

## XVII

### The 1977 Protocol I and The United States

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The failure of previous United States Administrations to send the 1977 Protocol I<sup>1</sup> to the Senate for its advice and consent to ratification by the President was both a political and a military decision. Accordingly, it is possible, but unlikely, that different action will be taken by the Clinton Administration. Why, then, does the United States object to the provisions of this law-of-war treaty, the purpose of the drafting of which was to fill in the *lacunae* which had admittedly been found to exist in the *Regulations Attached to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land*<sup>2</sup> (1907 Hague Regulations on Land Warfare) and in the four 1949 Geneva Conventions?<sup>3</sup> True, the United States has stated that it considers itself bound by the rules contained in the 1977 Protocol I which represent customary international law—but only to the extent that they reflect customary international law as determined by United States legal advisers.<sup>4</sup>

A review of the provisions of the 1977 Protocol I labeled as objectionable by officials of the United States in informal presentations will quickly demonstrate that there are actually no overpowering reasons to object to the vast majority of those provisions.<sup>5</sup> The finding of a need for two dozen or more reservations and two dozen or more understandings (as reported to have been demanded by the Joint Chiefs of Staff) can only have resulted from “nitpicking.”<sup>6</sup> While there are unquestionably some really objectionable provisions, these could very easily be taken care of at the time of ratification. Other provisions may not be worded exactly as the United States would have desired, but this is not a valid reason for a reservation or an understanding unless the objectionable wording results in an ambiguous or unintended or unwanted meaning—and such instances are rare. President Reagan’s statement in his message to the Senate that “Protocol I is fundamentally and irreconcilably flawed”<sup>7</sup> was a gross overstatement of the facts, resulting from overreaction to a very small group of provisions on one subject which, concededly, were flawed.

Because the document containing the specific objections to the 1977 Protocol I registered by the Joint Chiefs of Staff is still classified, we must have recourse to other sources in order to ascertain what at least some of those objections may be. This information we have, to an abbreviated extent, in the letter from the

Secretary of State to the President submitting the *1977 Protocol II* for transmission to the Senate, and in more detail in presentations made at various meetings by representatives of the Department of State and of the Department of Defense.<sup>8</sup> Presumably, the objections stated by these officials are the major reasons for the non-ratification of the Protocol by the United States.<sup>9</sup>

To begin at the beginning, certainly the Preamble of the *1977 Protocol I* is clear and concise and leaves nothing to interpretation. After three paragraphs which, in sum, point out that the fact that the international community has drafted rules applicable during the course of international armed conflict in no manner legitimizes aggression or the threat or use of force, there appears a substantive provision which states that such rules

must be applied in all circumstances to all persons who are protected by those instruments, *without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.*<sup>10</sup>

The importance of this statement cannot be overemphasized as it definitely lays to rest the “just war” doctrine espoused by some nations, including, particularly, a number of Third World nations as well as the nations which were Communist at that time period, under which the humanitarian law of war would be binding upon the “aggressor,” always the enemy, while it would not be binding upon the victim of aggression, always oneself. The United States has expressed no objection to the Preamble which, in fact, states a proposition to which the United States has long adhered: that the provisions of the humanitarian law of war are equally applicable to both sides in any international conflict, no matter what the cause alleged.<sup>11</sup>

The United States objects strongly and, in the opinion of this author, properly so, to Article 1(4) of *1977 Protocol I*.<sup>12</sup> In addition to being objectionable in itself, that article lays the foundation for other objectionable provisions of the Protocol. The troublesome material in Article 1(4) reads as follows:

The situations referred to in the preceding paragraph include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. . . .<sup>13</sup>

Obviously, this provision refers to civil conflicts, i.e., internal conflicts, which have always heretofore been considered to be governed by national law, not international law, except insofar as Common Article 3 of the *1949 Geneva Conventions* may be said to govern civil conflicts—something that rebels have heretofore steadfastly denied, or disregarded. Moreover, as we shall see, with its implementation by Article 44(3), the provision places members of so-called national liberation movements in a status superior to that of all other

combatants—exactly the end sought by its progenitors, but scarcely one acceptable to nations which believe that all *legal* combatants should be protected equally.

Article 9 of the *1874 Project of an International Declaration Concerning the Laws and Customs of War* established four requirements for an individual to be considered a legal combatant: He must (1) be commanded by a person responsible for his subordinates; (2) wear a fixed distinctive emblem recognizable at a distance; (3) carry his arms openly; and (4) conduct military operations in accordance with the laws and customs of war.<sup>14</sup> These requirements were restated in Article 1 of the *Regulations Attached to the 1899 Hague Convention No. II with Respect to the Laws and Customs of War on Land (1899 Hague Regulations on Land Warfare)*;<sup>15</sup> they were stated again in Article 1 of the *1907 Hague Regulations on Land Warfare*;<sup>16</sup> they were incorporated by reference in Article 1(1) of the *1929 Geneva Convention Relative to the Treatment of Prisoners of War (1929 Geneva Prisoner of War Convention)*;<sup>17</sup> and they were again restated in the first three *1949 Geneva Conventions*.<sup>18</sup> Despite this continuous acceptance of these four requirements by the international community for over a century, the 1977 Diplomatic Conference saw fit to discard them for the sole purpose of giving additional protection to members of national liberation movements.

Article 43(1) of the *1977 Protocol I* follows the foregoing historical precedent to the extent that it requires the armed forces of a party to a conflict to have a responsible commander and to enforce the law of war, even if that party does not recognize the government or authority of the adverse party. However, Article 44(3), which implements the objectionable Article 1(4) of the Protocol, has the effect of relieving members of national liberation movements from those requirements, as well as from others. It is here that the main United States objection to the Protocol lies—and, admittedly, not without justification.<sup>19</sup>

In a lengthy analysis of these provisions written some years ago, this author concluded:

To summarize, paragraph 3 of Article 44 requires combatants (as defined in Article 43) to distinguish themselves from the civilian population “while they are engaged in an attack or in a military operation preparatory to an attack.” They will fulfill that requirement if they carry their arms openly (a) during an actual military engagement and (b) when visible to the enemy while in the course of a military deployment preliminary to an attack. This appears to mean that these combatants may merge with the crowd, weapons concealed, until they are about to attack, at which time they move out of the crowd, disclose their weapons, and begin their attack.

There seems little doubt but that the provisions of paragraph 3 of Article 44 will increase the dangers to the civilian population.<sup>20</sup>

Paragraph 4 of Article 44 provides that even if an individual fails to meet the limited requirements just mentioned and is, therefore, not entitled to prisoner of war status, he is entitled to all of the protection available to a prisoner of war, including those relating to any trial and punishment. With this there can be no quarrel. It merely ensures what any civilized nation would certainly provide: fair treatment of the captured person prior to trial for his alleged criminal acts and a trial with all the safeguards required for such a trial to be fair.<sup>21</sup>

The United States also seems to object to the provisions of Article 44(2) of the 1977 *Protocol I* which provide, in effect, that a combatant who has violated the law of war is nevertheless entitled to prisoner of war status if captured.<sup>22</sup> But there is nothing novel about that provision. Article 85 of the 1949 Third Geneva Convention, to which the United States is a party, as is practically every other member of the international community, specifically provides that prisoners of war prosecuted for pre-capture offenses (violations of the law of war) “shall retain, even if convicted, the benefits of the present Convention.”<sup>23</sup> There is no basis for the statement that this paragraph of the Protocol provides that “once a group qualifies as a national liberation movement protected by article 1(4), no conduct by members of the group can lead to the loss of its status as a protected organization.” No place in the Protocol will there be found any provision for “qualifying” a group. Like Article 85 of the 1949 Third Geneva Convention, Article 44(2) of the 1977 *Protocol I* merely provides that pre-capture violations of the law of war will not affect an individual’s right to the status of being a prisoner of war—it does not prevent his captor from trying him and, if he is convicted, from punishing him for any pre-capture violation of the law of war.<sup>24</sup> Moreover, rather surprisingly, that paragraph excepts from its coverage those individuals who have not complied with the provisions of Article 44(3) and (4). This means that the member of the national liberation movement who fails to carry his arms openly during a military engagement or during a military deployment prior to an attack is not entitled to prisoner of war status. (However, under Article 44(4) he is, nevertheless, entitled to all the protections to which a prisoner of war is entitled, so this appears to be a distinction without a difference.)

In his presentation, the Legal Adviser of the Department of State emphasized his position that the provisions just cited have the effect of “granting terrorist groups protection as combatants.”<sup>25</sup> There is no basis for such reasoning. Terrorists do not engage in “war” or in “armed conflict” as those terms are understood in either national or international law. They engage in isolated criminal acts. Terrorists do not have “an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict” as required by Article 43(1). Any law is anathema to them. Terrorists do not participate in the “military engagement” or in the “military

deployment” specified in Article 44(3). They engage in hit-and-run or blind operations primarily against the civilian population.<sup>26</sup> While members of national liberation movements may, and frequently do, engage in acts of terrorism, when they do so and are thereafter captured they may legally be compelled to answer for such criminal acts, just as the uniformed soldier who commits the identical acts may be compelled to answer for his criminal acts. Terrorists may claim that they are entitled to prisoner of war status when captured, but their claims are rarely, if ever, recognized.<sup>27</sup> Statements to be found in the opinion of the United States District Court in the *Lopez* case,<sup>28</sup> the only relevant case of those cited by the Legal Adviser, are typical of the findings to be expected from courts on this issue. The court there said:

There is no evidence in the record that defendant was a member of an organized military force which had a tribunal established for punishing violations of the rules and regulations of that force. To the extent that defendant is a member of any organization, this court can take judicial notice of the fact that that organization exists at least in part for the purpose of violating criminal statutes of the United States and that therefore such violations would conform to rather than violate the rules and principles of that organization.... There is no logic to the argument that an organization can be created for the purpose of violating the laws of this nation and overthrowing its government and at the same time declare its members to be exempt from prosecution for violation of the criminal laws of that same country, the United States of America.<sup>29</sup>

With the changes that have occurred in the political world since 1977, it is doubtful that many states which are party to the Protocol would find it necessary to take issue with a reservation to those few paragraphs of the Protocol mentioned above if such reservation were made by the United States at the time of ratification. Moreover, if a few parties did object and announced that they would not consider themselves bound by the Protocol vis-a-vis the United States, such action would be of little moment—and the United States would be in a better position with respect to the vast majority of parties and no worse off with respect to the few objectors. Of course, politically such an action would be a clear rebuff to the national liberation movements which have uncontrolled terrorist wings. But these are now few in number and the United States could live with that.<sup>30</sup>

Part II of the *1977 Protocol I* is entitled “Wounded, Sick and Shipwrecked” and does not appear to present any problems for the United States.<sup>31</sup> However, in Part III, “Methods and Means of Warfare; Combatant and Prisoner of War Status,” objections are encountered, in addition to those already mentioned in connection with the discussion of Articles 1(4) and 44. Some of these objections

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present real problems, while others do not. The first objection relates to the provisions of Article 35(3), which state:

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.<sup>32</sup>

As to this provision, an official of the United States has said that it is “too broad and ambiguous and is not a part of customary law.”<sup>33</sup> If it is truly ambiguous, certainly action should be taken to remove any ambiguity. But is it ambiguous? The United States and the larger part of the international community are parties to the *Environmental Modification Convention* which includes the following provision:

1. Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.<sup>34</sup>

In the first place, it should be noted that this latter provision, accepted by the United States, is drafted in the disjunctive, and is, therefore, even broader than that contained in Article 35(3) of the 1977 Protocol, which is drafted in the conjunctive. In the second place, when this provision was drafted, the drafting conference included “understandings” with respect to each of the three descriptive adjectives used. They said:

It is the understanding of the Committee that, for the purposes of this Convention, the terms “widespread,” “long-lasting” and “severe” shall be interpreted as follows:

- (a) “widespread”: encompassing an area on the scale of several hundred square kilometres;
- (b) “long-lasting”: lasting for a period of months, or approximately a season;
- (c) “severe”: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.<sup>35</sup>

While, of course, the understandings refer to those words as used in the *Environmental Modification Convention*, it would be extremely difficult for any state which is a party to the *1977 Protocol I* to assert that the words so defined had a different meaning in the Protocol; and it is rare, indeed, for the international community to have the benefit of agreed definitions of words of art included in an international convention. The conclusion is inescapable that

the United States has no valid reason for objecting to the substance or to the wording of Article 35(3) of the *1977 Protocol I*.<sup>36</sup>

The next provision to which objection is made is Article 39(2) which states:

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.<sup>37</sup>

Concerning this provision the statement is made that “we [the United States] do not support the prohibition in article 39 of the use of enemy emblems and uniforms during military operations.”<sup>38</sup> To say that the objection to this provision by the United States is astonishing is an understatement. The following has been the official policy of the United States since as long ago as 1863:

63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

....

65. The use of the enemy’s national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.<sup>39</sup>

Article 23 (f) of both the *1899* and the *1907 Hague Regulations on Land Warfare* prohibits “the improper use” of the enemy uniform or insignia,<sup>40</sup> and a current field manual of the United States Army interprets that term as meaning that “[i]t is certainly forbidden to employ them in combat, but their use at other times is not forbidden.”<sup>41</sup> Wearing enemy uniforms “while engaging in attacks” would unquestionably fall within that manual’s prohibition; and war crimes trials for the use of enemy uniforms in non-battle military operations were conducted in wars prior to World War I<sup>42</sup> and in World War II.<sup>43</sup> Finally, as noted above, one of the four requirements to be a legal combatant has uniformly been “the wearing of a fixed distinctive emblem, recognizable at a distance”;<sup>44</sup> and the removal of that requirement by Article 44(3) of the *1977 Protocol I* is one of the major objections voiced by the United States to that instrument.<sup>45</sup>

The next provision of the *1977 Protocol I* to which objection is expressed is Article 47, which, in effect, denies humanitarian protection to most mercenaries. Why the United States should take up the cudgel on behalf of mercenaries is somewhat of a mystery, unless it fears that attempts might be made to place foreign military advisers and technicians in the category of mercenaries, despite the fact that they do not fall within the definition of mercenaries set forth in that article.<sup>46</sup> Moreover, there is a general belief, apparently entertained even by its sponsor, Nigeria, that the article will have little, if any, effect.<sup>47</sup> The objection made by the United States is apparently not directed at the substance of the

provision, or from a desire to protect mercenaries, but at the fact that it is another instance of politicizing the *1977 Protocol I* in favor of national liberation movements.<sup>48</sup> This provision of *1977 Protocol I* is, of course, the other side of the coin with respect to national liberation movements: full protection to members of national liberation movements no matter to what extent they violate the law of war; no protection to those who oppose national liberation movements even if they comply with the law of war.

Objection is made to Article 51(6) which prohibits attacks against the civilian population by way of reprisal. While there is much to be said for the use of reprisals as a method of compelling the adverse party who is violating the humanitarian law of war to return to compliance with that law, there is also much to be said in favor of prohibiting reprisals against certain categories of individuals, including the civilian population. The United States is a party to the *1929 Geneva Prisoner of War Convention*,<sup>49</sup> Article 2(3) of which prohibits reprisals against prisoners of war; and it is a party to the *1949 Geneva Conventions*, the first three of which include provisions prohibiting reprisals against the wounded and sick on land,<sup>50</sup> against the wounded, sick and shipwrecked at sea,<sup>51</sup> and against prisoners of war.<sup>52</sup> Article 33 of the 1949 Fourth Geneva Convention,<sup>53</sup> prohibits reprisals against persons protected by that convention, all of whom are members of civilian populations but whose categories are limited in number (primarily the civilian populations of occupied territories), and, in particular, does not include the civilian populations of the belligerents in their home territories. There does not appear to be any great difference between the wounded and sick and prisoners of war and the civilian population. All three categories are persons who are no longer, or were never, combatants. However, the United States' position would appear to be based on the belief that only the fear of the reprisal bombing of its own civilian population might serve as a basis for dissuading an enemy from bombing the civilian population of the United States—and there is considerable merit to that belief.<sup>54</sup> The bombing of civilian populations in Europe by both sides during World War II, claimed by both sides to be reprisals, caused innumerable deaths and created devastation which probably contributed to extending the duration of the hostilities. Here, mixed military-humanitarian reasons might well warrant a reservation to this provision. (It is worthy of note that no other objection was voiced to Article 51, paragraph 2 of which prohibits making the civilian population the subject of attack or the threat of attack, and paragraphs 4 and 5 of which prohibit indiscriminate attacks, including target area bombing.)

For military reasons the United States objects to the provisions of Article 56(1), which prohibits attacks on



[w]orks or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, . . . if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.<sup>55</sup>

The Legal Adviser of the Department of State has indicated his belief that “under this article, civilian losses are not to be balanced against the military value of the target.”<sup>56</sup> In other words, it is his position that this provision disregards the longstanding principle of proportionality and prohibits the attack if there are to be “severe” civilian losses no matter how important the target may be from a military point of view.<sup>57</sup> Accepting this as a valid possible construction of the provision, the United States could, upon ratification, merely “understand” that, as in other applicable cases, the principle of proportionality would apply in balancing the “severe” losses against the military advantage.<sup>58</sup>

The Legal Adviser of the Department of State further points out that during the drafting of this provision a United States representative had called attention to the difference between this prohibition and current international law.<sup>59</sup> The statement made by the United States representative indicated that his primary concern and the main thrust of his argument was not that the progress of international humanitarian law was removing from the category of military objectives installations which had previously been within that category, a procedure that has occurred with some degree of regularity during the past century (medical and religious personnel and units, military hospitals, hospital ships, civilian hospitals, medical aircraft, museums, places of worship, and cultural objects have all received this special protection), but that these specially protected installations might be used “as a cover to obtain military advantage.”<sup>60</sup> One cannot help but conclude that the military decision to object to this provision may well be based on the experience in North Vietnam where, when it became apparent that for humanitarian reasons the United States would not bomb the dikes, these became havens for reserve fuel supplies and anti-aircraft artillery weapons. While Article 56(2) attempts to eliminate this problem by setting forth with particularity the circumstances which will result in the cessation of the special protection, it must be admitted that there are some loopholes in that paragraph of which a lawless belligerent could avail itself. However, the adverse party could also take advantage of the language of these provisions as a legal basis for asserting that the known facts warrant the cessation of the special protection accorded to these objects. (One objection made to Article 56(2) is to the distinction between the stated manner in which a dam or dike loses its protection and the stated manner in which a nuclear power plant loses its protection.<sup>61</sup> Understandably, in view of its projected effect, the latter is more restrictive.)

The United States complains that Article 5 (Protecting Powers) and Article 90 (International Fact-Finding Commission) do not go far enough because in both cases the consent of the parties to the conflict is required and all of the Communist countries have been adamant in refusing to allow any foreign or international body to operate or investigate on their territories.<sup>62</sup> This was a valid complaint when made, but is it still valid? And although Article 5 does not go as far as one might have wished, it does go a bit further in the right direction than its predecessors in the 1949 *Geneva Conventions*.<sup>63</sup> The provisions of Article 90 for an International Fact-Finding Commission are novel and offer great potential even though the “non-law-abiding” nations will unquestionably decline to permit the Commission to function in their territories. Once again, although Article 90 does not go as far as one might have wished by making the competence of the Commission compulsory for all parties, it does represent a considerable advance in the methods of enforcing the humanitarian law of war.<sup>64</sup> Moreover, it has been so successful that already more than the required twenty parties have filed the requisite statement recognizing the competence of the Commission, and the Commission has been established.<sup>65</sup>

It is believed that from the foregoing it can be seen that the few valid objections of the United States to the *1977 Protocol I* do not justify the refusal by the executive branch to send it to the Senate for its advice and consent to ratification. Rather than dozens of reservations and understandings, only a very few are required in order for the United States to remove from the Protocol, insofar as it is concerned, those provisions which it considers as politicizing that instrument, as well as the few provisions for which there are valid military objections.<sup>66</sup> The United States can then join the more than one hundred other members of the international community who are already parties to the *1977 Protocol I*.

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#### Notes

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 [hereinafter *1977 Protocol I*]; see also 1 SWISS FEDERAL POLITICAL DEPARTMENT, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 155 (1978) [hereinafter OFFICIAL RECORDS] (official record of the diplomatic conference which drafted *1977 Protocol I*; THE LAWS OF ARMED CONFLICTS 621 (D. Schindler & J. Toman eds., 3d ed. 1988) [hereinafter Schindler & Toman]. For a discussion of the historical context surrounding *1977 Protocol I*, see generally HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* (1993) [hereinafter LEVIE, *TERRORISM*].

2. Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; see also 1 CHARLES I. BEVANS, *TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 1776-1949*, at 631 [hereinafter BEVANS]; 2 AM. J. INT'L L. (Supp.) 90 (1908); Schindler & Toman, *supra* note 1, at 63; see generally LEVIE, *TERRORISM*, *supra* note 1.

3. The four 1949 Geneva Conventions, all signed on August 12, 1949, are: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 First Geneva Convention]; Convention for the Amelioration

of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Second Geneva Convention]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 Stat. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Third Geneva Convention]; and Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Fourth Geneva Convention]. These Conventions are also reprinted in Schindler & Toman, *supra* note 1, at 373, 401, 423, and 495, respectively. See generally LEVIE, *TERRORISM*, *supra* note 1.

4. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987). In his presentation, Matheson, Deputy Legal Adviser of the Department of State, specifically affirmed that the United States "supported" the following articles: 5, 10, 11, 12-20, 21-23, 24-31, 32, 33, 34, 35(1)(2), 37, 38, 44 (a few parts), 45, 51 (except paragraph 6), 52, 54, 57-60, 62, 63, 70, 73, 74, 75, 76, 77, 78, 79, 80-85, and 86-89. Specific objections were stated with respect to Articles 1(4), 35(3), 39(2), 47, 55, and 56 by Matheson and other government officials. There is a passing mention of Article 90. No mention is made of the other articles of the Protocol.

5. See Howard Levie, *Pros and Cons of the 1977 Protocol I*, 19 AKRON L. REV. 537 (1986) [hereinafter Levie, *Pros and Cons*] (discussing some of the "good" and "bad" provisions of 1977 Protocol I).

6. A good example of "nit-picking" is the objection made to Article 16, that it "establishes such a high level of protection for medical activities that it would protect the operation of clandestine hospitals in guerrilla warfare situations." Burras M. Carnahan, *Customary International Law Relative to the Conduct of Hostilities and the Protection of Civilian Population in International Armed Conflict*, 2 AM. U. J. INT'L L. & POL'Y 505, 509 (1987) [hereinafter Carnahan, *Customary International Law*]. In other words, the doctor who treats a sick or wounded guerrilla should be considered as having committed an illegal act; and the wounded or sick guerrilla patient should not enjoy the protection of the confidentiality of the physician-patient relationship which is otherwise universally applied, even with respect to the most vicious criminal.

7. President's Message to the Senate Transmitting Protocol II, 1987 PUB. PAPERS 88. This message was unusual in that it set forth the reasons why an international convention signed by the United States (the 1977 Protocol I) was not being sent to the Senate for its advice and consent to ratification. Nevertheless, it "invite[d] an expression of the sense of the Senate that it shares this view." *Id.* To date the Senate has not accepted the invitation, nor has it acted on the 1977 Protocol II.

8. Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460 (1987) [hereinafter Sofaer, *Position*]. Judge Sofaer, Legal Advisor to the U.S. Department of State also wrote the following article: Abraham D. Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)*, 82 AM. J. INT'L L. 784 (1988) [hereinafter Sofaer, *Agora*]. For the presentation made by Michael J. Matheson, Deputy Legal Adviser of the Department of State, see Matheson, *supra* note 4. For the presentation made by Douglas J. Feith, the Deputy Assistant Secretary of Defense for Negotiations Policy, see Douglas J. Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 AKRON L. REV. 531 (1986) [hereinafter Feith]. Feith had previously published the following article: Douglas J. Feith, *Law in the Service of Terrorism—The Strange Case of the Additional Protocol*, 1 NATIONAL INTEREST 36 (Fall 1985). For some of the remarks made by Lieutenant Colonel Burras M. Carnahan, USAF, a legal officer on the Staff of the Joint Chiefs of Staff, see Carnahan, *Customary International Law*, *supra* note 6; see also Burras M. Carnahan, *Additional Protocol I: A Military View*, 19 AKRON L. REV. 543 (1986) (this article includes a disclaimer statement).

9. Articles in support of the 1977 Protocol I include, among others, one by Ambassador George Aldrich, the head of the United States Delegation at the Diplomatic Conference, see George Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764 (1981); one by Waldemar A. Solf, a member of the U.S. Delegation, see Waldemar A. Solf, *A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol*, 20 AKRON L. REV. 261 (1986); and one by Hans-Peter Gasser, Legal Adviser to the Directorate, International Committee of the Red Cross, see Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987). Regarding the latter article, Abraham Sofaer states that Gasser assumes "that the United States is somehow obligated to ratify or accede to 1977 Protocol I simply because it was adopted by the Geneva Conference." Sofaer, *Agora*, *supra* note 8, at 784. However, no facts or arguments are presented which support that conclusion.

10. 1977 Protocol I, *supra* note 1, preamble, 16 I.L.M. at 1391 (emphasis added).

11. This matter is mentioned here, despite the fact that the Preamble is not the subject of objection by the United States, because it is occasionally hinted by opponents to ratification of the 1977 Protocol I that some of its provisions condone the just war doctrine. See, e.g., Feith, *supra* note 8, at 532.

12. No objection is stated to Article 1(1), (2), and (3). Paragraphs (1) and (3) of that article merely restate provisions of the 1949 Geneva Conventions, see *supra* note 3, and paragraph (2) restates the DeMartens Clause

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which originated in the Preamble to the 1899 Hague Convention No. 11 with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; *see also* 1 BEVANS, *supra* note 2, at 247; Schindler & Toman, *supra* note 1, at 63; LEVIE, *TERRORISM*, *supra* note 1, at 17, 152, 366, 457, 492.

13. The United States has ratified the International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, at 2-3, 18 I.L.M. 1456. *See also* LEVIE, *TERRORISM*, *supra* note 1, at 247, 306. Article 12 of this Convention states:

[T]he present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4 of Additional Protocol I of 1977 . . .

*Id.* at 10. In other words, the United States has agreed that the doctrine of *aut punire, aut dedere* (punish or extradite) contained in that Convention will not apply to members of national liberation movements who take hostages, leaving that problem to the provisions of the 1949 Geneva Conventions and the 1977 Additional Protocols. *See supra* notes 1, 3. Article 147 of the 1949 Fourth Geneva Convention makes the taking of hostages a grave breach of that instrument with no exclusions. *See supra* note 3.

14. August 27, 1874, 65 BRITISH FOREIGN AND STATE PAPERS 1005 [hereinafter 1874 Declaration of Brussels]; *see also* LEVIE, *TERRORISM*, *supra* note 1, at 17, 444; Schindler & Toman, *supra* note 1, at 28; 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 194 (L. Friedman ed., 1972) [hereinafter Friedman]. Obviously, the uniformed member of the armed forces of a nation normally meets all of these requirements. On occasion, as an individual he will fail to meet the fourth requirement, and this will warrant his trial and punishment by his own force, if it is well-disciplined, or by the enemy, if he is thereafter captured.

15. *See supra* note 12.

16. *See supra* note 2.

17. July 27, 1929, 47 Stat. 2021, T.S. No. 846 [hereinafter 1929 Geneva Prisoner of War Convention]; *see also* 2 Bevens, *supra* note 2, at 932; 118 L.N.T.S. 343; 27 AM. J. INT'L. L. (Supp.) 59 (1933); Schindler & Toman, *supra* note 1, at 339; *see generally* LEVIE, *TERRORISM*, *supra* note 1.

18. *See* 1949 First Geneva Convention, *supra* note 3, art. 13(2); 1949 Second Geneva Convention, *supra* note 3, art. 13(2); 1949 Third Geneva Convention, *supra* note 3, art. 4(2).

19. Strangely, the United States delegation voted in favor of Article 44 in its totality in Committee III. 15 OFFICIAL RECORDS, *supra* note 1, at 155; 2 HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS 485, 486 (1980) [hereinafter LEVIE, PROTECTION]. The United States delegation later gave an explanation of its vote. 15 OFFICIAL RECORDS, *supra* note 1, at 169, 179; 2 LEVIE, PROTECTION, *id.*, at 505-06.

20. Howard S. Levie, *Prisoners of War Under the 1977 Protocol I*, 23 AKRON L. REV. 55, 64 (1989).

21. The United States "supports" Article 75 of the 1977 Protocol I, which sets forth the "Fundamental Guarantees" to which a person in the custody of the adverse party is entitled. Matheson, *supra* note 4, at 427-28.

22. Sofaer, *Position*, *supra* note 8, at 465-66.

23. The cited provisions of both of these instruments are international actions intended to establish an international rule contrary to the rule enunciated in the case of *In re Yamashita*, 327 U.S. 1, 20-21 (1946), which held that the provisions for the trial of prisoners of war set forth in the 1929 Geneva Prisoner of War Convention, *see supra* note 17, only applied to post-capture offenses. The Soviet Union and all of the other Communist states of the time made a reservation to Article 85 of the 1949 *Third Geneva Convention*, *see supra* note 3, under which the individual ceased to have those benefits once he had been finally convicted.

24. Of course, the individual who has prisoner of war status will have to be tried by the court that would be authorized to try members of the captor's armed forces—usually a court-martial—but that should present no great problem; and the terrorist, who has no military standing, would continue to be tried by civilian courts. *See infra* notes 25-28 and accompanying text.

25. Sofaer, *Position*, *supra* note 8, at 467. Douglas J. Feith, then the Deputy Assistant Secretary of Defense for Negotiations Policy, Department of Defense, labelled the 1977 Protocol I "a pro-terrorist treaty that calls itself humanitarian law." Feith, *supra* note 8, at 534. This is because of two paragraphs of two articles of a convention containing ninety-one substantive articles, many of which include numerous numbered paragraphs!

26. Article 51(2) of the 1977 Protocol I provides:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

1977 Protocol I, *supra* note 1, art. 51(2), 16 I.L.M. at 1413. This provision prohibits the main activity of terrorists—the time bomb left in public places.

27. The cases cited by Sofaer, *Position*, *supra* note 8, at 465 n.136, merely indicate that when captured some terrorists claim that they are entitled to prisoner of war status—a claim not sustained by the courts.

Manuel Noriega asserted and was granted prisoner of war status by the United States, but he surrendered during the course of armed conflict in Panama.

28. *United States v. Oscar Lopez*, No. 80 CR 736-4 (N.D. Ill. July 14, 1981) (LEXIS, Genfed library, Dist file).

29. *Id.*

30. Fear has been expressed that the position of the United States would be viewed as "imperialist," or "racist." Sofaer, *Position*, *supra* note 8, at 470. While it would undoubtedly be so denominated by a few nations, it is extremely doubtful that this would have a momentous effect in the present era.

31. *See, e.g., Matheson*, *supra* note 4, at 423-24; *but see supra* note 6.

32. For some reason the Diplomatic Conference elected to include in the 1977 Protocol I provisions for the protection of the natural environment in two separate articles, Article 35(3) and Article 55(1). While the two provisions are worded somewhat differently, their substance and intent are the same. *See 1977 Protocol I*, *supra* note 1, art. 35(3), 55(1), 16 I.L.M. at 1408, 1415. Matheson refers to, but does not discuss, Article 55(1) in his presentation, perhaps because he considers the criticism of Article 35(3) to be equally applicable to Article 55(1). *See Matheson*, *supra* note 4, at 424.

33. Matheson, *supra* note 4, at 424. It is interesting to note that the wording of that paragraph was based on a proposal made by the Rapporteur of Committee III, who was the head of the United States Delegation, 2 LEVIE, PROTECTION, *supra* note 19, at 271, and that the United States delegation made no objection to the paragraph either after it was adopted in Committee III, 14 OFFICIAL RECORDS, *supra* note 1, at 408-14; 2 LEVIE, PROTECTION, *supra* note 19, at 273-75, or after it was adopted by the Plenary Meeting, 6 OFFICIAL RECORDS, *supra* note 1, at 99-101, 113-18; 2 LEVIE, PROTECTION, *supra* note 19, at 277-80. Presumably, he had been authorized to propose this wording.

34. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 31 U.S.T. 333, 16 I.L.M. 88; *see also* Schindler & Toman, *supra* note 1, at 163; LEVIE, TERRORISM, *supra* note 1, at 190, 299. In signing the Convention in Geneva on May 18, 1977, Secretary of State Vance pointed out that the United States believed that "it is wise to outlaw what is commonly called 'environmental warfare' before it has a real chance to be developed significantly for military purposes, with potentially disastrous consequences." Statement by Secretary of State Vance at the Signing of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, in 1977 DOCUMENTS ON DISARMAMENT 326, 327 (1977).

35. Draft Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Sept. 2, 1976, in 1976 DOCUMENTS ON DISARMAMENT 577, 582 (1976).

36. It is probably these provisions that are sometimes claimed to have the potential of being interpreted as an unacceptable limitation on the use of nuclear weapons. If the United States fears this interpretation, it need only repeat on ratification the understanding that it stated at the time of signing: "[T]he rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons." Schindler & Toman, *supra* note 1, at 718. The United Kingdom stated a similar understanding. *Id.*

37. 1977 Protocol I, *supra* note 1, art. 39(2), 16 I.L.M. at 1409.

38. Matheson, *supra* note 4, at 425.

39. General Orders No. 100, Apr. 24, 1863, Instructions for the Government of Armies of the United States in the Field (also known as the Lieber Code), *reprinted in* Schindler & Toman, *supra* note 1, at 3, 12, and in Friedman, *supra* note 14, at 170.

40. *See supra* notes 2, 12.

41. 27-10 U.S. ARMY FIELD MANUAL ¶ 54 (1956). The British manual, THE LAW OF WAR ON LAND ¶ 320 (1958), is to the same effect. Of course, a spy has always been in violation of the law of war when caught behind enemy lines in the enemy's uniform.

42. COLEMAN PHILLIPSON, INTERNATIONAL LAW AND THE GREAT WAR 208 (1915).

43. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 490-91 (1948). Although the accused in the war crimes trial of Otto Skorzeny, *see* National Archives, RG 338, File M1217, Roll 1; UNITED NATIONS WAR CRIMES COMMISSION, 9 L. REP. OF TRIALS OF WAR CRIMINALS 90 (1948), were acquitted of entering into combat while wearing American uniforms, a number of other members of Skorzeny's unit who were captured by American units while wearing American uniforms during the Battle of the Bulge were immediately tried by court-martial, convicted of spying, and executed. Maximilian Koessler, *International Law on Use of Enemy Uniforms as a Stratagem and the Acquittal in the Skorzeny Case*, 24 Mo. L. Rev. 16, 29-30 (1959).

44. *See* Friedman, *supra* note 14; *see also* text accompanying notes 14-18, *supra*.

45. It should not be overlooked that Article 39(3) specifically exempts espionage and armed conflict at sea from the scope of the quoted provision. *See 1977 Protocol I*, *supra* note 1, art. 39(3), 16 I.L.M. at 1409.

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46. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS ¶ 1806 (Yves Sandoz et al. eds., 1987).

47. There are a number of General Assembly resolutions dealing with mercenaries. The last well-publicized trial of mercenaries as illegal combatants was that held in Angola in June 1976. See Mike J. Hoover, Notes, *The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War*, 9 CASE W. RES. J. INT'L L. 323 (1977). The provisions of Article 47(2)(b) of the 1977 Protocol I, see 1977 Protocol I, *supra* note 1, art. 47(2)(b), 16 I.L.M. at 1412, require that to be a mercenary the individual must have taken direct part in the hostilities, something which several of the accused who were convicted in the Angolan trial had not done.

48. Sofaer, *Position*, *supra* note 8, at 469.

49. See *supra* note 17.

50. 1949 First Geneva Convention, *supra* note 3, art. 46.

51. 1949 Second Geneva Convention, *supra* note 3, art. 47.

52. 1949 Third Geneva Convention, *supra* note 3, art. 13, ¶ 3.

53. See *supra* note 3.

54. Article 20 of the 1977 Protocol I prohibits reprisals against the persons and objects protected by Part II of the Protocol (wounded, sick, shipwrecked, medical units and personnel, and medical transportation); Article 52(1) prohibits reprisals against civilian objects; Article 53(c) prohibits reprisals against cultural objects and places of worship; Article 54(4) prohibits reprisals against objects indispensable to the survival of the civilian population; Article 55(2) prohibits reprisals against the natural environment; and Article 56(4) prohibits reprisals against works or installations containing dangerous forces. See generally 1977 Protocol I, *supra* note 1. No objection was raised in the presentations made by the officials of the United States to any of these provisions. See *supra* notes 4, 8.

55. 1977 Protocol I, *supra* note 1, art. 56(1), 16 I.L.M. at 1415.

56. Sofaer, *Position*, *supra* note 8, at 468.

57. It should be noted that Article 57(2)(a)(iii), concerning reaching decisions to attack, refers to civilian losses "which would be excessive in relation to the concrete and direct military advantage anticipated"; and that Article 85(3)(c), concerning the specific attacks referred to in the article quoted in the text, makes such an attack a grave breach of the Protocol only if it "will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)." See Protocol, *supra* note 1, art. 85(3)(c), 16 I.L.M. at 1430. Both of these provisions are applications of the rule of proportionality.

58. Frankly speaking, this author has never been able to understand how the balancing of civilian losses versus military advantage is to be accomplished. Is the bombing of a battalion of tanks found in a residential area justified if the civilian casualties will be in the range of 50? 100? 500? 1,000? How does one decide? Suppose that they are the only tanks available to support an impending enemy attack or to be used against an impending friendly attack. Does that increase the number of justified civilian casualties? If so, to what extent?

59. Sofaer, *Position*, *supra* note 8, at 468 n.146.

60. 14 OFFICIAL RECORDS, *supra* note 1, at 151, 158 ¶ 39; 3 LEVIE, PROTECTION, *supra* note 19, at 281, 284.

61. Carnahan, *Customary International Law*, *supra* note 6, at 506; Sofaer, *Position*, *supra* note 8, at 468.

62. Sofaer, *Position*, *supra* note 8, at 469-70. The present author has also taken the position that it is unfortunate that these provisions are not mandatory. Levie, *Pros and Cons*, *supra* note 5, at 541-42. The United States apparently does not object to these articles, but only to their failure to include provisions which would have ensured their effectiveness in all relevant cases. The United States affirmatively "supports" Article 5. See *supra* note 4.

63. See Articles 8-10 common to the first three 1949 Geneva Conventions, *supra* note 3, and Articles 9-11 of the 1949 Fourth Geneva Convention, *supra* note 3.

64. During the hostilities in Korea (1950-1953), the North Koreans alleged that the United States was using bacteriological weapons. The United States denied the charge and proposed an investigation by the World Health Organization and the International Committee of the Red Cross. The North Koreans refused to allow such an investigation to be made but had one conducted by other Communists who, naturally, found that the allegations were true. However, probably having decided that the conclusions of its own investigative body were not receiving the desired publicity and acceptance, the North Koreans dropped the matter. Such an investigation would now be a function of the Fact-Finding Commission, but only if its competence has been accepted, generally or specially.

65. 31 INT'L REV. RED CROSS 411 (1991). When Poland filed a declaration on October 2, 1992, recognizing the competence of the Commission, it was the thirty-second party to do so. 32 INT'L REV. RED CROSS 606 (1993).

66. The United Kingdom had no difficulty in setting forth ten understandings at the time of signing the 1977 Protocol I. Schindler & Toman, *supra* note 1, at 717-18.