the Second Convention), and, according to Art. 20 of the Fourth Convention "persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases." As for the Red Cross and other civilian personnel, they "may not be detained" and "shall have permission to return to their country, or if this is not possible, to the territory of the Party to the conflict in whose service they were, as soon as a route for their return is open and military considerations permit" (Art. 32 of the First Convention).

Combatants in Various Situations of Distress

Of a different character altogether are the next class of "noncombatant persons" listed in paragraphs 5.3 and 11.1: members of the armed forces "who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture." Such persons differ from medical personnel and chaplains in that they find themselves in a noncombatant position, not as a matter of vocation,

profession or preference but by accident, or indeed by a stroke of bad luck. They are first and foremost combatants and, as such, are not precluded in principle from taking up arms against the enemy. A wounded soldier is fully entitled to open fire on an adversary, provided he does not do so while feigning to be incapacitated by his wounds. Even when taken prisoner, a soldier retains his capacity and status as a combatant; thus, he may escape with impunity, and his national legislation may even oblige him to attempt to do this.

Paragraph 11.4, The Wounded and Sick, states the principle that "[m]embers of the armed forces incapable of participating in combat due to injury or illness may not be the subject of attack." Paragraph 11.8, Prisoners of War, adds the equally important principle that when they are given medical treatment, "no distinction among them will be based on any grounds other than medical ones."

Paragraph 11.6, The Shipwrecked, extends similar protection to all "[s]hipwrecked persons, whether military or civilian." Persons belonging to the category of the shipwrecked "include those in peril at sea or in other waters as a result of either the sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft."

Obviously, the above comments about "noncombatants against their will" do not apply to the civilians among the shipwrecked. That they are placed on the same footing as the military shipwrecked is easily understood in the light of the situation at sea, where shipwreck means the same extreme danger for everyone and where rescue without discrimination has become more or less the natural thing to do.

Equally self-evident, although phrased in such complicated "legal" terms as to be open to interpretation in practice, are the exceptions made in the second subparagraph of paragraph 11.6:

> Shipwrecked persons do not include combatant personnel engaged in amphibious, underwater, or airborne attacks who are proceeding ashore, unless they are clearly in distress and require assistance. In the latter case they qualify as shipwrecked persons only if they cease all active combat activity and the enemy has an opportunity to recognize their condition of distress.

The first sentence of paragraph 11.8, Prisoners of War, contemplates situations of distress combatants may find themselves in just moments before they are taken prisoner:

> Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured.

This language corresponds in the main with the provision in Art. 41 (1) of Protocol I, that "[a] person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack." One missing element is, of course, the affirmative duty of the adversary to recognize the person in question as being *hors de combat*.

For the rest, the specific situations where paragraph 11.8 considers a combatant to be *hors de combat* do not markedly differ from those set forth in Art. 41 (2) of Protocol I.[32]

A situation comparable to that of the combatant *hors de combat* is dealt with in paragraph 11.7, Parachutists. It provides in part:

> Parachutists descending from disabled aircraft may not be attacked while in the air and, unless they land in territory controlled by their own forces or engage in combatant acts while descending, must be provided an opportunity to surrender upon reaching the ground.

This is a more or less faithful reflection of the rules laid down in Art. 42 (1) and (2) of Protocol I. The inclusion of this provision in paragraph 11.7 may be taken as a sign that the United States regards the position of these persons as being governed by customary law.[33]

Section 11.7 deviates from the language of Art. 42, notably, in the reference to the performance of "combatant acts while descending." At the Diplomatic Conference of 1974-1977, in the course of the debate on the draft Article, some urged that a clause to that effect be included, whereas others asserted that it would be an empty phrase as performance of such acts in the course of a descent by parachute was impossible. In the end, a Philippine amendment to add "unless he commits a hostile act during such descent" failed to obtain the required two-thirds majority.[34]

While Art. 42 (3) provides, by way of exception, that "Airborne troops are not protected by this Article," paragraph 11.7 also excludes from protection "special warfare infiltrators and intelligence agents." This sounds reasonable enough. Yet it may not be easy in practice to ascertain that a person who is parachuting from an airplane that may or may not be in distress actually belongs to one of these sinister categories.

Prisoners of War

As provided in paragraph 11.8, Prisoners of War, "combatants that have surrendered or otherwise fallen into enemy hands are entitled to prisoner-of-war status." Subparagraph 2 defines the persons entitled in principle to such status. They "include members of the regular armed forces, the militia and volunteer units fighting with the regular armed forces, and civilians accompanying the armed forces." While the *Handbook* poses no further conditions for members of the regular armed forces, subparagraph 2 specifies in a second sentence:

> Militia, volunteers, guerrillas, and other partisans not fighting in association with the regular armed forces qualify for prisoner-of-war status upon capture, provided they are commanded by a person responsible for their conduct, are uniformed or bear a fixed distinctive sign recognizable at a distance, carry their arms openly and conduct their operations in accordance with the law of armed conflict.

This sentence provides a slightly simplified version of the traditional law, while at the same time supplementing it with embellishments and explanatory elements of its own. In doing so, it largely relies on the treaties to which the United States is a party. For the rest, it appears to borrow elements from Protocol I or, indeed, from its drafting history.

The applicable pre-Protocol treaty law is found mainly in Art. 13 common to the First and Second Geneva Conventions and in Art. 4 of the Third Convention. As far as relevant here, these Articles list in identical terms, first, the members of regular armed forces, including "members of militias or volunteer corps forming part of such armed forces," and secondly:

> Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.

Like the quoted phrase in paragraph 11.8, these Articles distinguish between the regular armed forces and other armed groups, and specify a number of conditions the latter groups have to meet in order to qualify for prisoner-of-war status. The main difference is in the definition of the not-so-regular armed groups, with the treaty provisions specifically mentioning resistance movements, as a *species* of the *genus* "other volunteer corps." That resistance movements were mentioned at all was a great victory in 1949, after the failure of the Hague Peace Conferences of 1899 and 1907 to resolve the problem of armed resistance in occupied territory in a satisfactory manner.

At the same time, it was but half a victory, because the 1949 text maintained the four conditions as adopted in 1907 (including the element that the distinctive sign had to be "fixed"—a rather unfortunate German addition of that year to the text established in 1899). Even in 1949 it was a well-known fact that resistance movements are rarely able to meet all four conditions. It also became clear that even regular armed forces very often rely on cover and camouflage rather than, as in the days of yore, on the splendor and brilliance of their uniforms and arms. On the other hand, irregular fighters were often treated in practice as combatants and prisoners of war, even if they had not met all four conditions all the time.

These facts eventually led to the adoption of Art. 43 (1) of Protocol I, providing a completely new definition of "armed forces." The new text does

away with the distinction between "regular" and "irregular" armed forces, as also with the list of stringent conditions of 1907. Instead, it requires organization, responsible command, and discipline.[35] The obligation of combatants "engaged in an attack or in a military operation preparatory to an attack" to "distinguish themselves from the civilian population" is laid down in Art. 44 (3), leaving open how they will discharge this obligation.[36] One obvious means remains the uniform. As specified in para. 7, Art. 44 "is not intended to change" the practice of regular armed forces with respect to the wearing of the uniform - no matter what that practice may be.

The definition of "armed forces" in Art. 43 (1) doubtless constitutes new law, and the United States is therefore legally entitled to disregard it. At the same time, one cannot but feel a sense of regret at this posture, which contradicts not only the stand taken by its delegation at the Diplomatic Conference of 1974-1977 but, perhaps even more strikingly, its own practice in the Vietnam War, a practice that served as an example to the rest of the world and was a source of inspiration for the negotiators at the Conference. In particular, after all that has happened, it is difficult to accept as serious propositions that a distinction should still be maintained between regular and other armed forces and that the latter would be required at all times to "be uniformed or bear a fixed distinctive sign recognizable at a distance" and "carry their arms openly."

Given the rather retrograde posture of the *Handbook* on the matter of qualification as prisoners of war, the reference in paragraph 11.8 to "guerrillas" and "partisans" is all the more surprising. Such catchwords may have been used in the debate preceding the adoption of Art. 43 (1) of Protocol I, but they were no more included in the text than other comparable, equally undefined terms, if only because they are as open to subjective interpretation as, for example, the word "terrorist."[37]

The third and last subparagraph of paragraph 11.8 provides, in accordance with the rule in Art. 5 of the Fourth Convention, that in case of doubt, a captive is entitled to "prisoner-of-war treatment until a competent tribunal convened by the captor determines the status to which that individual is properly entitled."

While the "competent tribunal" is expected to determine a person's entitlement to prisoner-of-war status, it will usually have to do so on the basis of a finding concerning that person's combatant status. In this respect, subparagraph 12.7.1, Illegal Combatants, is of interest. It provides that "Persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle are illegal combatants and are subject to punishment upon capture." Then, referring to the above rule on determination of status, it asserts that if a competent tribunal finds them to be "illegal combatants," they "may be denied prisoner-of-war status and be tried and punished for falsely claiming noncombatant

status during combat." This is followed by the somewhat reassuring conclusion that: "It is the policy of the United States, however, to accord illegal combatants prisoner-of-war status if they were carrying their arms openly at the time of capture."

All of this can hardly go without a few words in comment. While the closing part of the first sentence is doubtless correct, the assertion that such persons are "illegal combatants" is, to say the least, highly controversial. As the modern law stands, a person either is a member of the armed forces and, hence, a "combatant," or he does not belong to an armed force and, hence, is a "civilian." For this, it is immaterial whether the person in question, while engaged in combat activities, has distinguished himself from the civilian population. If he failed to do so, he is liable to be punished. In other words, the better view is that a category of "illegal combatants" simply does not exist.

As regards the general rule of distinction, the "new law" of Art. 44 (3) and (4) of Protocol I admits one exception. It concerns the armed combatant who finds himself in a situation where, "owing to the nature of the hostilities" he cannot properly distinguish himself from the civilian population while "engaged in an attack or in a military operation preparatory to an attack." If this man then fails to meet even the minimum requirement of carrying his arms openly, (a) during a military engagement and (b) "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate," he forfeits "his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol."

This exception to the principle of distinction is among the points most strongly objected to by the United States.[38] To some extent, the quoted phrases of subparagraph 12.7.1 reflect these objections, in that they disqualify as "illegal combatants" all those who take part in combat operations without proper distinction. At the same time, one senses a reluctant (or audacious?) attempt to meet the "new law" half-way in the closing sentence, where it is declared to be U.S. policy to accord prisoner-of-war status (not merely treatment) even to persons who have been found to be "illegal combatants" - this on the condition that they were carrying arms openly at the time of capture, rather than during the periods of activity and visibility indicated above. This is surprising, because the moment of capture may occur days after the aforesaid combat activities. Perhaps the sentence is intended to mean exactly the same as the rule in Art. 44 (4), the assumption being that capture will take place in the course of the combat activities.

As for the treatment of prisoners of war, it may suffice to note that while this is dealt with in minute detail in the Fourth Convention, the *Handbook* obviously does not repeat all of this. Paragraph 11.8 states the principle that

they "must be treated humanely and protected against violence, intimidation, insult, and public curiosity," as well as the main rules on interrogation, including the prohibition of "[t]orture, threats, or other coercive acts." After some basic facts about "trial and punishment," "labor," and "escape" (subparagraphs 11.8.1 to 11.8.3), subparagraph 11.8.4 lays down some sensible rules for the "Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels." None of this needs special comment.

War Correspondents and Other Persons Accompanying the Armed Forces

While section III of this essay dealt with civilians as members of very broad categories (the entire civilian population, or large segments, such as inhabitants of occupied territory), a totally different approach consists in singling out specified classes of civilians for special protection. A case in point is the war correspondent, mentioned in paragraph 5.3 of the *Handbook*. He belongs, in the terms of Art. 4 A (4) of the Third Convention, to the "[p]ersons who accompany the armed forces without actually being members thereof." As distinct from the information officer (who is a member of the armed forces), the war correspondent, although officially accredited with the armed forces, is a civilian and must in principle be treated as such. Yet his work exposes him to the risk of falling into enemy hands.

Accordingly, it was provided in Art. 13 of the Hague Regulations that in case this happened and if the enemy considered it "expedient to detain" war correspondents they were then "entitled to be treated as prisoners of war, provided they [were] in possession of a certificate from the military authorities of the army which they were accompanying." Art. 81 of the 1929 Prisoners-of-War Convention used more or less the same language. The most important innovation was that the requirement of a certificate had been replaced by a requirement of authorization from the same military authorities. Art. 4 A (4) of the present Third Convention differs from the 1929 text in this one respect that the text no longer refers to the expediency of detaining the persons in question. This does not, however, materially affect the situation; they are and remain civilians and the enemy will still be fully entitled to let them go if he so prefers.

The rule of Art. 4 A (4) applies not only to war correspondents but likewise to all "[p]ersons who accompany the armed forces without actually being members thereof." The Article gives as further examples: "civilian members of military aircraft crews, . . . supply contractors, members of labour units or of services responsible for the welfare of the armed forces." As with the war correspondents, a condition for prisoner-of-war status of all these groups is "that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model." And once again, they all are and remain

civilians, even though the enemy might think fit to detain them temporarily or, if he so prefers, for the duration of the armed conflict.

In the *Handbook*, the second subparagraph of paragraph 11.8 refers in passing to the general category of "civilians accompanying the armed forces."

Journalists on Dangerous Missions

In recent years, a great deal of attention has been given to the risks run by journalists who report on an ongoing armed conflict without being accredited as war correspondents with the armed forces of one of the parties. The result is Art. 79 of Protocol I, on "measures of protection for journalists." The Article aims to provide a modicum of protection to journalists who are "engaged in dangerous professional missions in areas of armed conflict." Obviously, such journalists often put their lives at risk in their news-gathering activities. So long as they roam freely through an area of actual combat, the law can do little more than remind the belligerent Parties, as Art. 79 does, that they are civilians and thus are entitled to "general protection" (the Article states erroneously that they "shall be considered as" civilians).[39]

While, as explained above, the officially accredited war correspondent who is captured and detained by the enemy is entitled to treatment as a prisoner of war despite his status as a civilian, this rule does not apply to other journalists. Art. 79 of Protocol I does not modify the situation; it merely makes clear that even in this eventuality, the "journalist engaged in a dangerous professional mission in an area of armed conflict" is and should be treated as a civilian.

The "journalists on dangerous missions" have not found a place in the *Handbook*.

Crew Members of Merchant Marine and Civil Aircraft

By virtue of Art. 4 A (5) of the Third Convention, and for similar reasons as war correspondents, the "[m]embers of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft" qualify as prisoners of war when detained by the enemy. This rule, although not mentioned in Chapter 11, is duly reflected in Chapter 8, Naval Targeting, notably in subparagraph 8.2.2.1.

Protective Signs and Symbols and Other Means of Identification

Paragraph 11.10, Protective Signs and Symbols, sums up the main rules on use of protective means of identification. With respect to the use Israel makes of the Red Star of David, instead of the red cross or red crescent as the two internationally accepted and commonly used symbols, subparagraph 11.10.1 states that the United States "has not agreed that it is a protective symbol." While this is indubitably correct, perhaps even more important is that the other 160-odd states of the world equally, and quite emphatically, refuse to

include it amongst the recognized protective symbols. A U.S. agreement to recognize the Red Star of David as such could not alter this fact and, with that, the state of the law.

The paragraph provides a remarkably complete list of protective symbols. It includes, "for informational purposes only," two symbols established by Protocol I: one for the protection of dams, dikes and nuclear power plants, and the other protecting civil defense facilities and personnel. Curiously, it also mentions, as "of special interest to naval officers," the sign established by Hague Convention IX of 1907 and, according to the letter of Art. 5, designed to be used by the inhabitants of towns, etc. open to naval bombardment, to "indicate" "sacred edifices, buildings used for artistic, scientific or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected." The "visible signs" prescribed in Art. 5 and consisting of "large, stiff rectangular panels divided into two colored triangular portions, the upper portion black, the lower portion white," can hardly be regarded as well-known. They may even be said to have fallen into desuetude.[40]

In striking contrast to express reference to these obsolete signs is the total silence on the rules concerning the distinctive marking of hospital ships. In effect, the only reference to these ships is in paragraph 8.2.3, where they are listed among the "enemy vessels and aircraft exempt from capture or destruction." This is all the more astounding as hospital ships are a common feature of naval warfare and as, both during and after the Diplomatic Conference of 1974–1977, much has been said and done about the improved identification of such vessels, also by other than visual means.

V. Conclusions

A good part of the commentary in the preceding sections deals with civilians and the civilian population, notably on land. This is a consequence not of a predilection on the part of the present commentator but, rather, of the organization and contents of Chapter 11, that puts these people in a frontline position - in more than one respect. It should be stated straightaway that, even though much of a commendable nature was found in the relevant parts of Chapter 11, its overall impression as regards the protection of the civilian population was not entirely satisfactory.

The most important point is perhaps a question of "turn of mind." Civilians are not just "noncombatant persons;" they constitute a human society and, in the event of an international armed conflict, the enemy society. It is first and foremost in their societal existence that they must be respected and protected. It is a trite observation that in the practice of contemporary armed conflicts, members of the civilian population are far more likely to fall victim

to unjustifiable acts of war than to justifiable ones. Military manuals should serve to curb this tendency rather than encourage it.

More specifically, the present commentator ventures to suggest that the paragraphs dealing with the distinction between civilians and combatants and the fate of civilians taking a direct part in hostilities be rephrased and brought more in line with the humanitarian spirit of the modern law of war. The principle that the civilian population be spared as much as possible, now hidden in a corner of Chapter 8, should be given a more prominent place, preferably in Chapter 11.

Always in the context of protection of the civilian population, the express claim of a right of reprisal is deeply regretted.

It was stated at the outset of section II of this essay that the term "noncombatant" as used in the *Handbook* does not represent a simple notion at all. The discussion in sections III and IV may have made clear that the phrase is not just deceptively simple; it can hardly be regarded as adequate to cover the great variety of persons who at a given moment, and for one reason or another, are not actively engaged in the conduct of military operations. They range from the "innocent civilian" whose only hope is to remain unaffected by the hostilities, through the journalist who out of professional curiosity seeks out the danger areas, the military doctor who by profession and probably out of idealism will often have to confront the same types of danger, the wounded soldier who for the time being is incapacitated by his wounds, to the fighter pilot who has abandoned his disabled aircraft and parachutes to his own territory where he may hope soon to resume his combatant handiwork.

This being the case, the question arises whether the treatment of all these widely different categories of persons in one chapter is really justified. The present commentator entertains serious doubts in this respect.

Perhaps the point where these doubts become most poignant is with regard to paragraph 11.2, purporting to lay down a series of general principles applicable to all "noncombatant persons" without exception. Without going once again into the details of law relating to specified categories of persons, it may simply be stated here that unmodified application of the generalities of paragraph 11.2 to all of these categories may result in serious encroachments of the law.

There remains the question of the scope of Chapter 11, and of Part II of the *Handbook* in general. As set forth in the second section of the present comments, Part II is apparently designed for global application, on land, at sea, and in the air. This raises the tremendous difficulty of condensing into fairly brief paragraphs a great mass of legal provisions of varying age. While one may admire in principle the manner in which the authors of the *Handbook* have performed this task, some surprising features remain to be noted.

To this commentator, the most surprising aspect is the scant attention given in Part II to hospital ships. In our day and age, one would hardly expect an express reference to Art. 28 of the Second Convention, providing that "[s]hould fighting occur on board a warship, the sick-bays shall be respected and spared as far as possible." In contrast, the hospital ship is an extremely useful and important element in present-day naval operations, and it deserved a more prominent place in the *Handbook*.

In more general terms, a somewhat more extensive treatment of the rules relating to the wounded, sick, and shipwrecked would appear no exaggerated luxury in a "Commander's Handbook on the Law of Naval Operations." As the text stands, and with all due respect for the remarkable achievement it represents, it suffers from a certain imbalance between the commendable attention given to civilians and other "noncombatant persons" on land, and a decidedly less extensive and intensive attention to specific problems of protection of "noncombatant persons" at sea.

Notes

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1. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977*, (Bern: Federal Political Department, 1978) v. I, part 1, p. 12. [hereafter cited as *Official Records*].

2. On 26 June 1987, the Government of the Netherlands deposited its instruments of ratification of the two Protocols, with annexed declarations of understanding and a declaration accepting the competence of the International Fact-Finding Commission provided for by Art. 90 of Protocol I, thus becoming the 68th State Party to Protocol I and the 62nd to Protocol II, and the 10th State to make the declaration under Art. 90 of Protocol I; see *Revue internationale de las Croix-Rouge*, 1987, p. 444 (English ed. no. 259, 1987, p. 425).

3. Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987), reprinted in *American Journal of International Law*, October 1987, p. 910; see also Hans-Peter Gasser, "An Appeal for Ratification by the United States", *American Journal of International Law*, October 1987, p. 912.

4. Hereafter, in addition to the official sources, the reader is directed to a compilation of international agreements by Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts*, (Alphen aan den Rijn, The Netherlands: Sijthoff and Nordhoff, 1981) [hereafter cited as Schindler and Toman].

5. The exception is Article 3 of the Regulations on land warfare annexed to the Hague Convention (IV) of 18 October 1907; *see infra* note 10.

6. The Geneva Convention of 22 August 1864 on the relief of the wounded in the field (1 Bevans 7) was superseded by the Geneva Convention of 6 July 1906 (35 Stat. 1885), which was replaced by the Geneva Convention of 27 July 1929 (47 Stat. 2074) and this, in turn, by the Geneva Convention (I) of 12 August 1949 (6 UST 3114) [hereafter cited as Geneva I]; Schindler and Toman, *supra* note 4 at pp. 213, 233, 257, 305.

7. The Hague Convention (III) of 29 July 1899 adapting the Geneva Convention of 1864 to maritime warfare (32 Stat. 1827) was replaced by the Hague Convention (X) of 18 October 1907 (36 Stat. 2371) which, in turn, was replaced by the Geneva Convention (II) of 12 August 1949 (6 UST 3217) [hereafter cited as Geneva II]; Schindler and Toman, *supra* note 4 at pp. 221, 245, 333.

8. The Geneva Convention of 27 July 1929 on the treatment of prisoners of war (47 Stat. 2021) was replaced by the Geneva Convention (III) of 12 August 1949 (6 UST 3316) [hereafter cited as Geneva III]; Schindler and Toman, *supra* note 4 at pp. 271, 355.

9. The Geneva Convention (IV) of 12 August 1949 on protecting civilians (6 UST 3516) has not been replaced [hereafter cited as Geneva IV]; Schindler and Toman, *supra* note 4 at p. 427.

10. The Hague Convention (II) of 29 July 1899, with annexed Regulations on land warfare (32 Stat. 1803) was replaced as between contracting Powers by the Hague Convention (IV) of 18 October 1907, with annexed Regulations (36 Stat. 2277) [hereafter cited as Hague IV Regulations]; Schindler and Toman, *supra* note 4 at p. 57.

The Second Hague Peace Conference (1907) produced a series of conventions relating to matters of naval warfare: Convention VI - the status of enemy merchant vessels at the outbreak of hostilities; Convention VII - the conversion of merchant vessels into warships; Convention IX - bombardment by naval forces of land targets (36 Stat. 2351) [hereafter cited as Hague IX]; Convention XI - restrictions on exercising the right of capture (36 Stat. 2396). Schindler and Toman, *supra* note 4 at pp. 703, 709, 723, 731.

11. The quoted phrase is in Art. 43, paragraph 2 of Protocol I. *Official Records*, *supra* note 1 at p. 143; Schindler and Toman, *supra* note 4 at p. 577.

12. For a modern, thoroughly researched discussion of the question of the law applicable in mixed conflicts, see M. Hess, *Die Anwendbarkeit des humanitaren Volkerrechts, insbesondere in gemischten Konflikten* (Zurich, 1985).

13. Rules of this type are found in Articles 25-27 of the Hague IV Regulations: prohibiting the "attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended;" recognizing a duty of the "officer in command of an attacking force . . . before commencing a bombardment, except in cases of assault, [to] do all in his power to warn the authorities;" and also a duty to take "all necessary steps . . . to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." 36 Stat. 2302-03; Schindler and Toman, *supra* note 4 at p. 77-78.

With respect to naval bombardments, Article 2 of Hague IX lists targets that, although located within undefended ports, towns, villages, dwellings, or buildings, are excluded from the general prohibition and may be bombarded as military objectives: "military works, military or naval establishments, depots of arms or war *materiel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour." 36 Stat. 2363; Schindler and Toman *supra* note 4 at p. 724.

14. Rules of this type are found in Section III of the Hague IV Regulations (Military Authority over the Territory of the Hostile State). 36 Stat. 2306; Schindler and Toman, *supra* note 4 at p. 82.

15. Of special importance is Art. 23 of Geneva IV. It provides for "the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians" of the adversary, as well as of "all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases." 6 UST 3532-34; Schindler and Toman, *supra*, note 4 at 440-41. *See infra* text under the subsection entitled "Protection under the Fourth Convention."

16. The full text of Resolution XXVIII, protecting civilians from indiscriminate warfare, appears in Schindler and Toman, *supra* note 4 at 195. In relevant part the resolution states that "indiscriminate warfare constitutes a danger to the civilian population and the future civilization," and

> solemnly declares that all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:
> - that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
> - that it is prohibited to launch attacks against the civilian populations as such;
> - that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
> - that the general principles of the Law of War apply to nuclear and similar weapons.

17. United Nations, General Assembly, *Official Records: Resolutions Adopted by the General Assembly During its Twenty-Third Session, 24 September- 21 December 1968*. Resolution 2444, A/7218 (New York: 1969) pp. 50-51.

18. Frits Kalshoven, *The Law of Warfare, A Summary of its Recent History and Trends in Development* (Leiden: Sijthoff, 1973), p. 44.

19. Article 48 of Protocol I lays down the basic rule: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." *Official Records*, *supra* note 1 at 146; Schindler and Toman, *supra* note 4 at p. 580. Articles 51 and 52 provide detailed rules elaborating the prohibition to attack the civilian population or civilian objects.

Subsection (1) of Art. 57 states the second principle: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." *Official Records*, *supra*

note 1 at p. 150; Schindler and Toman, *supra* note 4 at 584-85. Subsections (2)-(5) elaborate this principle into a set of detailed provisions.

Protocol II, on the one hand, reaffirms in Art. 13 the principle of general protection and the prohibition against making the civilian population the object of attack. On the other hand, it provides no definition of military objectives (and contains only one reference to this concept (in Art. 15 on the protection of works and installations containing dangerous forces)). Nor does it expressly refer to the principle of distinction.

20. *Revue internationale de la Croix-Rouge*, 1986, p. 115 (English ed. no. 251, 1986, p. 114). On the matter of wartime reprisals in general see Frits Kalshoven, *Belligerent Reprisals* (Leyden: Sijthoff, 1971). On the negotiations in the Diplomatic Conference of 1974-1977, an article by the same author "Reprisals in the CDDH" in Robert J. Akkerman et. al., eds., *Declarations on Principles, A Quest for Universal Peace* (Leyden: Sijthoff, 1977) pp. 195-216; see also Stanislaw E. Nahlik, "Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law, Geneva 1974-1977", *Law and Contemporary Problems*, no. 2, 1978, p. 36.

21. Article 51 (7) provides that:

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations. [*Official Records*, *supra* note 1 at p. 147; Schindler and Toman, *supra* note 4 at pp. 581-82.]

22. The following measures are listed:

> (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
> (b) avoid locating military objectives within or near densely populated areas;
> (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations. [*Official Records*, *supra* note 1 at p. 151: Schindler and Toman, *supra* note 4 at p. 585.]

23. Article 51 (8) reads: "Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57." *Official Records*, *supra* note 1 at p. 147; Schindler and Toman, *supra* note 4 at p. 582.

24. Article 57 (2) (a) provides that those who plan or decide upon an attack shall:

> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
> (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [*Official Records*, *supra* note 1 at p. 150; Schindler and Toman, *supra* note 4 at pp. 584-85.]

25. As the late Professor Waldemar Solf wrote in Michael Bothe et. al., *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff, 1982), p. 303:

> [C]ivilians providing only indirect support to the armed forces, such as workers in the defense plants or those engaged in distribution or storage of military supplies in rear areas, do not pose an immediate threat to the adversary and therefore would not be subject to deliberate individual attack. It is obvious, however, that they assume the risk of incidental injury as a result of attacks against their places of work or transport.

26. Subparagraphs (1) and (2) of Article 4(A) appear *infra* in Section IV on "other 'noncombatant persons;'" *see infra* in subsection entitled, "Prisoners of War." Subparagraphs (3) and (6) read as follows:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva III, 6 UST 3320-22; Schindler and Toman, *supra* note 4 at p. 362-63. Article 43 of Protocol I reads as follows:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to the conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict. [*Official Records*, *supra* note 1 at p. 143; Schindler and Toman, *supra* note 4 at 577.]

27 M. Bothe et. al., *supra* note 25 at p. 302.

28. International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva: Martinus Nijhoff, 1987), p. 619.

29. The quoted text is from Art. 4(A) 6 of Geneva III. *See supra* note 26. This does not materially differ from the earlier text of Art. 2 of the Hague IV Regulations. 36 Stat. 2296; Schindler and Toman, *supra* note 4, at p. 69.

30. *See supra* note 15.

31. Protected persons are "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals," but excludes, among others, persons who are protected under Geneva I, II and III. 6 UST 3520; Schindler and Toman, *supra* note 4 at pp. 434-35.

32. Article 41(2) provides that a person is hors de combat if:

(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape. [*Official Records*, *supra* note 1 at p. 142; Schindler and Toman, *supra* note 4 at p. 576.]

33. While no treaty prior to Protocol I provides for the protection of persons descending from disabled aircraft, a rule to this effect was included in Art. 20 of the Rules of Air Warfare, drafted by a commission of jurists at The Hague, December 1922 - February 1923, that convened at the instigation of the Washington Conference of 1922 on the Limitation of Armaments. See Schindler and Toman, *supra* note 4 at p. 147 for text.

34. The amendment (CDDH/413), when put to the vote in the plenary meeting of 25 May 1977, obtained 29 votes in favour, 27 votes against and 34 abstentions. *Official Records*, *supra* note 1, v. VI, p. 93 at 106.

35. The text of Art. 43(1) reads as follows:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. [*Official Records*, *supra* note 1 at p. 143; Schindler and Toman, *supra* note 4 at p. 577.]

36. Article 44(3) is among the most hotly contested provisions of Protocol I. *See infra* text accompanying note 38.

37. Given the express reference in Section 11.8 to "guerrillas" and "partisans," one would not have been surprised equally to find a reference to President Reagan's preferred "freedom fighters," better known as the contras.

38. See *supra* note 36.

39. With respect to the status and protection of journalists see International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), pp. 917-24.

40. In Article 1012.1 of *The Code of International Armed Conflict* (New York: Oceana, 1986), v. 2, p. 652, H.S. Levie mentions the signs of the 1907 Hague (IX) Convention, but leaves no doubt that they are for all practical purposes obsolete.