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**PROTOCOL I TO THE 1949 GENEVA CONVENTIONS
AND THE IMPLICATIONS FOR AUSTRALIAN POWER**

By

Squadron Leader Murray Gordon

About the Author

Squadron Leader Murray Gordon joined the Royal Australian Air Force in 1976. He was appointed to the General Duties branch as a Navigator and has subsequently served as aircrew within the Transport and Maritime Patrol elements of the RAAF. He is a graduate of the RAAF Command and Staff Course and is currently serving at the Department of Defence – Air Force Office.

INTRODUCTION

‘Kindhearted people might, of course, think that there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst.’

Clausewitz¹

The Geneva Conventions Amendment Bill 1990, gained Royal assent on 4 March 1991 thereby enabling the ratification of Protocols I and II to the Geneva Conventions of 12 August 1949.² These Protocols were formulated by the Geneva Diplomatic Conference 1974 – 1977 which was convened to study draft submissions prepared by the International Committee of the Red Cross (ICRC) as supplements to the Geneva Conventions. Examination of the Protocols has resulted in considerable debate on the efficacy and ultimate viability of the Protocols, as well as claims that the political nature of the conference engendered a bias in the Protocols which unduly inhibits the application of air power.

To appreciate the significance of the Protocols it is necessary to place them in the context of the wider issue of the development of the law of war. As a component of International Law, the laws of war are a collection of treaties and customary international behaviour. Up until the mid-19th century the laws of war were largely based on custom. However, from this time on a process of codification began, largely as a result of profound changes in the nature of warfare brought about by the emergence of nation states in Europe.³ It was after the Battle of Solferino in 1859 that Henri Dunant, a citizen of Geneva, wrote a book entitled the *Memory of Solferino* which described the appalling suffering he witnessed on the battlefield. His book resulted in the formation of a committee which was later to become the ICRC. This committee dealt with the issues raised in Dunant’s book⁴ by formulating the 1864 Geneva Conventions which signalled the parallel development of the humanitarian law of war. However, it should be noted that while this impulse for codification derived from humanitarian concerns, the laws themselves frequently reflected the national interests of the participating countries.

The advent of air power at the end of the 19th century was to cause the greatest change in warfare since the discovery of gunpowder. No longer was warfare restricted to the battlefield or ships at sea since aircraft could bring the battle to virtually any part of the belligerents’ homeland. Combined with the development of weapons of mass destruction, air power was to undermine the viability of the existing laws of war. The

¹ Clausewitz C., *On War*, Princeton University Press, Princeton, 1984, p 75.

² The Geneva Conventions of 1949 consist of four conventions which are listed below:

- I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
- II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
- III. Geneva Convention relative to the Treatment of Prisoners of War.
- IV. Geneva Convention relative to the Protection of Civilian Persons in Times of War.

³ Schindler D. and Toman J., *The Laws of Armed Conflicts*, Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, 1981, p V.

⁴ *ibid.*, p 209.

experience of two World Wars and the ascendancy of air power, culminating in the extensive aerial bombardment of World War II, re-focused attention on the codification of new laws of war. The 1949 Geneva Conventions advanced the humanitarian law of war but the means and methods of warfare were vestiges of the turn of the century. The proliferation of ‘wars of liberation’ in the 1950s and 1960s provided the impetus for the ICRC and the United Nations to address the laws of war in their entirety. The laws concerning the means and methods of warfare, and humanitarian law of war were to merge in Protocols I and II.

Since Protocol II only concerns armed conflict internal to a nation and it is unlikely to affect the application of Australian air power, this essay will focus on Protocol I dealing with international conflict. The aim of this essay is to examine the development of Protocol I to the Geneva Conventions of 1949 and the implications for Australian air power arising from compliance by the Australian Defence Force (ADF) with Protocol I. Considering the long and vigorous debate that ratification of Protocol I has received in Australia and internationally, particularly with regard to the use of air power, it will be necessary to establish a benchmark from which to measure changes wrought by compliance with the Protocol. Similarly, a brief description of both the participants and the political climate in which the Protocols were conceived, will be presented to give an insight into the various interpretations of the contentious articles contained in the Protocol.

AIR POWER AND THE LAW OF WAR

The Lieber Instructions: A Beginning

The Lieber Instructions of 1863 represent the first attempt to codify the laws of war. They were prepared by Professor Francis Lieber of Columbia University in consultation with a board of officers and promulgated by President Lincoln in April 1863. While the Instructions pre-date the significant application of air power,⁵ Lieber codified principles applicable to air power that endured until the formulation of the Protocols. Articles 14 to 16 codify and qualify the concept of military necessity and define it as those lawful measures which are indispensable to secure the ends of war. Of particular significance, Lieber makes a clear distinction between military personnel and civilians in Article 15:

Military necessity admits of all direct destruction of life or limb of *armed enemies*, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of war.⁶

The overriding qualification is that ‘military necessity’ is not grounds for cruelty or for wanton destruction.

The concepts codified by Lieber governed principles concerning the conduct of war for the next century. They clearly established limits on the belligerent’s means to wage war and identified military personnel and supporting infrastructure as the only

⁵ Hot air balloons were used for observation etc.

⁶ Schindler and Toman, *The Laws of Armed Conflicts*, p 6.

legitimate targets for deliberate attack. On the other hand, Lieber upheld the legitimacy of persons other than 'armed enemies' being killed or injured in an attack on 'armed enemies' or their supporting infrastructure, providing the casualties were incidental and unavoidable. Lieber justified this stance on two counts. First, he recognised the ultimate consequence of wars between nation states by the inclusion of Article 21:

The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war.⁷

Second, he shared Clausewitz's view that the intense but thoughtful application of violence would lead to brief wars and this was more humane than prolonged conflicts.⁸

Hague Peace Conference of 1899 and 1907

The Hague Peace Conferences of 1899 and 1907 resulted in a significant progression in the codification of the laws of war and represented the first direct attempt to address the emergence of air power. The conferences failed to achieve their primary objective of a limitation or reduction in armaments but nevertheless, adopted several conventions and other acts with mixed results. There was to have been a third conference to pursue a reduction in the arms race and further address the means and conduct of war, particularly in regard to war at sea. Events overtook time and the outbreak of WWI sealed the fate of the third conference. However, in terms of international law those conventions which codified existing customary behaviour or were to become customary behaviour were eventually binding on all states. By the beginning of WWII, the Conventions with Respect to the Laws and Customs of War on Land (hereafter, the Hague conventions on land warfare) were considered to be 'recognized by all civilised nations and were regarded as being declaratory of the laws and customs of war'.⁹

Whereas the Hague conventions on land warfare established new laws and reaffirmed existing laws that were to influence the application of air power, the declaration to prohibit the launching of projectiles and explosives from balloons¹⁰ was to have less of an immediate effect. Nevertheless, this latter declaration set the scene for the vexations and apparently never ending debate on aerial bombardment that was to follow.

Principal among the concepts articulated by Lieber but developed by the Hague conventions, was that of discrimination. The intention was to reduce incidental, and prohibit deliberate but unnecessary, destruction and injury. For the process of

⁷ *ibid.*, p 7.

⁸ Clausewitz's discourse on 'The Maximum Use of Force' from which the quotation at the beginning of this paper was taken, and Article 29 of the Lieber Instructions are remarkably similar.

⁹ Statement made by the Nuremberg International Military Tribunal in 1946 and quoted in Schindler and Toman, *The Laws of Armed Conflicts*, p 57.

¹⁰ Declaration (IV, 1) to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives Nature (1899) and Declaration (XIV) prohibiting the Discharge of Projectiles and Explosives from Balloons (1907).

discrimination to be effective, definitions are required of what objects or people can be made the legitimate object of attacks. Articles 1 to 3 of the Hague conventions of land warfare clearly defined who were combatants and therefore who could be made the subject of a legitimate attack. Fundamental to the definition is that irrespective of whether they belong to a formal military organisation, belligerents shall 'carry arms openly' and respect the laws of war. This provision affects the discrimination between civilian and military personnel which has dogged the use of air power, particularly in the limited wars since WWII.

The recognition of air power's considerable potential during the years between the conferences motivated the nations involved to broaden the incorporation of restrictions on the application of air power. The 1899 Hague Convention of Land Warfare prohibits the bombardment of undefended places, principally areas of habitation, and was an extension of existing artillery practice. However, the 1907 Hague Convention of Land Warfare modified Article 25 to include the phrase 'by whatever means' as a qualification to the word 'bombardment'. This deliberate action brought air power under the umbrella of the conventions of land warfare.

From an air power perspective, the Hague conferences are important since they represented the first of several attempts to prohibit or restrict the application of air power in war. The 1899 Hague Conference adopted Declaration (IV, 1) which declared a five year moratorium on aerial bombardment. The intent of this conference had been to totally prohibit aerial bombardment. However, the US delegation could not fathom the humanitarian value of the proposal save for the existing gross inaccuracies of aerial bombardment which may have led to unintended casualties. Under pressure from the US delegation, the convention adopted a five year moratorium in lieu of a prohibition. With the moratorium having expired, the 1907 conference had to grapple with the issue of aerial bombardment. Despite some opposition claiming that the inclusion of 'by whatever means' in Article 25 was sufficient to deal with aerial bombardment, the prohibition was adopted on an interim basis until the third conference. Since this conference has not taken place, the declaration is technically binding on the few nations that ratified the declaration but only in conflicts solely between them. In reality, the declaration has no great significance other than as an indicator of resistance to technological change adopted by the conference.¹¹

Surprisingly, Convention (IX) of the 1907 Hague conference which deals with naval bombardment was to have the greatest effect upon the conduct of aerial bombardment. The nations attending the second Hague conference clearly believed that there were grounds to differentiate in law between naval and land bombardment. Article 1 of this convention confirms the prohibition on the bombardment of undefended towns but Article 2 goes on to state that military objectives within an undefended town are not included in the prohibition. Of equal significance, Article 2 absolves the commander of the attacking forces of responsibility for any unavoidable damage caused by the bombardment. The rules contained within this article eventually became applicable to air warfare,¹² as evidenced by the bombing campaigns of both World Wars.

¹¹ Hays Parks W., 'Air War and the Law of War', *The Air Force Law Review*, Volume 32, Number 1, 1990, p 19. At Section D of Part IV of this article, Hays Parks examines the second Hague conference in light of its preferences to shy away from technological change.

¹² Schindler and Toman, *The Laws of Armed Conflicts*, p 723.

Hague Rules of Air Warfare 1922 – 1923: An Opportunity Lost

By the end of WWI, air power's potential was widely appreciated in the military and civilian communities. It became the subject of deliberations at disarmament conferences between the wars. Initially, these sought, among other things, to impose strict limitations on the military use of aircraft, be they unilateral as in the case of the Treaty of Versailles or multilateral as in the Washington Conference of 1923. These attempts failed, although the Washington conference gave rise to the 1923 Hague Commission of Jurists charged with the drafting of Rules for Air Warfare. While the 1923 Rules of Air Warfare were never legally adopted, they are considered an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war.¹³

The stillbirth of the 1923 Rules for Air Warfare reflect the environment in which they were conceived. There was considerable polarisation on the legitimacy of air power. Advocates of unencumbered independent air forces cited the appalling stalemates of WWI as an example of the getters applied to warfare by regulation.¹⁴ At the same time, there were many who had grounds to fear an unrestrained growth in air power. Great Britain was fearful of the development of air forces in Europe, particularly since WWI had already shown that air power had the potential to overcome the security conferred on Great Britain by its geography. Similarly, the commanders of the world's leading navies were only too mindful of Brigadier General Mitchell's demonstration where he sank the battleship *OSTFRIESLAND* by aerial bombing in July 1921.

The Commission of Jurists attempted to constrain air power in several areas. With a single exception, bombing was to be legitimate only when directed at specified military objectives in the immediate vicinity of land operations. Where the specified 'military objectives' fell outside the immediate vicinity of operations, they may be attacked providing any collateral damage was clearly less than – and distinguishable from – that which could be caused by indiscriminate bombing.¹⁵ These rules were a marked departure from the observed customs of the time since the list of targets was much narrower than observed by both sides during WWI. Hence the great attribute of air power, its ubiquity, was to be restricted and the legitimacy of a bombing attack was to be determined by result rather than intent. This direct contrast with international practice, and the failure by the major powers to embrace them, denied the rules any legitimacy.

World War Two: Acid Test to Benchmark

The approach to WWII saw a few vain attempts to gain acceptance for fundamental rules concerning aerial bombardment. Principal among these was Prime Minister Chamberlain's three rules for bombing which were adopted by the League of Nations. They prohibited deliberate attacks on the civilian population, required legitimate military targets to be capable of identification and called for care to be exercised in bombing to avoid civilian casualties arising from carelessness.¹⁶ Despite these

¹³ *ibid.*, p 147.

¹⁴ Spaight J. M., *Air Power and War Rights*, Longmans, Green and Co., London, 1924, p 14.

¹⁵ *ibid.*, p 217.

¹⁶ Schindler and Toman, *The Laws of Armed Conflicts*, p 161.

attempts, the general practice of nations and hence, the law of war pertaining to air power at the commencement of WWII, held that indiscriminate bombardment was prohibited but collateral civilian casualties were inevitable. Such casualties were a manifestation of the nation state and were considered part of the cost borne by a nation engaging in war. Moreover, the responsibility for civilian casualties lay largely with the defender, since only the defender has control over the civilian population.

The difficulty with these fundamental principles was the definition of discrimination. Who could be made the object of an attack? Once decided, what was the determinant of a discriminatory, as opposed to an indiscriminate attack? These issues were to become the focus of post WWII analysis of the aerial bombardment conducted during the war.

WWII proved to be the acid test of the relevant laws of war and they were found to be wanting. The humanitarian concerns with the bombing campaigns and the charges of indiscriminate bombing originated in the concept of discrimination. Clearly, the most significant problem was that although this concept had been codified for over 70 years, the term had never been defined. A dictionary definition states that discriminate means to 'detect or draw or make distinctions (between)'.¹⁷ However, this is inadequate for it does not direct when, how, or to what degree, the distinction is to be made. A second problem is that the laws of war appeared to have failed to recognise the changing nature of warfare. Nations wage war and arguably the person responsible for the design, manufacture or maintenance of a weapons system, irrespective of whether he wears a uniform or 'bears arms openly' is just as vital to the war effort as the uniformed operator of the system. Yet the existing definition of civilians and combatants failed to recognise this. At the same time, the industrialisation and consequent urbanisation of society in the 20th Century, and the growing interdependence of military power and industry, has tended to concentrate civilians in the vicinity of military objectives.

Lastly but most significantly, the action of the defender needs to be considered. Whereas the attacker may have taken due care to confine an attack to a military objective, action by the defender, including active and passive air defence measures,¹⁸ must increase the probability of collateral damage. The British decision during the war to switch from a daylight to a night bombing policy in the face of heavy aircraft attrition is a case in point. Clearly, responsibility for the extent of collateral damage may rest with both the attacker and defender, and the mere existence of damage to civilian objects or civilian casualties is not evidence of a policy of indiscriminate bombing by an attacker. This is not to infer that indiscriminate bombing did not occur in WWII; it merely challenges the assumption of indiscrimination on the basis of observed damage and without considering the actions of the defender or determining the intent of the attacker.

Various analyses have been made of WWII to distil the general practice of nations during that conflict. The observations listed below are those of Hays Parks.¹⁹ They

¹⁷ *The Australian Pocket Oxford Dictionary*, Second Edition, Oxford University Press, Melbourne, 1989, p 202.

¹⁸ Active measures may include air defence fighters, anti-aircraft artillery (AAA) and Surface to Air Missiles (SAM) whereas passive measures are typically deception and camouflage.

¹⁹ Hays Parks, 'Air War and the Law of War', p 55.

establish a clear benchmark from which to measure post WWII attempts to codify the laws of war pertaining to air power.

The intentional attack of the civilian population generally was regarded as prohibited... However, the collateral injury to the civilian population or damage to civilian objects was “the price of doing business” (ie. waging war).

To the degree that there was concern for collateral civilian casualties, it was regarded as a mutual obligation shared by the attacker, defender and the individual civilian. The primary responsibility rested... with the defender... through civil defence procedures.

Where collateral civilian casualties occurred, they could be attributed to... the intensity of enemy defences. Other factors included weather, enemy deception, dispersal of targets, and their commingling with the civilian population as a natural consequence of industrialisation...

Lawful targets were regarded as: military equipments, units, and bases; economic targets; power sources (coal, oil, electric, hydroelectric); industry (war supporting manufacturing, export and/or imports); transportation (equipment, lines of communications, and petroleum...); command and control; geographic; personnel; military; and civilians taking part in hostilities, including working in industries directly related to the war effort.

PROTOCOLS TO THE 1949 GENEVA CONVENTION

1974 – 1977 Geneva Diplomatic Conference

Apart from the adoption of the 1949 Geneva Conventions which were a welcome improvement in humanitarian terms, the polarisation of the world in the grip of the Cold War prevented any meaningful development in the laws of war until the mid-1960s. However, conflicts in Vietnam, Nigeria and the Middle East renewed interest in the laws of war. In 1965, the International Conference of the Red Cross adopted a resolution urging the ICRC to pursue the development of humanitarian law. Simultaneously, the United Nations (UN) was engaged in closely related humanitarian issues, notably human rights. On the basis of consequent UN resolutions, the ICRC convened two successive conferences of government experts in Geneva from May – June 1971 and May – June 1972. These conferences prepared two draft protocols additional to the Geneva Conventions of 1949; the first for international conflict and the second for internal conflict. Upon publication of the draft protocols by the ICRC in 1973, the Swiss Federal Council convened the Diplomatic Conference to consider the draft protocols in four sessions from 1974 to 1977.

The structure of the Diplomatic Conference was radically different from the Hague Peace Conferences of the turn of the century. Representation at the Diplomatic Conference varied between 106 and 126 states and included the full participation, with the single exception of voting, of no less than eleven national liberation organisations. These included the African National Congress (ANC), the Palestine Liberation Organisation (PLO) and the South West Africa People’s Organisation (SWAPO).

Developing nations comprised 60 per cent of the nations at the conference. Understandably, they brought with them a distinct bias. Many of the developing nations had only recently gained their independence from colonial powers after bloody conflicts where the independence movement was pitted against superior firepower, particularly in the form of air power. The developing nations and the liberation organisations at the conference sought to inhibit the military power of the developed nations as well as gain international recognition for the various liberation struggles.²⁰

With over 120 nations represented at the conferences, there was the very real problem of obtaining agreement on the draft protocols. The process adopted was a consensus approach. Only when a national had a substantial objection to an article was the consensus broken and the issue negotiated. Recognising the difficulty of obtaining total agreement of up to 126 nations to an article, participating nations were forced to compromise. Where difficulties arose, the negotiation process was usually semantic based and the language was adjusted to satisfy the nations in dispute rather than attempt to resolve the substance of the dispute. The outcome of this process is clearly evident in undefined, vaguely defined and ambiguous terms.

Protocol I: Combatant Versus Civilian

Protocol I breaks new ground in several areas in relation to the application of air power but it is the distinction between combatants and civilians and the subsequent articles on the protection of civilians which are most significant. In a concession to the third world majority, the definition of combatants was broadened from existing customary practice to further accommodate guerrilla warfare by the following inclusion in Article 44:

Recognizing, however, that there are situations in armed conflicts where, owing to the nature of hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- during each military engagement, and
- 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.

Clearly, the entitlement of combatants to prisoner of war status is very valuable and Protocol I seeks to apply this status in the broadest manner possible. However, civilian status is defined equally broadly. As a result, there is a confusing degree of over-lap. The Protocol requires prisoner of war status to be given to individuals of organised armed forces who should comply with the rules of international law²¹ and who are only required to 'carry arms openly' during an engagement or while

²⁰ Two Angolan liberation movements thought it vital to participate in the first two conferences but failed to attend the last two conferences after Angola gained independence from Portugal in November 1975. (Hays Park W., 'Air War and the Law of War', p 79.)

²¹ Failure of an organisation to comply with international law does not deny the individual prisoner of war status.

deploying for an attack. This provision should be considered in the light of there being no requirement to be uniformed or be distinguishable from the civilian population in any other manner and 'deployment preceding the launching of an attack' is undefined.

Civilian is defined in Article 50 as follows:

A civilian is any person who does not belong to one of the categories referred to in Article 4 A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. *In case of doubt whether a person is a civilian, that person shall be considered a civilian.*²²

Examination of this article reveals two contentious issues. First, the failure to restrict the definition of civilian to the Protocol is unfortunate since it unduly and significantly complicates the issue, particularly since Articles 1(4), 43 and 44 of Protocol I effectively amend Article 4(A) and the Third Convention (Geneva Convention 1949). Second, the qualification reproduced in italics amplifies the effect of the reduced requirement for combatants to distinguish themselves from the civilian population by directing that in cases where doubt exists, the individual is to be considered a civilian. Notably, the Protocol fails to indicate, for the purposes of Article 50, what constitutes grounds for doubt. A similar effect is evident from a qualification to the definition of the civilian population. While the definition provided at Article 50(2) and (3) is a simple extension of the definition of civilians, it is qualified in a manner which greatly increases the proportion of the population which is to be afforded protection:

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.²³

The qualification provided by Article 50(3) is far reaching, for it can be interpreted as meaning that all populations except those which consist exclusively of combatants, are civilian populations.

The definitions of civilians, civilian populations and combatants have their impact at Article 51 which details the protection to be conferred on the civilian population. This Article expands the existing protection afforded to civilians by broadly defining 'indiscriminate attacks', shifting the responsibility for the protection of the civilian population almost entirely to the attacker and by providing civilian status to civilians who take part, occasionally, in hostilities. The definition of indiscriminate attacks includes at Article 51 (4a) the following:

... those which employ a method or means of combat which cannot be directed at a specific military object ...²⁴

²² Schindler and Toman, *The Laws of Armed Conflicts*, p 580. Author's italics.

²³ *ibid.*, p 581.

²⁴ *ibid.*

This issue is further expanded at Article 51(5) which provides examples of indiscriminate attacks:

an attack which may be expected to cause incidental loss of life, injury to civilians, damage to civilian objects... which would be excessive in relation to the concrete and direct military advantage anticipated.²⁵

Of particular concern is the protection afforded to the civilian population being extended to civilian objects, despite there being a separate article addressing civilian objects.

The shift in responsibility for the civilian population is evident in article 51(7),(8) and reinforced later in the Protocol in Article 58. Essentially, Article 51 prohibits the use of civilians as shields for military objects or as a means to impede military operations. However, the violation of this provision does not alter the attacker's responsibilities in respect to discrimination and application of the extensive precautionary measures demanded by Article 57. The disparity in responsibility for the protection of the civilian population is further evident at Article 58 which provides the definitive contrast to Article 57 by requiring the defender to only provide protection to the civilian population to 'the maximum extent feasible'.²⁶

The difficulty that commanders face in determining who may be considered a legitimate target is compounded by Article 51(3):

Civilians shall enjoy the protection of this Section, *unless and for such time they take a direct part in hostilities.*²⁷

For a civilian to 'take a direct part in hostilities' can legitimately be interpreted as engaging in acts of violence and clearly, in such circumstances, the person is either a combatant or a terrorist. To direct that an individual may only be made the subject of an attack while he or she is engaging in an act of violence places a grave responsibility on the individual who determines the beginning and end of the act.

Protocol I: Military Objects Versus Civilian Objects

Protocol I attaches great importance to civilian objects by declaring that a deliberate, indiscriminate attack which causes excessive damage to civilian objects to be a grave breach of the Protocol. As with civilians, civilian objects are defined in the broadest possible manner as 'all objects which are not military objectives' (Article 52(1)). The Protocol proceeds to define military objectives in Article 52(2):

... military objects are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.²⁸

²⁵ *ibid.*, p 581.

²⁶ *ibid.*, p 585.

²⁷ *ibid.*, p 581. Author's italics.

²⁸ *ibid.*, p 582.

Notwithstanding this strict definition, it is qualified such that where doubt exists the object must be presumed to be civilian. Again, the article does not indicate what circumstances constitute grounds for doubt.

Article 56 further restricts the application of air power by prohibiting attacks on works or installations containing dangerous forces where an attack may cause the release of dangerous forces and consequent severe loss amongst the civilian population. Installations specifically identified are dams, dykes and nuclear electrical generating stations. This prohibition exists despite these works or installations being military objects. The protection afforded by this article extends to military installations engaged solely in the defence of these works or installations together with other military objects located in the vicinity. However, these works and installations may lose their protection only when they are used 'in regular, significant and direct support of military operations and if such an attack is the only feasible way to terminate such support'.²⁹ Again emphasis is placed on the responsibility of the attacker for the protection of the civilian population for Article 56(5) only requires parties to the conflict to 'endeavour to avoid locating any military objectives in the vicinity of works or installations'³⁰ containing dangerous forces.

Protocol I embodies a marked change from existing customary behaviour in respect of civilian objects. By declaring indiscriminate attacks on civilian objects a grave breach, the Protocol makes no distinction between the value of life and property. This unprecedented equality between property and life is not representative of normal peacetime practice and has serious implications for air power. The ubiquity and flexibility of air power can resulting its application in areas remote from the battlefield. Commanders at all levels are now faced with double jeopardy since they must discriminate equally between civilians and civilian objects, and military objectives. The problem of the 'doubt' clause in Article 52(3) was evident in the Gulf conflict. The bombing of a 'civil defence' air raid shelter³¹ and a 'milk factory'³² by allied forces were criticised as acts of indiscriminate bombing. It may have been difficult for the US to prove otherwise had it been bound by the provisions of the Protocol.

The definition of indiscriminate bombing in Article 51(4a), clearly requires an attacker to employ a method or means of attack which allows the attack to be directed at a specific military object. This may have a profound effect on the type of weapons which can be used to engage targets. Article 51(4a) could be used to argue that Precision Guided Munitions (PGM) must be employed against military objectives where there is a possibility of collateral damage occurring to either civilians or civilian objects. Consequently, an attacker may be faced with the dilemma that it is

²⁹ *ibid.*, p 583.

³⁰ *ibid.*, p 584.

³¹ During the pre-dawn of 13 Feb 91 a civil defence air raid shelter which the US determined from ELINT and satellite imagery was being used as an Iraqi command and control centre, was attacked with two laser guided bombs delivered by an F-117A. Several hundred civilians were killed in the attack and in the ensuing controversy, the US revealed that the target had been screened by a satellite pass during daylight and therefore missed detecting the influx of civilians who sheltered at the facility during the night.

³² The allies bombed an alleged chemical weapons plant which the Iraqis claimed to be a baby milk factory. Subsequent inspection of the factory by western news media failed to detect evidence to refute the Iraqi claims.

prohibitively expensive to pursue some or all legitimate military objectives or face strong allegations of indiscriminate bombing if conventional weapons are used. Again, the recent Gulf conflict serves as an example, for while considerable and effective use was made of PGMs, they represented only two per cent of the munitions used during the conflict.³³ It should be noted, however, that PGMs are not a panacea since a strong allegation of indiscriminate bombing was levelled at the RAF during the same conflict when a PGM failed to operate correctly and a populated area was struck instead of the intended target.³⁴

While the protection afforded installations containing dangerous forces by Article 56 is laudable in its intent, it is very likely to create humanitarian difficulties. Firstly, the compliance with this provision is doubtful since electrical power generating facilities in particular, have long been held to be important military objectives. While it may be argued that the generating equipment may be attacked with PGMs, the language of Article 56 makes no allowance for failure as in the case of the RAF attack on the bridge, even though damage to the facilities may be as a result of the defender's actions. Secondly, it encourages the illegitimate use of these installations as shields for military objectives and of even greater significance, a long range, high capability air defence system with control of over 20,000 sq kms may be legitimately sited at an installation and afforded protection from attack. Yet this system is able to engage enemy aircraft within its area of control on the grounds that the aircraft may have been manoeuvring to launch a stand-off weapon against the installation containing dangerous forces. The implications of this are as wide ranging as they are obvious. Thirdly, while the Protocol allows for these installations to lose their protection, it is not likely to eventuate in the case of electrical generating installations since the extensive networking which occurs in electrical grids would preclude the identification of those power stations which provide 'power in regular, significant and direct support of military operations'.³⁵

The exploitation of Article 56 by a belligerent could result in the concentration of military objectives within the vicinity of these installations. An attacker may have no other choice than to similarly breach the Protocol and engage in attacks in the vicinity of these installations containing 'dangerous forces'.

IMPLICATIONS FOR AUSTRALIAN AIR POWER

The implications for the application of Australian air power in times of conflict range across all three campaigns envisaged as being relevant to the RAAF.³⁶ Of prime

³³ LTGEN Graham Boyd speaking at the air power conference, *Conventional Air Power Into the 21st Century: Smaller But Larger*, Canberra, 25-27 March 1991.

³⁴ During an attack on a bridge at Fallujah, the Paveway 2 guidance section of a laser guided bomb failed to operate, causing the bomb to remain in a ballistic trajectory and miss its target by a considerable distance. Several civilians were killed by the errant bomb.

³⁵ Schindler and Toman, *The Laws of Armed Conflicts*, p 583.

³⁶ RAAF doctrine contends that air power is achieved through three broad approaches or campaigns, conducted at the strategic level of war. They are:

- a. Control of the Air,
- b. Air Bombardment, and
- c. Air Support for Combat Forces.

consideration is the vexatious issue of discrimination. While Protocol I addresses the issue at length, it fails to clarify the issue in either the context of civilians or their property. In fact, it has complicated and confused the issue. Under the terms of the Protocol, the inevitable co-location of civilians or civilian objects with targets engaged during the conduct of Offensive Counter Air (OCA),³⁷ Close Air Support (CAIRS)³⁸ and Suppression of Enemy Air Defences (SEAD)³⁹ will require the provision of extensive combat support. For the aircraft captain to accurately identify and attack the target in a hostile environment in both terms of weather and air defence measures, the supply of sufficient intelligence, airborne target identification suites and electronic counter measures (ECM) will be crucial. The alternative to this is an increased mission abort rate or an increased probability that the commander directing the attacks and the aircraft captain will be held responsible for the inevitable breaches of the Protocol. As evidenced by the air raid shelter incident alluded to earlier, even the sophisticated satellite based intelligence available to the US was found to be wanting when put to the test of war.

Selection of weapons will necessarily be based more on their ability to minimise collateral damage than cost or even effectiveness since local commanders and aircraft captains can be held personally responsible for excessive collateral damage. Similarly, the CAIRS role will present particular problems in that traditionally the target has been determined and marked by a third person engaged in the heat of battle, yet the aircraft captain will be accountable for civilian casualties and damage to civilian objects.

The greatest effect of Australian compliance with Protocol I will be to compound the most critical deficiency in Australia's strategic posture; namely, the development and maintenance of a credible offensive capability.⁴⁰ Independent Strike, principally Strategic Land Strike, provides the Australian Government with both a deterrent and a means of gaining the initiative should an opponent choose to escalate an existing low level conflict.⁴¹ As such, this is the rationale for the F111 fleet.⁴² Yet Protocol I significantly restricts the scope of the Strategic Land Strike role and places constraints on the means by which this element of the Air Bombardment campaign is conducted. A military objective is now more restricted than previously defined by international customary behaviour and the onus for the protection of civilians and their property has been shifted almost entirely to the attacker. Also the Protocol requires compliance with an undefined principle of proportionality. In this regard, Article 57 requires the suspension of an attack if 'the attack may be expected to cause incidental loss of

The Air Power Manual – AAP 1000, Air Power Studies Centre, RAAF Base Fairbairn, ACT, 1990, p 32.

³⁷ OCA normally involves the attack of enemy aircraft located on the ground at their operating or staging bases which commonly employ civilian support personnel.

³⁸ The Vietnam War witnessed the use of aircraft in support of ground forces to engage guerrillas in and around villages.

³⁹ The Vietnam War and more recently, the Gulf war witnessed the placement of anti-aircraft artillery (AAA) in heavily populated areas.

⁴⁰ Desmond Ball argues that Australia's strategic posture is patently defensive and is critical of the failure to develop adequate concepts for the offensive employment of the ADF despite possessing offensive elements, principally the F-111.

⁴¹ *The Air Power Manual – AAP 1000*, p 28.

⁴² *The Defence of Australia 1987*, Commonwealth of Australia, (Department of Defence), Canberra, 1987, p 25, p 41.

civilian life... damage to civilian objects...which would be excessive in relation to the concrete and direct military advantage anticipated'.⁴³ No attempt has been made to quantify any of the terms in Article 57 and there is some doubt as to whether the military advantage is restricted solely to the military objective under attack. For example, in the case of three power stations supplying a common electric grid, it may be necessary to destroy all stations to achieve a definite military advantage but the attack on a particular power station may cause substantial collateral damage. Is the collateral damage to be assessed against the attack on the individual station or against the overall plan? Protocol I fails to provide an answer.

Compliance with Protocol I will diminish one of the most significant characteristics of air power – its flexibility⁴⁴ - by restricting the targets that may be attacked either by statutory means or by illegitimate shielding of targets with civilians or civilian objects.⁴⁵ This reduction in flexibility may prevent the pursuit of an Australian air power imperative; the application of force against an adversary's centre of gravity while defending one's own centre.⁴⁶ The protection of an adversary's centre of gravity, by whatever means, would have serious and profound implications for the conduct and duration of the conflict.

As a democracy with a stated objective of good international citizenship⁴⁷ and highly sensitive to world opinion, Australian compliance with the Protocol would have to be beyond reproach. Yet the Protocol confers considerable advantages on a defender who fails to comply with the Protocols. Furthermore, the Protocol removes the traditional means of assuring compliance with the laws of war by denying the right of reprisal. This loss of the right of reprisal together with the vague language of the Protocol and the shift in responsibility for the protection of civilians to the attacker may have an additional unfortunate effect. Charges of war crimes against downed aircrew and subsequent show trials will probably increase.

CONCLUSION

The ICRC set out to afford greater protection to the victims of armed conflict by reaffirming and developing the Hague Conventions of 1899 and 1907. Many of the new states that have emerged since 1907 were involved in the process. Protocol I focused on the protection of civilians and the vexatious issue of discrimination. In doing so, the Diplomatic Conference prohibited attacks on civilians and civilian objects and defined them in the broadest possible terms, including clauses which direct the attacker to refrain from attacks if there exists an element of doubt as to whether the target complied with either definition. Because the conference consisted largely of new states and included representation from many 'liberation

⁴³ Schindler and Toman, *The Laws of Armed Conflicts*, p 585.

⁴⁴ *The Air Power Manual – AAP 1000*, p 28.

⁴⁵ The use of 'human shields' by Saddam Hussein is in clear contravention of Protocol I but they may have been much more effective had the coalition forces been bound by the Protocols since President Bush would have been prohibited from carrying out his threat to attack the targets, irrespective of the human shields.

⁴⁶ *The Air Power Manual – AAP 1000*, p 101.

⁴⁷ Australia's Regional Security – Ministerial statement by Senator the Hon. Gareth Evans QC, Commonwealth of Australia, (Department of Foreign Affairs and Trade), Canberra, 1989, p 1.

organisations', it had to accommodate an additional agenda. This agenda sought to legitimise the activities of organisations engaged in wars of liberation or struggles against racist regimes. The resulting definitions of civilians, civilian objects and combatants may afford the opportunity to discriminate at a theoretical level but it has failed to clarify the issue of discrimination with respect to the application of air power in times of conflict.

Protocol I broadens the definition of combatant to afford the privilege of POW status to as many participants as possible; prohibits attacks on civilians unless they are engaged in direct hostilities, admits collateral damage proportionate to concrete and direct military advantage and elevates the value of civilian objects to that of civilian lives. Moreover, the Protocol transfers the onus for the protection of civilians and their property almost entirely to the attacker; narrows the definition of military objectives; restricts attacks on certain military objectives; and places constraints on the means by which attacks can be made. Full compliance with the Protocol by all belligerents in a conflict will spare the civilians the intensity of violence they have unduly suffered at the hands of air power in previous conflicts. However, the Protocol's focus on the protection of civilians has placed responsibility almost entirely with the attacker, while removing the means by which compliance with the Protocol can be assured. The Protocol encourages non-compliance by the defender, particularly the practice of 'human shields' and locating military objects amongst civilians or civilian objects to afford them protection from attack. In order to comply with the Protocol, the Australian Defence Force (ADF) would have to refrain from attacking the military objects so protected. The consequences are increased risk to members of the ADF, a probably lengthening of the conflict and possible military defeat.

The ICRC and the Diplomatic Conference were so focused on their objective of protecting civilians and their property during armed conflict that they have failed to take account of the practicalities of war. Nor have they realistically considered the paramountcy of national interest. While the Australian Government may be prepared to surrender the potent air power characteristic of flexibility for the perceived humanitarian benefits of Protocol I, it is doubtful that nations possessing significant air power resources will be so generous. If it eventuates that the Protocols become observed more in the breach than in the observance, then new meaning will be given to Clausewitz's view that '...war is such a dangerous business that the mistakes which come from kindness are the very worst'.⁴⁸

⁴⁸ Clausewitz, 'The Maximum Use of Force', p 75.