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Ratification of Protocol I to the Geneva
Conventions of 1949 by the United
States: Discussion and Suggestions
for the American Lawyer-Citizen

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I. INTRODUCTION

The progression of humanitarian law can be less than obvious to those of us not avocationally absorbed in it, either as scholars who labor in its furtherance or those practitioners who strive to be the world's conscience regarding its observance. Yet the state of such law is currently at a crucial juncture. In order to move forward it must maintain and enhance its place in the *opinio juris* of the nations of this world. However, this same world appears in danger of dissolving into a fractious melange of heavily-armed groups with divergent economic status, ideology, and aspirations. The drafting of the 1977 Protocols to the Geneva Conventions, and particularly Protocol I,¹ reflects this world milieu. If successful, the Protocols will be a milestone for this era in the development of humanitarian law.

The purpose of this Article is to consider certain provisions of Protocol I which have been the source of controversy, particularly in the context of the United States administration's (under President Reagan) refusal to submit it for ratification. Some of the criticisms

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1. Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, reprinted in 16 INT'L LEGAL MATERIALS 1391 (1978).

which have been leveled against Protocol I will also be analyzed in order to evaluate the United States' interests, and how these interests may best be served. Finally, a suggestion will be offered for lawyers as citizens and opinion leaders concerning what the United States' approach to Protocol I should be.

A. *Background to the Geneva Conventions*

Before consideration of Protocol I is undertaken, a brief introduction to the Geneva Conventions of which the Protocol supplementary, the status of the humanitarian law relative to armed conflict prior to their adoption, and the factors which led to the Protocols thereto will be presented.²

1. Law of the Hague and Predecessors

For the present state of humanitarian law we credit nations which, following conflicts among societies, have articulated norms and procedures to govern them.³ As history has evolved, conflicts internal to territories have become the most common variety.⁴ Indeed, it is noteworthy that one of the most significant attempts at nineteenth-century codification of the rules for protection of war victims arose from such an internal conflict—the American Civil War.⁵

The first general codification of laws regarding the conduct of armed hostilities was the Hague Convention of 1907.⁶ The "law of the Hague," as it has come to be known, contained some provisions for the protection of civilians who found themselves entrapped in warfare,⁷ but was generally concerned with limiting the means of waging war and making those means more humane. After attaining the status of customary international law,⁸ the law of the Hague remained

2. Perhaps the definitive treatise on the subject of the Protocols and their background and content is M. BOTHE, K. PARTSCH & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS—COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* (1982) [hereinafter BOTHE].

3. See generally G. BEST, *HUMANITY IN WARFARES* (1980) and J. PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* (1975).

4. See generally J. PIRAGE, *MANAGING POLITICAL CONFLICTS* (1976) and Forsythe, *Legal Management of Internal War*, 72 *AM. J. INT'L L.* 272 (1978). In the present passage, the term "internal conflict" is not intended to be used as a term of art, but is intended simply to refer to conflicts other than traditional ones between established nation-states.

5. *Lieber Instructions* (1863), especially arts. 21-25.

6. Hague Convention of Oct. 18, 1907 and Annexed Regulations Concerning the Laws and Customs of War on Land, 36 Stat. 2277, T.I.A.S. No. 539.

7. *Id.* § art. 42, et. seq.

8. Judgment No. 83, International Military Tribunal (Nuremberg) (1947) declared that

unaltered in its scope for the next seventy years.⁹

2. Law of Geneva

Following World War II, the victorious powers set about the business of restructuring world order. This included rectifying certain inadequacies in humanitarian law which had become apparent during the War. The four multilateral pacts which are well known as the "Geneva Conventions" were the result.¹⁰ The "law of Geneva" thus created has since remained the standard against which conduct in war has been measured in all areas to which the Conventions are applicable. In addition, the Conventions are regarded as having enjoyed the status of customary international law virtually since they were adopted.¹¹

As the character of armed conflict has changed, serious gaps in coverage of the law of Geneva and the Hague have become all too visible.¹² The most critical deficiencies lay in the areas of conflict within national borders and the protection of civilians from the ravages of war.

B. *The Impetus for Revision*

In the years following the proliferation of internal conflicts, nations began to express the sense that further additions to humanitarian law were needed. International organizations became aware of this need and began addressing the issues.¹³ These actions facilitated

by 1939, the Rules of the Hague Convention (*supra* note 6) were declaratory of the customary law of war.

9. See *infra* text accompanying notes 41-43.

10. The official names given to the pacts are: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (First Geneva Convention); (2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (Second Geneva Convention); (3) Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (Third Geneva Convention); and (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War of Aug. 12, 1949 (Fourth Geneva Convention). All four of these agreements entered into force for the United States on February 2, 1956.

11. See Baxter, *Some Existing Problems of Humanitarian Law*, in THE CONCEPT OF INTERNATIONAL ARMED CONFLICT: FURTHER OUTLOOK 2 (Proceedings of the International Symposium on Humanitarian Law, Brussels 1974).

12. See *infra* text accompanying notes 13-23.

13. The Draft Rules of Limitation of the Dangers Incurred by Civilian Populations in Time of War (I.C.R.C. 1957) were submitted to the 19th International Conference of the International Committee of the Red Cross in New Delhi that year. In 1968, U.N. General Assem-

further efforts which culminated with the Protocols.¹⁴

1. Character of Conflicts Since 1945

The renewed interest of countries in the further development of international humanitarian law may be attributed to two factors: (1) the process of decolonization in the wake of the loss of control by colonizing powers in World War II, and (2) the "wars of the 1960's," such as those in Vietnam (which fits the former circumstance as well), Nigeria, Bangladesh, and the Middle East.¹⁵ The result was that "conventional" wars, as commonly understood when the Geneva Conventions were adopted, became less of a concern.¹⁶

The proliferation of non-conventional or guerrilla warfare meant conflict of a less confrontational character, along with increasing dependence upon the civilian population for logistical and other kinds of support. In large part, this was due to the typical disparity in resources available to belligerents in an internal conflict. It also meant that the targets of retaliation by the official military were much less determinate.¹⁷ Moreover, while many of the wars were strictly internal,¹⁸ others reached, at least from a political standpoint, an interna-

bly Resolution No. 2444 was adopted, in which certain fundamental principles were reaffirmed as requiring observance by all governments in the conduct of warfare, and the Secretary-General was invited to consult with the I.C.R.C.

14. For a useful compilation of the developments leading to the 1977 Protocols, see Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 46 (1984).

15. See the background explanation of Ambassador George H. Aldrich, head of the United States delegation to the Conference from which the Protocols resulted, in *Some Reflections on the Origins of the 1977 Geneva Protocols*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET 129-32 (1984). See also G. HERCZEGH, DEVELOPMENT OF INTERNATIONAL LAW 84-85 (1984); Moreillon, *Humanitarian Law, The ICRC and Promoting the Geneva Conventions*, 31 AM. U.L. REV. 819 (1982).

16. Other factors worthy of mention would, of course, include an extended era of stability among the major powers, pressures for self-determination among many groups subject to the domination of others for whatever reason, and the fomentation of "wars of national liberation" by communist bloc nations.

17. See Rwelamira, *The Significance and Contribution of the Protocols Additional to the Geneva Conventions of August 1949*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET 228 (1984).

18. This was the reason for the creation of Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, U.N. Doc. A/32/144, Annex II, reprinted in 16 INT'L LEGAL MATERIALS 1442 (1978)). Protocol II appears headed for eventual United States ratification, and is, of course, beyond the scope of this writing. However, at least one scholar has argued that the threshold requirements for applicability of Protocol II, together with the derogability of most human rights conventions in situations of emergency, result in serious

tional dimension.

Unfortunately, civilian casualties, in proportion to those of military persons, were on a steady increase.¹⁹ The only positive humanitarian law provisions applicable to the "non-international"²⁰ strife were those few found in article 3 of the Geneva Conventions.²¹

The United States' willingness to participate in the process²² was the result of the effect of the Vietnam conflict on its view of the effectiveness of the laws of war.²² Its captured soldiers and airmen were often mistreated and denied protection as prisoners of war for alleged violations of the laws of war. Some of these prisoners have not, in the minds of many, been fully accounted for. In addition, United States' medical evacuation aircraft were destroyed at a rate three times that of combat helicopters.²³ Dispiriting political restrictions upon military operations and unprecedented public scrutiny surrounded the American conduct of the war. This reinforced the need to draw and maintain a clear distinction between legal and merely political restrictions to help future military professionals.²⁴

2. 1974-1977 Diplomatic Conference

The International Committee of the Red Cross invited experts to Geneva to attempt the drafting of a model convention concerning armed conflict.²⁵ This draft was to provide the operating framework

omissions in coverage of existing humanitarian norms in internal strife. See Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589 (1983).

19. It has been estimated that the percentage ratio of civilian to military casualties in wars during this century have ranged as follows: World War I—5%; World War II—48%; Korean Conflict—80%; Vietnam War—>80%. See Mirimanoff-Chilikine, *La Restauration du Statut Juridique de la Population Civile en Periode de Conflit Arme*, REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 1094 (1974), cited in Ciobanu, *The Attitude of the Socialist Countries*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 424 (1979).

20. As the term was understood prior to the adoption of Protocol I—see *infra* text accompanying notes 45-47 and 78-79.

21. Geneva Conventions, *supra* note 10, art. 3. The article requires that certain protections be provided persons *hors de combat* (i.e. not military or associated personnel) from violence and maltreatment, and mandates due process guarantees. While the motivation is understandable, this provision is a non-specific, non-inclusive expression of limited minimum standards which resembles an afterthought.

22. See Aldrich, *supra* note 15, at 129-31.

23. P. DORLAND & J. NANNEY, DUST OFF (1982), cited in McMahon, *A Good Treaty*, 19 AKRON L. REV. 551, 552 (1986).

24. See Aldrich, *supra* note 15, at 133.

25. These "conferences of experts," which began in 1971 and continued at intervals before and during the diplomatic Conference, included selected persons representing governments, national societies of the Red Cross and Red Crescent, and other humanitarian institu-

for the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in 1974. The Conference convened for four sessions until the Protocols were produced in 1977.²⁶ As the final results reflected,²⁷ the participants represented a strikingly diverse group in terms of ideology.²⁸ It is also significant that representatives of eleven "national liberation" movements were present.²⁹

The main issues the Conference addressed have been summarized as follows:³⁰

- (1) the methods and means of modern warfare;
- (2) the problems raised by the appearance of "new" forms of warfare (including those waged by guerrillas and other irregulars);
- (3) how to guarantee the protection of the civilian population (both in occupied areas held by the enemy and within their homeland);³¹
- (4) how to provide better protection for the wounded and sick, and for medical personnel, units and transports;
- (5) enhanced protection for the victims of non-international armed conflicts;³²
- (6) how to attain better means of securing actual observance of the laws of war.

tions. See BOTHE, *supra* note 2, at 3; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 xxxi (Y. Sandoz, C. Swinarski, B. Zimmerman eds. 1987) [hereinafter I.C.R.C. COMMENTARY]; G. HERCZEGH, *supra* note 15, at 112-14.

26. A general history of the Protocols is contained in I.C.R.C. COMMENTARY, *supra* note 25. For a discussion of the progress of the Convention through the draft stages of the Protocols, see DePue, *The Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949*, 75 MIL. L. REV. 71, 71-80, 88-92 (1977).

27. See *infra* text accompanying notes 49-71.

28. Including the U.S.S.R. and U.S.A., People's Republic of China, Syria, Israel, Democratic Republic of Vietnam, German Democratic Republic and countries of the European Economic Community, and many others. See Introductory remarks by Prof. Hamilton DeSaussure, 19 AKRON L. REV. 521 (1986).

29. See 2 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ARMED CONFLICTS, GENEVA 1974-1977 1 (Federal Political Department, Bern, 1978) [hereinafter OFFICIAL RECORDS]; Wortley, *Observations on the Revision of the 1949 Geneva 'Red Cross' Conventions*, 54 BRIT. Y.B. INT'L L. 143 (1983). Of the eleven present, three (Palestine Liberation Organization, Pan-Africanist Congress, and Southwest Africa People's Organization) signed the text "without prejudice to the position of participating States on the question of precedent." *Id.*

30. BOTHE, *supra* note 2, at 4.

31. See DeSaussure, *supra* note 28.

32. With which, of course, Protocol II, *supra* note 18, was mostly concerned.

Upon review of the more significant provisions of Protocol I,³³ it may be said that the Conference was successful in addressing most of these objectives, although predictably less so as to the final one.³⁴

Another feature of the Conference which influenced the final product was the presence of extensive political pressures from a plethora of ideologies and *ad hoc* alliances of participating nation-states. Those pressures which most shaped the outcome came from two often overlapping sources: developing countries of the third world,³⁵ and states who had suffered attacks by mercenary forces.³⁶ In the view of many commentators, these two forces united to confound irretrievably the resulting agreement.³⁷

As a consequence of the diversity among participants at the Conference, specialized concerns emerged. The developing countries, as former colonies, together with certain socialist states, were anxious that wars of national liberation be included for humanitarian (and, apparently, political) reasons.³⁸ Nations such as France and Norway, whose recent histories have included fighting by their citizens as partisans, focused upon prisoner of war and combatant status for resistance fighters against occupying powers.³⁹ The United States was interested in outlawing the kind of maltreatment (under the rule of non-protection for alleged violators) which was inflicted upon some of its prisoners of war in Korea and Vietnam.⁴⁰

Due to this concern, the United States took an active role in the

33. See *infra* text accompanying notes 49-71.

34. See generally Cassese, *A Tentative Appraisal of the Old and New Humanitarian Law of Armed Conflict*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 461 (1979).

35. See Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 *HARV. INT'L L. J.* 1, 11 (1975); Cantrell, *Humanitarian Law in Armed Conflict: The Third Diplomatic Conference*, 61 *MARQ. L. REV.* 253, 259 (1977).

36. See Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 *VA. J. INT'L L.* 693, 708 (1986).

37. One author argues that the prevalent attitudes, which ranged all the way to a proposal by the Rumanian delegation to make armed conflict so legally difficult as to render it impossible, led to "incorporation by the Conference of unworkable standards that, because of their vagueness, unfeasibility, and failure to accept political realities, represent a backward step in the effort to protect noncombatants and limit destruction during armed conflicts." Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 *VA. J. INT'L L.* 109, 123 (1985).

38. Aldrich, *supra* note 15, at 134; DeSaussure, *supra* note 28, at 521.

39. See Erickson, *Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict*, 19 *VA. J. INT'L L.* 557, 581 (1979); Lysaght, *The Attitude of Western Countries*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 357 (1979).

40. Lysaght, *supra* note 39, at 371.

Conference and contributed to the prevailing atmosphere of *detente*.⁴¹ American civilian and military personnel were integrally involved in the Conference,⁴² and the United States' objectives were clearly defined.⁴³

C. Protocol I: General Character and Purpose

Protocol I was intended to supplement the Geneva Conventions⁴⁴ and does not repeal or override any provisions. The design of Protocol I was to fill gaps which existed in humanitarian law with respect to international armed conflicts, and to find common ground among the different nations for doing so.⁴⁵ In a sense, Protocol I served to unite the law of the Hague and the law of Geneva.⁴⁶ Moreover, Protocol I codified for the first time the customary international law principle of "proportionality"—that no injury to civilians or damage to civilian targets may be permitted beyond the strict requirements of military necessity.⁴⁷

1. Salient Provisions

The following summary is intended to provide a clearer view of the overall contours of Protocol I before examining its specific provisions:⁴⁸

1. Article 1, section 4 incorporates into the coverage of the hu-

41. Ambassador Aldrich has stated that this circumstance made possible the necessary negotiations between the U.S. and U.S.S.R. to allow the Protocols to be concluded. Aldrich, *supra* note 15, at 133.

42. Aldrich, *supra* note 36, at 695.

43. "These objectives are, first, to obtain better implementation of and compliance with the existing international law and, second, to 'develop new rules of law' that are clear, capable of being accepted by States, and capable of being applied in practice." Remarks by Ambassador Aldrich, U.S. Representative to the Diplomatic Conference (Mar. 5, 1974), *cited in* 1974 *U.S. Dig. Prac. Int'l L.* 701.

44. *See supra* notes 13-14.

45. The Geneva Conventions were produced by a relatively small number of states possessing relative ideological and philosophical homogeneity, unlike the situation at the Conference, involving the entirety of international society (including young countries as well as older and more established members of the community of nations). *See Cassese, supra* note 34, at 462.

46. *See generally* Erickson, *supra* note 39; Aldrich, *supra* note 15.

47. Aldrich, *supra* note 15.

48. This should not be regarded as an attempt at comprehensive explication. The portions designated herein as "salient" may in the opinion of another observer be arbitrary and incomplete. For fuller treatment of the Protocol, see BOTHE, *supra* note 2. Abridged discussions may be found in Levie, *Some Recent Developments in the Law of War*, 25 *GER. Y.B. INT'L L.* 252 (1982); Parks, *The 1977 Protocols to the Geneva Conventions of 1949*, 31 *NAVAL WAR C. REV.* 17 (1977).

manitarian law applicable to international armed conflict “[wars] in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations.”⁴⁹ Under article 96, section 3, the authority representing such a people may undertake to obtain the application of the Protocol (and the remaining provisions of the Geneva Conventions) by filing a unilateral declaration with the Swiss Federal Council, the depositary of the Conventions. These passages may be the most controversial of the Protocol, and are among the chief reasons for the opposition to ratification.⁵⁰

2. In article 5, new procedures are provided for the designation of a “protecting power” to help insure that some nation, or the International Committee of the Red Cross, is selected to function in such a capacity. While this is a useful provision, it arguably does not go far enough in terms of unconditionally obligating the parties.⁵¹

3. Articles 24 through 31 increase the protection of medical aircraft against becoming the targets of hostile fire. Previously, no applicable prohibitions were in force, and an agreement had to be reached in the field in the case of each and every sortie.⁵² This unheralded and uncontroversial portion is among the Protocol’s best features.⁵³

4. Articles 32 through 34 address another problem which could alleviate much suffering—the right of surviving families to be promptly notified of the fate of relatives reported missing, and the obligation to treat human remains with respect and care.⁵⁴

5. Dealing generally with the instruments of waging war, articles 35 through 42 codify the principle of customary law that the means and methods employed are not unlimited. For example, caus-

49. Protocol I, *supra* note 1, art. 1, § 4.

50. See *infra* text accompanying notes 76-103.

51. Aldrich, *supra* note 36, at 694. In *Levie, Pros and Cons of the 1977 Protocol I*, 19 AKRON L. REV. 537, 541 (1986), it is observed that the only recent conflict in which there were true protecting powers was the 1982 Falklands/Malvinas War.

52. See McMahon, *supra* note 23, at 551-54.

53. Aldrich, *supra* note 36, at 696.

54. Unfortunately, this has been the subject of much extortionate abuse by both sides in the protracted war between Iran and Iraq. That war should serve as an object lesson for the misery which results if all laws of armed conflict are cast aside. See generally Report of Mission Dispatched by the Secretary-General, *Prisoners of War in Iran and Iraq*, U.N. Doc. S/16962 (Feb. 19, 1985).

ing unnecessary suffering or destruction is forbidden, including practices considered perfidious. The most interesting and controversial portion is article 35, section 3, which prohibits the use of means of warfare which are "intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."⁵⁵

6. Articles 43 and 44 deal with combatant⁵⁶ and prisoner of war⁵⁷ status. They are designed to increase the scope of entitlement, and are a specific and concrete application of the more abstract principles set forth in article 1, section 4, and article 96, section 3.⁵⁸

Specifically, article 44, section 2 provides that a person cannot be deprived of the right to be considered a combatant or prisoner of war for most violations of the rules of war.⁵⁹ The understanding of "armed forces" provokes more controversy, since as it is defined as those groups which "shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."⁶⁰

Furthermore, a member of an irregular force shall be entitled to combatant status if "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."⁶¹

Even if a combatant fails to meet these rather circumscribed requirements, he must still be afforded treatment (although not formal status) as a prisoner of war.⁶²

7. Articles 51 through 58 of the Protocol are among the most sweeping in their expansion of the protection afforded civilians and

55. See *infra* text accompanying notes 192-95 regarding this provision.

56. Combatant status has the legal effect of immunizing persons from civil or criminal prosecutions for violent acts not against the laws of war.

57. As a prisoner of war, the member is entitled to be held under the provisions of the Third Geneva Convention, *supra* note 10, must be repatriated at the end of the war, and cannot be punished for acts which do not violate the laws of armed conflict.

58. See *infra* text accompanying notes 107-36.

59. See *supra* text accompanying notes 22-24 regarding the special concerns of the United States in this connection. In connection with the express prohibitions against "indiscriminate" attacks on civilian targets, see *infra* text accompanying notes 164-85. This provision is clearly beneficial to the United States in outlawing any mistreatment of its combatants.

60. Protocol I, *supra* note 1, art. 43, § 1. The interpretation of this provision is critical to a correct understanding of the actual effects of Protocol I and the advisability of its ratification. See *infra* text accompanying notes 92-93 and 118.

61. Protocol I, *supra* note 1, art. 44, § 3.

62. This consists largely of due process protections concerning trial and punishment for offenses committed, as provided in the Third Geneva Convention, *supra* note 10.

civilian objects. In general, they are a broad positive law enactment of the "principle of proportionality" in that they require that destruction of civilian objects be minimized.⁶³

Moreover, articles 51 through 58 represent a sharp departure from prior practice⁶⁴ by explicitly and unconditionally prohibiting reprisals against civilian persons and objects.⁶⁵

Articles 68 through 71 grant similar protection to civilians by imposing obligations upon an occupying power to provide relief measures to meet the basic needs of the civilian population.⁶⁶

8. Beginning at section 75, Protocol I sets forth the fundamental "safety net" guarantees accorded all parties who do not benefit from any of the more favorable provisions of the Protocol or the Geneva Conventions.⁶⁷ Significantly, this safety mechanism also operates explicitly in favor of women and children.⁶⁸

9. The concept of "grave breaches," or offenses which carry the obligation of extradition and are subject to prosecution in any country that is a party to the Geneva Conventions, is expanded in article 85.⁶⁹

10. Provision is made for the establishment of an International Fact-Finding Commission to inquire into allegations of breach. The Commission operates upon recognition by declaration of any party in relation to another party.⁷⁰

D. Decision Not to Submit for United States Ratification

Despite the earlier central involvement of the United States delegation in the Conference and the recommendation of the Conference

63. See *infra* text accompanying notes 164-85.

64. As will be noted, the practice of reprisals against civilian targets and the full right of self-defense, even at the expense of civilian losses, was considered an important component of the normative structure under which wars are waged. See Comments made at the adoption of draft article 46 (now 51) by the Diplomatic Conference, in 6 OFFICIAL RECORDS, *supra* note 29, at 161-64.

65. See *infra* text accompanying notes 137-63 regarding the subject of reprisals.

66. Although criticized by one author as "burdensome and self-defeating," Roberts, *supra* note 37, at 152, this provision has not proven to be a controversial topic.

67. This includes, but is not limited to, persons accused of war crimes (mercenaries are not included). See Levie, *supra* note 51, at 537.

68. There was previously no provision in international humanitarian law actually protecting children from use by their own government in war. Present day examples include the use of children by the Viet Cong, see McMahon, *supra* note 23, at 554, and similar shameful exploitation of children by the parties to the Iran-Iraq War.

69. See *infra* text accompanying notes 211-14.

70. This provision, dependent as it is upon voluntary declaration of acceptance, is not expected to be significant in actual operation. See Levie, *supra* note 51, at 541.

delegation,⁷¹ the Reagan administration delayed action with respect to Protocol I. Objections to ratification were first raised by the Joint Chiefs of Staff, notwithstanding the participation by United States military experts in the drafting of the agreement.⁷² Similarly, it appears that certain influential legal advisers to the Reagan administration had formed opinions that Protocol I should not be ratified due primarily to objections to the provisions of article 1, section 4⁷³ and articles 43-44.⁷⁴ These opinions were expressed in writings which, judging from their effect, must have had a profound influence on United States policymakers.⁷⁵

On December 12, 1986, the Secretary of State transmitted a letter to the President in which he concluded that Protocol I was subject to certain infirmities which could not be corrected by reservations or understandings.⁷⁶ Shortly thereafter, on January 29, 1987, the Chief Executive sent his own message to the Senate urging ratification of Protocol II, but stating that Protocol I would not be thus recommended, being "fundamentally and irreconcilably flawed."⁷⁷ In his

71. See *Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Fourth Session Mar. 17-June 10, 1977)*, submitted to the Secretary of State by George H. Aldrich, Chairman of the Delegation Sept. 8, 1977, reprinted in 1977 *U.S. Dig. Prac. Int'l L.* 917, 918 (1977); see also Erickson, *supra* note 39, at 571.

72. See Gasser, *A Brief Analysis of the 1977 Geneva Protocols*, 19 *AKRON L. REV.* 525, 526 (1986).

73. See *supra* text accompanying notes 49-50.

74. See *supra* text accompanying notes 56-62.

75. See Feith, *Moving Humanitarian Law Backwards*, 19 *AKRON L. REV.* 531 (1986), in which the author (then Deputy Assistant Secretary of Defense for Negotiations Policy) states: "In my view, the upshot of the [Geneva] Diplomatic Conference was a pro-terrorist treaty that calls itself humanitarian law." *Id.* at 534 (emphasis added). See also Sofaer, *Terrorism and the Law*, 64 *FOREIGN AFFAIRS* 901 (1986), in which the State Department Legal Adviser charges that the Protocol confers legitimacy upon terrorist groups and depends for its operation upon the motivations of the belligerents. Mr. Sofaer has restated, in broader summary form, his position in the recent *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: The Rationale for the United States Decision*, 82 *AM. J. INT'L L.* 784 (1988).

76. Letter of Submittal from Secretary of State George Shultz, *S. Treaty Doc. No. 2*, 100th Cong., 1st Sess., at VII, IX (1987) [hereinafter "Shultz Letter"]. The letter also contains the following passage in apparent reference to arts. 43 and 44: "As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of [Protocol I] with the United States' announced policy of combating terrorism." This rather perplexing phrase does not make clear in what sense the distinction is being obliterated, but resembles a similar assertion made in Sofaer, *supra* note 75, at 914.

77. Letter of Transmittal from President Ronald Reagan, *Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed*

letter, the President stated that the Protocol would grant recognition and protection to terrorist groups, and would result in a "politicization" of humanitarian law by such organizations.⁷⁸

In addition to the generalized objections of the current administration, other writings contain a number of specific legal arguments⁷⁹ which provoke discussion of the advisability of United States' ratification of the Protocol.

II. ANALYSIS AND CRITICISM OF SPECIFIC ARGUMENTS AGAINST RATIFICATION

A. *Legitimization of Wars of National Liberation*

One of the contentions most frequently raised against ratification of Protocol I is that it confers international legitimacy upon "national liberation" groups which ordinarily would not be entitled to recognition under established precepts.⁸⁰ First, it is argued that such legitimization authorizes foreign intervention in what should be regarded as internal conflicts.⁸¹ Similarly, the Protocol assertedly entitles splinter liberation groups to recognition on a state-to-state basis.⁸² This would have political impact, but not humanitarian effects, due to the inability of national liberation movements to marshal the resources or organizational discipline needed to fulfill their own obligations under the Protocol.⁸³ Moreover, the provision is said to pose difficulties of

Conflicts, S. Treaty Doc. No. 2, *supra* note 71, at III. The letter is reprinted in full in 81 AM. J. INT'L L. 910 (1987).

78. *Id.*

79. See Sofaer, *supra* note 75. Legal citations were omitted in the interests of readability.

80. The reference here is to art. 1, § 4. See *supra* text accompanying notes 49-50. See also Shultz Letter, *supra* note 76, at IX; Feith, *supra* note 75, at 532. Lysaght states that the achievement of recognition of the international legal character of wars of national liberation was a major aim of Afro-Asian and Arab groups. Lysaght, *supra* note 39, at 349.

81. See Roberts, *supra* note 37, at 125; Feith, *supra* note 75, at 531. This is presumably by virtue of the following paragraph of part 1 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations:

Every State has the duty to refrain from any forcible action which deprives peoples . . . [sic] in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the principles and purposes of the [U.N.] Charter.

G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/2890 (1970) (emphasis added) [hereinafter The Declaration].

82. See remarks of Harry H. Almond, Jr. of the National War College in *Protocols Additional to the Geneva Conventions on the Laws of War*, *Proceedings Am. Soc. Int'l L.* 196 (1980).

83. See Roberts, *supra* note 37, at 125.

construction with regard to the definitions of "peoples"⁸⁴ and "authority"⁸⁵ which render it unworkable, and distortive of humanitarian principles.⁸⁶

However, all of the foregoing contentions can be handily disposed of by reference to the text, relevant interpretations, and history of the Protocol. To begin with, the argument concerning foreign intervention simply begs the question of whether a conflict is of the type which should be regarded as affording the protections of Protocol I. Irrespective of whether or not the provision of the Declaration⁸⁷ authorizing assistance from a foreign state is customary law, the fact remains that Protocol I is simply not directed at defining the conditions under which it is permissible.⁸⁸ Additionally the Protocol, by its very terms, states that its application shall not affect the legal status of parties to the conflict,⁸⁹ and thus could not be the basis for an argument in favor of *de jure* recognition of any group.

With regard to the notion that the Protocol benefits splinter factions or groups unwilling or unable to observe the dictates of humanitarian law, such an interpretation simply does not follow from the terms of article 1, section 4. For example, the necessary division between an internal rebellion by a disaffected minority and a struggle of international scale⁹⁰ is maintained by the modifiers of "peoples" and "right of self-determination," and the explicit reference to the United Nations Charter and Declaration.⁹¹ In this same connection, it bears

84. *Id.*

85. Wortley, *supra* note 29, at 145.

86. The notion here is that under art. 96, § 3, there is no delineation of which "authority" may make a declaration and thereby subject itself and the opposing force to the Protocol and Geneva Conventions. This is said to create an advantage for insurgent forces over governments, which must formally accede to the Protocol, and to allow minority groups making extravagant claims to gain its protection without the willingness or the ability to observe its requirements.

87. The Declaration, *supra* note 81.

88. Put another way, the Protocol describes the conflicts at issue in the same way as the Declaration—it is the Declaration, and not the Protocol, which may authorize foreign intervention. The question of whether the humanitarian law of international armed conflict should apply is separate. The characterization of such actions as international is the logical reason why Protocol I contains no provision such as that in article 3 of Protocol II expressly disclaiming any authorization for intervention. See Protocol II, *supra* note 18.

89. Protocol I, *supra* note 1, art. 4.

90. It has been noted that during the drafting of the Protocol, it was the clear understanding of all concerned that it would only be applicable to conflicts above a certain threshold level. See Lysaght, *supra* note 39, at 355; Cassese, *supra* note 34, at 467.

91. Notwithstanding the definitional complaints that have been raised, the term "people," as used in the Declaration, cannot be fairly stretched to encompass any ordinary outlaw or insurgent group. For illustrations of the use of the term in proper context, see the explana-

reiteration that no group can enjoy the benefits of the Protocol and Conventions without accepting their obligations.⁹² A reasonable interpretation of this prerequisite, consistent with the purposes of humanitarian law, would imply at least some capacity to do so.⁹³

In addition, the portions of the Protocol concerning wars of national liberation may ultimately be without practical application.⁹⁴ The history of the Diplomatic Convention indicates that those certain passages were in fact drafted with specific situations in mind.⁹⁵ More importantly, since the governments affected will be the practical arbiters of the applicability of the provisions, the very language of article 1, section 4 is a substantial deterrent to its being given effect.⁹⁶ For good or ill, it appears these factors will render it difficult for most liberation movements to gain benefits under Protocol I.⁹⁷

tory background materials in Note, *The Meaning of 'People' in the African Charter of Human and Peoples' Rights*, 82 AM. J. INT'L L. 80, 86 (1988). The second key component is: A "people" must have a "right of self-determination," and not just any cell of radicals can lay claim to that right. The right, as established by the Charter and Declaration, does not extend to secessionist or other splinter movements within a state, because the Declaration very clearly does not authorize the impairment of the territorial integrity of an existing state. See The Declaration, *supra* note 81; Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 812, 816 (1987); Cassese, *Current Trends in the Development of the Law of Armed Conflict*, *Rivista Trimestrale di Diritto Pubblico* 1407, 1419 (1974), cited in Lysaght, *supra* note 39, at 353.

92. Protocol I, *supra* note 1, art. 96, § 3. See *supra* text accompanying notes 49-50.

93. This interpretation is adopted by Ambassador Aldrich. He stated that movements would not be able to accept the obligation "unless and until they are about to succeed in becoming the government of the state." Aldrich, *supra* note 36, at 702.

94. In Aldrich, the passage is referred to as a "dead letter." Aldrich, *supra* note 36, at 703. This approach, though seemingly cynical, is urged in support of overall ratification.

95. "Racist" was to be used in reference to the white regimes in Rhodesia and the Union of South Africa; "alien" to the occupation of territory by Israel following the 1967 Six-Day War; ("colonial" pertained to Portugal, now moot). See Roberts, *supra* note 37, at 125-26; Aldrich, *supra* note 15, at 132.

96. That is, no government is likely to characterize itself as "racist" or "alien." This means not only that most national regimes would *a priori* deny the relevancy of the article to their own situations, but that the "target" states are most unlikely to accede to the Protocol. See Roberts, *supra* note 37, at 125. As an example, the white Rhodesian government denied it was alien or racist to the end. When the Protocol was signed, the British government reserved from the application of art. 1, para. 4 to Rhodesia, on the ground that it had no ability to enforce it there absent the regime's compliance. Austin, *National Liberation in Southern Africa: New Perspectives and Conceptions of International Law, War and Neutrality*, in *NEW PERSPECTIVES AND CONCEPTIONS OF INTERNATIONAL LAW: AN AFRO-EUROPEAN DIALOGUE* 174, 178 (1983).

97. Austin recounts that the Rhodesian government also rejected the declaration of applicability under art. 96, para. 3 on the part of rebel forces. Austin, *supra* note 96, at 179-80. The Swiss government refused to accept the declaration of the African National Congress on the grounds that the Republic of South Africa was not party to the Protocol. In fact, no national

Therefore, with respect to the threatened legitimization of wars of national liberation, it is difficult to see how any vital interests of the United States are affected.⁹⁸ Without vital interests being threatened, the United States cannot genuinely consider this part of Protocol I a barrier to final approval.

1. Reintroduction of the "Just War" Concept

An additional objection to article 1, section 4 of Protocol I is that it revives the notion of *jus ad bellum*,⁹⁹ with the result that belligerent actions grounded upon certain motives may no longer be legally proscribed.¹⁰⁰ This construction would supposedly prevent considering such actions as aggression,¹⁰¹ and "politicize" humanitarian law by placing its imprimatur upon the actions of terrorist groups in the name of an allegedly just cause.¹⁰²

This argument is but a variation on the "legitimization" theme,¹⁰³ which has been adequately countered by the simple reminder that the Protocol deals with the nature, and not the motivation of the conflict involved.¹⁰⁴ The justness or legality of a conflict is not intended to be addressed by its terms,¹⁰⁵ and it bestows no higher principle on the use of force.¹⁰⁶ Parties are not granted protection merely because they are fighting for a righteous cause. The Protocol

liberation movement has ever successfully filed such a declaration. Aldrich, *supra* note 15, at 132.

98. See Lysaght, *supra* note 39, at 354; Aldrich, *supra* note 36, at 703. Indeed, it has even been suggested that the shoe is already on the other foot, and the interests of the United States may be served by urging application of the section. See Comment, *The Resistance in Afghanistan is Engaged in a War of National Liberation*, 81 AM. J. INT'L L. 906 (1987).

99. This shorthand phrase refers to the legality of war. An explanation may be found in the discussion of the "Just War" doctrine in R. BLEDSOE & B. BOCZEK, *THE INTERNATIONAL LAW DICTIONARY* 335 (1987).

100. This contention was raised by the United States at the Diplomatic Convention, see Lysaght, *supra* note 39, at 350, and remains a linchpin argument against ratification today. Letter of Transmittal, *supra* note 77; Sofaer, *Terrorism and the Law*, *supra* note 75, at 913. In fairness, it should be acknowledged that some Convention participants had as their aim the linkage of *jus in bello* with *jus ad bellum*. See Ciobanu, *supra* note 19, at 403; but see *infra* notes 103-107 and accompanying text.

101. Almond, *supra* note 82, at 196.

102. Letter of Transmittal, *supra* note 77; Sofaer, *Terrorism and the Law*, *supra* note 75, at 913; Feith, *supra* note 75, at 532.

103. See *supra* text accompanying notes 80-86.

104. See Lysaght, *supra* note 39, at 351; Gasser, *supra* note 91, at 917.

105. Despite the intentions of some of the contracting parties, it is accepted that the terms of the Protocol did not address the juridical status of any conflict. See Ciobanu, *supra* note 19, at 412.

106. See Protocol I, *supra* note 1, preamble, paras. 3 and 4, and art. 51, which should by

demands that it be given effect by parties on both sides of a dispute that have capacity to do so.¹⁰⁷ "Just War" pretenders will find no shelter in humanitarian law norms under the Protocol; moreover, the mere possibility that they may seek such shelter under the Protocol should not undermine it.

B. Guerrillas and Other Irregular Forces

The second major category of objections to Protocol I deals with its treatment of guerrillas and other irregular forces.¹⁰⁸ In general, the thrust of this criticism is that protection is afforded to these forces at an unprecedented level and at unacceptable costs. This problem, which is as ancient as organized warfare itself, is of special importance to the United States' concerns regarding terrorism.¹⁰⁹ This Article shall consider several facets of this objection and the pertinent answers in turn.

1. Dangers to Civilian Population

The ability to determine which groups are functioning in combat capacity, and which are not, is essential to the operability of the rules of war. Such distinction is equally essential to the protection of the population from harm. This "principle of distinction," which obligates combat personnel to distinguish themselves from civilians, follows from the foregoing and was reaffirmed in 1949 when the Geneva Conventions were drawn.¹¹⁰

It is urged that articles 43 and 44 relax the requirements for visi-

any principled interpretation be read to prohibit most, if not all, terrorist acts. *See also* Adrich, *supra* note 36, at 697.

107. *See supra* notes 49-50 and accompanying text regarding art. 96, para. 3.

108. Protocol I, *supra* note 1, arts. 43 and 44. These articles deal with entitlement to Prisoner of War and combatant status, also introduced *supra* in text accompanying notes 56-62.

109. *See generally* Feith, *Law in the Service of Terror—The Strange Case of the Additional Protocol*, 1 NAT'L INTEREST 36 (1985), in which the former Deputy Assistant Secretary of Defense harshly criticizes the Protocol as casting aside accepted precepts of humanitarian law and providing aid to terrorism. *See also* the response thereto in Solf, *A Response to Douglas J. Feith's Law in the Service of Terror*, 20 AKRON L. REV. 261 (1986), in which a former Chief of International Affairs, Office of the Judge Advocate General, U.S. Army and member of the United States delegation to the Diplomatic Conference defends the Protocol. While considering this subject, recall that there have been and are circumstances in which groups that enjoy the support of the United States (such as the French, Norwegian and Yugoslavian partisans in World War II, and possibly the *mujahedeen* in Afghanistan (*see supra* note 98)) would receive the benefits of the parts of the Protocol under discussion; presumably these groups would not then be *ipso facto* terrorist.

110. Third Geneva Convention, *supra* note 10, art. 4.

ble identifiability of those claiming combatant status,¹¹¹ thus improperly tilting the balance of protection away from civilians and toward irregular forces by making it unduly difficult for a regular soldier to determine who is a guerrilla and who is not.¹¹²

While Protocol I substantially alters the requirements of identifying symbols for combatants, that is not the end of it. It is equally likely that the strict requirements of the Third Geneva Convention would make irregulars unable to comply.¹¹³ If this is true, this would lead to the complete breakdown of observance of the laws of war on both sides, and further undermine the success of these laws.¹¹⁴ The only advantage to established forces seems to be the denial of combatant status and prisoner of war treatment to those who have not carried their arms openly. In actuality, this may be counterproductive and illusory by endangering civilians to a greater extent.¹¹⁵

2. Use by Terrorists

Some argue that the passages of Protocol I which afford guerrillas and irregulars protection also allow terrorists and terrorist groups to claim combatant status and treatment as prisoners of war.¹¹⁶ In

111. Article 44, para. 3, provides:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the 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:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Protocol I, *supra* note 1, art. 44, para. 3. *But cf.* Third Geneva Convention, *supra* note 10, art. 4.

112. Roberts, *supra* note 37, at 127. *See also* Sofaer, *Terrorism and the Law*, *supra* note 75. He claims that "terrorist groups" attending the Diplomatic Conference were successful in having their needs met at the expense of civilians. *Id.* at 914. The phenomenon discussed herein also works to the detriment of the regular soldier by limiting his freedom to act without harming civilians. *Id.*

113. *See* Third Geneva Convention, *supra* note 10, art. 4. These requirements would be considered palpably unacceptable by most irregulars. They include, *inter alia*, that of carrying arms openly and having a fixed distinctive sign recognizable from a distance. *Id.*

114. Aldrich, *supra* note 36, at 704; *see also* Aldrich, *New Life for the Laws of War*, 74 AM. J. INT'L L. 764, 765 (1981).

115. *See* Lysaght, *supra* note 39, at 358. Art. 50, para. 1 of the Protocol, provides additional protection by requiring that a person be considered a civilian in cases of doubt.

116. One ready answer to this charge may be found in the text accompanying *supra* notes 80-98, regarding the types of conflicts to which the Protocol is applicable, and the conditions

fact, this is the principal reason the United States' administration has refused to ratify the treaty.¹¹⁷

But there are many reasons why articles 43 and 44 cannot reasonably be construed as a shield for terrorists.¹¹⁸ First, article 43 of the Protocol would disqualify many—perhaps most—groups on the basis of its command link, internal disciplinary and international law compliance conditions.¹¹⁹

Second, terrorist groups that violate the rules of war do not go unpunished under the Protocol. The failure to distinguish oneself as a combatant carries with it the liability for prosecution under national law.¹²⁰ Willful attacks on civilians causing death or injury in violation of the Protocol (which would include most terrorist attacks) are considered grave breaches.¹²¹ An actual attack by a combat soldier while in the guise of a civilian is an act of perfidy.¹²²

Third, the Protocol was not intended to apply to random insurgencies or terrorist attacks. Historically, only two conflict situations

thereof. The floor requirements of being a recognized people exercising their right of self-determination under international law must be met, as do the requirements of committing by declaration to observe the terms of the Protocol. It is unlikely that terrorist groups will meet these requirements to acquire combatant status. Gasser, *supra* note 91, at 919. Protocol I applies to international armed conflicts and encompasses all members of the armed forces. It does not extend to terrorist acts or groups that are not committed to the provisions of Protocol I. If, for example, a group rejects humanitarian law on policy grounds, they would lose their privilege of combatant status. The group would "be prosecuted and punished according to national law." *Id.*

117. Feith, *supra* note 109, at 36; Sofaer, *Terrorism and the Law*, *supra* note 75, at 912. See also Levie, *supra* note 51, at 541. The reference in the Shultz letter, *supra* note 76, at IX, to terrorism as traditionally erasing the distinction between civilians and combatants is true as far as it goes, but it seems to have its hat on backwards, so to speak. Doesn't that refer to non-differentiation of military and civilian *targets of attack*, rather than the blending of guerrilla perpetrators into the populace? It is unclear how the idea is being used there.

118. *Supra* note 116 and references therein.

119. The construction of this requirement as conditional rather than merely advisory is not yet settled, but it seems the eminently more reasonable one when read with article 44 and the Protocol as a whole. The best argument in its favor is that it has the suggested effect of excluding terrorist groups from protection. This is persuasively stated in the important writing of the Legal Adviser to the Directorate, International Committee of the Red Cross, in Gasser, *supra* note 91, at 919.

120. Protocol I, *supra* note 1, art. 55, para. 4. Under Protocol I, it is for the first time explicitly provided that fighters not meeting the standards of distinguishing themselves from the civilian populace may be prosecuted under national law, subject only to due process and fair trial guarantees. *Id.*

121. Protocol I, *supra* note 1, art. 85. This means they are clearly war crimes, and persons committing them must be prosecuted or extradited to another jurisdiction. *Id.*

122. Protocol I, *supra* note 1, art. 37. Thus, it is a serious war crime for which the individual may be prosecuted. *Id.*

have prevented observance of the traditional principles. They are hostilities between irregulars and occupying forces, and wars of national liberation within the terms of the Protocol.¹²³ The Protocol does not provide undue protection for rebels in situations that would likely be of interest to the United States.

3. Military Considerations

It has also been argued that Protocol I places government military forces at a disadvantage by allowing guerrillas to use tactics forbidden to the military.¹²⁴ Irregulars may engage in clandestine tactics, including espionage, for example, while military forces cannot.¹²⁵ Yet the United States' own military practice does not support this assertion.¹²⁶ The protection guaranteed irregular forces under the Protocol coincides with the protection the United States' armed forces have previously afforded them.¹²⁷

One should also consider where the interests of the United States military actually lie. Protocol I makes it more difficult for an adversary to lawfully deny prisoner of war status on the basis of asserted violations.¹²⁸ Protocol I also preserves and emphasizes the principle that, in ordinary cases, responsibility for violations must be considered individually, rather than collectively.¹²⁹ In view of the United

123. See discussion *supra* in notes 80-98 regarding requisites of wars of national liberation. See also I.C.R.C. COMMENTARY, *supra* note 25, commentary to art. 44 at 529; Aldrich, *supra* note 36, at 707; Lysaght, *supra* note 39, at 359; Gasser, *supra* note 91, at 920.

124. Carnahan, *Additional Protocol I: A Military View*, 19 AKRON L. REV. 543, 545 (1986).

125. *Id.* Under article 39, the uniformed military is prevented from utilizing the emblems of the enemy or other nationals. By contrast, the guerrilla, who will usually have no emblems, may do as he wishes and will be criminally liable only if actually caught engaging in espionage (art. 46) or launching an attack without then distinguishing himself (art. 44).

126. Solf, *supra* note 109, at 262, 265. See also discussion *supra* in text accompanying notes 41-43.

127. It was the practice of the United States to afford captured Viet Cong prisoners of war treatment, although not prisoner of war status, during the Vietnam War. Rubin, *Terrorism, "Grave Breaches" and the 1977 Geneva Protocols, Proceedings, Am. Soc. Int'l L.* 192, 194 (1980). See also Solf, *supra* note 109, at 273 (noting that it was not, however, the United States' practice to afford such treatment to Viet Cong who committed terrorist acts, as would also be the case under the Protocol); Gasser, *supra* note 91, at 921, (citing United States Military Command, Vietnam, *Criteria for Classification and Disposition of Detainees*, Ann. A of Directive No. 381-46 (Dec. 1967), *reprinted in* 62 AM. J. INT'L L. 766 (1968)).

128. Protocol I, *supra* note 1, art. 44, para. 2. The United States was eager for such a provision, following its experience with captured soldiers and fliers in Korea and Vietnam. See Aldrich, *supra* note 36, at 704. See also text accompanying *supra* notes 21-23.

129. Protocol I, *supra* note 1, arts. 43-45. In their zeal to prevent ratification, the critics of the Protocol have used these articles out of context while ignoring the significant advantages to

States' practice with regard to its adversaries, the net effect of the Protocol would be an increase in the overall benefits to our military forces.

4. Problems of Definition and Application

Protocol I's definition regarding guerrilla and irregular forces is also said to be unallowably ambiguous. For example, what is meant by "deployment?"¹³⁰ If construed too narrowly under the Protocol, the definition will not sufficiently distinguish civilian from military personnel. Conversely, if read too broadly, it would unduly deny combatant and prisoner of war status to groups intended to be the object of protection. It is said that this makes the Protocol unworkable.¹³¹

However, the United States has preserved its right to interpret the term "deployment" in a manner which is reasonable and in accordance with its interests.¹³² Therefore, expressing an understanding of the term at the time of ratification should be sufficient to remove any ambiguity.¹³³ Because the government interprets and applies the Protocol in the context of an uprising, the irregular, not the captor, runs the risk of an unfavorable interpretation.¹³⁴

5. Compromise

The provisions of Protocol I concerning guerrillas and irregular forces were the product of settlement after contentious and multifarious negotiation. However, when read fairly, they do not provide pro-

United States forces. The Legal Advisor asserts that "[t]he effect is to preserve the rights of [terrorist] organizations to be treated as combatants, even if they routinely engage in acts of terror against civilians." Sofaer, *Terrorism and the Law*, 13th Sutzbacher Memorial Lecture, Columbia Law School, reprinted in *LAW AND CURRENT WORLD ISSUES* 152 (N. Wight ed. 1986).

130. Under art. 44, para. 3, a combatant is required to distinguish himself by carrying 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. Protocol I, *supra* note 1, art. 44, para. 3 (emphasis added).

131. See Cassese, *supra* note 34, at 474; Roberts, *supra* note 37, at 133.

132. During the Conference, differences of opinion existed as to the meaning of deployment. See 6 OFFICIAL RECORDS, *supra* note 29, at 453. However, at the time of signing, the United States expressed the opinion that deployment was to refer to "any movement towards a place from which an attack is to be launched." See The Notification of the U.S., cited in Gasser, *supra* note 91, at 22; see also 2 H. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 536 (1980).

133. See *infra* text accompanying note 269.

134. See Aldrich, *supra* note 36, at 707.

tection to terrorists. The Protocol actually increases protection *against* terrorism, and in practice, may be one of the most effective anti-terrorist measures yet adopted.¹³⁵ The main purpose of this part of Protocol I is to provide an incentive for irregular forces to comply with humanitarian law.¹³⁶ Regardless of increased difficulties for government authorities, Protocol I promises to alleviate cruelty and to increase the protection of the civilian population in times of strife.¹³⁷

C. Provisions Affecting Reprisals

The portions of Protocol I concerning the use of reprisals in war¹³⁸ pose a moral dilemma. Under the Protocol, the realm of hostile action which is permitted by way of reprisals has been diminished to near extinction, especially with regard to protecting civilians and civilian objects.¹³⁹ Whether this may be considered a step forward, or whether it effectively nullifies much of the protection afforded civilians under humanitarian law, is problematic.¹⁴⁰ The terms under which the Protocol should be ratified by the United States, in view of its limitations on the availability of reprisals as an instrument of warfare, deserve careful consideration.

Although Protocol I sets forth no blanket prohibition or reprisals, it contains numerous sections which, when read together, constitute an effective bar to all use of reprisals.¹⁴¹ Moreover, the taking of

135. Gasser argues that at the time of signing, the Director of the State Department's Office for Combating Terrorism considered Protocol I a positive development. Gasser, *supra* note 91, at 922-23.

136. Ambassador Aldrich believes that even though the sufficiency of the incentive is unknown the effort must be made because the previous legal regimen was so clearly self-defeating. Aldrich, *supra* note 36, at 704.

137. Cassese, *supra* note 34, at 469.

138. As discussed herein, "reprisals" refer to actions taken which would otherwise contravene the laws of war, but are permitted to be taken in order to compel one's enemy to comply with those laws. These acts are considered subject to requirements of humaneness, proportionality and military necessity. The subject of reprisals ordinarily is controversial insofar as reprisals affect civilians and civilian targets. Almond, *supra* note 82, at 198.

139. See *supra* text accompanying notes 63-66, and *infra* notes 141-43.

140. Some scholars believe a blanket prohibition would signal one's adversary that it could attack civilians and civilian objects with impunity, but only for the legal liabilities which would be incurred (and which could only be brought to bear, if ever, at war's end). See generally Bierzanek, *Reprisals as a Means of Enforcing the Laws of Warfare: The Old and New Law*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 232 (1979). The author was the Polish delegate to the 1974-1977 Geneva Diplomatic Conference.

141. Protocol I, *supra* note 1. In general, the operative passages are found in arts. 20 and 48-57. In particular, reprisal is mentioned in art. 20 (wounded, sick and shipwrecked); art. 51, para. 6 (civilian populations); art. 52, para. 1 (civilian objects); art. 53(c) (cultural objects and places of worship); art. 54, para. 4 (objects indispensable to the survival of the civilian popula-

reprisals may be a grave breach under the Protocol.¹⁴² These proscriptions mark a sharp departure from established military operational doctrines.¹⁴³

1. Need for Credible Threat of Reprisals as Deterrent

It has been cogently argued that the only real means for enforcement of the laws of war, at least in the absence of a multinationally-constituted tribunal, is the restraining effect of the credible threat of reprisals.¹⁴⁴ Thus, if the United States ratified Protocol I in its present form, it would be powerless to respond lawfully to a massive and abhorrent attack on its civilians and their property.¹⁴⁵ Protocol I also does not deal in any mandatory or specific way with excessively destructive weapons.¹⁴⁶ Thus, reprisals are necessary to control these instruments in order to be workable.¹⁴⁷ Further, the lack of available conventional reprisals to counter withering attacks upon the homeland might have the effect of lowering the threshold for the use of nuclear weapons.¹⁴⁸ These prospects are sufficient to give pause in any process of analysis.

A balanced view of the subject requires acknowledgment that the

tion); art. 55, para. 2 (natural environment); and art. 56, para. 4 (works and installations containing dangerous forces). *Id.*

142. This appears to be the clear import of Protocol I, *supra* note 1, art. 85, para. 3.

143. See generally Almond, *supra* note 82, and Bierzanek, *supra* note 140.

144. Authors on opposite sides of other issues seem to agree on this point. See Roberts, *supra* note 37, at 142; Aldrich, *supra* note 36, at 709.

145. See sources cited in *supra* note 144.

146. Protocol I, *supra* note 1, arts. 35-36. The Protocol did not include specific weapons proscriptions due to the delicate nature of the issue as a matter of negotiation, but was limited to a restatement of the principles of the Hague Regulations (*supra* note 6), which have become customary law. I.C.R.C. COMMENTARY, *supra* note 25, at xxxii; BOTHE, *supra* note 2, at 5-6, 194-201. The crucial point is whether the suffering caused by the particular device (poisoned weapons are often cited as examples) is needless, superfluous or manifestly disproportionate to the military advantage reasonably expected from its deployment. BOTHE, *supra* note 2, at 5-6. See also I.C.R.C., *Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts* (1973); Cassese, *Means of Warfare: The Traditional and the New Law*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 161 (1979). However, the follow-up efforts of the I.C.R.C. led ultimately to the adoption, under U.N. auspices, of the Convention on the Prohibition or Restriction of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects. U.N. Document A/CONF.95/15 of Oct. 27, 1980, reprinted in 19 INT'L LEGAL MATERIALS 1523 (1980). But the United States is not a party, and due to the proprietary interest nations have exhibited in developing new weapons, the Convention's widespread ratification seems a sadly remote prospect.

147. Almond, *supra* note 82, at 198.

148. Roberts, *supra* note 37, at 142.

use of reprisals is not without its critics.¹⁴⁹ In general, the opponents of reprisals base their contentions on two grounds: the dubious efficacy of reprisals, and their abuse as an excuse for the perpetration of acts which violate the laws of armed conflict.

Whether or not reprisals are effective can be argued without any conclusive resolution.¹⁵⁰ Commentators have collected examples in support of the notion that they are useful,¹⁵¹ but it is equally possible to think readily of instances in which they have not been.¹⁵² Commentators have also asserted that the threat of reprisals is less likely to deter an irrational belligerent,¹⁵³ but the one incident in which most agree the threat was effective involved just that.¹⁵⁴ That reprisals are subject to abuse as a justification for otherwise impermissible attacks is well documented and not subject to question.¹⁵⁵ But it may be supposed that the same justifications would still be asserted by one intent on attack. Thus, the danger of being held in violation of an additional humanitarian law norm (perhaps less serious than the wrongful attack itself) would not be an impediment.¹⁵⁶ The consequence is that the lines separating reprisal, retaliation and reciprocity have become blurred.

Those who criticize allowing reprisals to remain lawful have conceded that, as a last resort, reprisals are always available to a nation

149. "The doctrine of reprisals in its present somewhat obscure and undefined state provides the chief loophole for the evasion, violation and nullification of the laws of war." M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 408 (1959). See also G.I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* 99 (1958). These are cited in Roberts, *supra* note 37, at 142.

150. For a discussion of the history of reprisals, see Bierzanek, *supra* note 140, at 233.

151. See Roberts, *supra* note 37, at 139; Almond, *supra* note 82, at 199.

152. The World War II London Blitz, and the "war of cities" phase of the Iran-Iraq war (see Press Release No. 1479 (Geneva, Dec. 15, 1983) of the I.C.R.C., *Iran-Iraq: ICRC Appeals to Belligerents*"), both of which involve reprisals or claims to be acting by way of reprisal, show that mass attacks on civilian targets can either simply be ineffectual, or can go so far as to galvanize the resolve of the populace.

153. See Almond, *supra* note 82, at 194.

154. Commentators believe that Hitler was deterred from using gas as a weapon in World War II by virtue of the threat of retaliation in kind. This deterrent value was aided by Hitler's pathological fear of it from having been gassed in World War I. See 8 DEP'T. STATE BULL. 507 (June 12, 1943), reprinted in U.S. Naval War College, *International Law Documents* 1942, at 85-86 (1943).

155. See sources cited *supra* note 148.

156. An alternative is that substitutes for reprisals, in the form of retorsions or an improved international enforcement regimen, might be developed. See Roberts, *supra* note 37, at 142 (declaring retorsions unsuitable), and Bierzanek, *supra* note 140, at 244 (urging the development of a more effective system of prosecution and punishment). A discussion of these mechanisms is beyond the scope of this essay.

suffering heinous onslaught at the hands of an unscrupulous enemy.¹⁵⁷ While this is undoubtedly so, it places the entire matter into the realm of the *ad hoc*. It is difficult to imagine a worse situation in which trial and error determines whether reprisal action should or will be taken.

2. Reservation

The quandary resulting from the many conflicting variables on the issue of reprisals can only be addressed by a carefully drafted statement of reservation by the United States upon ratification.¹⁵⁸ This raises the threshold question of whether the prohibitions against reprisals contained in Protocol I may legally be made the subject of reservations.

Under the applicable law of treaties, reservations may not be permitted to a multilateral agreement if they are incompatible with its objects and purposes.¹⁵⁹ Based upon this proscription, it has been argued that no reservations may be made to the provisions in the Protocol concerning reprisals, although this is by no means a settled matter.¹⁶⁰ Thus, nations have several options. They may either accept the reservation or may object to it but allow the Protocol to enter into force between themselves and the United States absent the reservation. Also, they may proclaim that the Protocol is not considered a viable agreement insofar as any of them and the United States are concerned.¹⁶¹

If the reservation is allowed and the Protocol goes into effect, the

157. See Aldrich, *supra* note 36, at 710.

158. See *infra* text accompanying note 267 regarding the possible wording of a reservation.

159. Article 19, Vienna Convention on the Law of Treaties, U.N. Conf. on the Law of Treaties Off. Rec. 1st and 2d Sess., Documents of the Conference (U.N. Doc. A/Conf. 39/27), entered into force Jan. 27, 1980, at 289, also reprinted in 8 *Int'l Legal Materials* 679, 686-87 (1969) (hereinafter "Vienna Convention"). Although the United States has not formally acceded to the Vienna Convention, it has indicated the Convention is a correct statement of international law.

160. See Roberts, *supra* note 37, at 145; Bierzanek, *supra* note 140, at 255; and Aldrich, *supra* note 36, at 710. Each of the commentators discusses the suggestion that reservations might not be permitted. However, the latter two conclude that, while some states may lodge objections to reservations under the terms of arts. 20 and 21 of the Vienna Convention (thus excluding the reservation as between themselves and the United States, but allowing the Protocol otherwise to remain in force), they will not express the intent not to be bound thereby (as allowed by the same articles in the event of fundamental conflict regarding reservability), it being in the interests of smaller nations to have Protocol I in effect.

161. See Roberts, *supra* note 37, at 145; Bierzanek, *supra* note 140, at 255; and Aldrich, *supra* note 36, at 170.

limitations on reprisals contained in the 1949 Geneva Conventions would be binding upon the United States and all other parties.¹⁶² For our purposes, the conspicuous absence of any general prohibition upon reprisals against civilians and civilian targets is most material.¹⁶³

In addition, it would be advisable to draft a reservation that permits reprisals only under certain limited circumstances.¹⁶⁴ A broadly-drawn repudiation of any limitations upon reprisals would not serve the interests of the United States and would allow objecting states to avoid corresponding reciprocal limitations.¹⁶⁵

D. *Protection of Civilian Population and Objects*

Protocol I contains a number of provisions which are intended to increase the protection against military attack which is afforded to civilians and civilian property.¹⁶⁶ In general, these provisions are based upon two axioms which have evolved in the law of armed conflict: the principle of distinction¹⁶⁷ and the rule of proportionality.¹⁶⁸ Some of these provisions have been the subject of criticism, mostly from a military operational standpoint. These provisions will be considered and reasons why they should not cause the United States to

162. The Geneva Conventions remain in force notwithstanding the Protocols, and bind the United States under the rule of *pacta sunt servanda* and as customary law. Cf. Bierzanek, *supra* note 140, at 255. Under the Geneva Conventions, the following limitations upon reprisals are set forth: First Convention, art. 46 (wounded and sick); Second Convention, art. 47 (wounded, sick and shipwrecked); Third Convention, art. 13 (prisoners of war); Fourth Convention, art. 33 (protected persons, meaning persons who are, in case of a conflict or occupation, in the hands of a party of which they are not nationals).

163. *Id.*

164. *See infra* text accompanying notes 266-67.

165. It will be noted that under the objection procedure discussed *supra* in text accompanying notes 159-61, the provision to which the parties object is no longer in force as to either party, even if the remainder of the Protocol is enacted.

166. This is in addition to the prohibition upon reprisals discussed in the preceding section. For a useful summary and background to this portion of the Protocol, *see de Preux, Protection of the Civilian Populations against the Effects of Hostilities*, 25 INT'L REV. RED CROSS 153 (1985). The portions herein to be considered are principally those contained in arts. 48-58 of the Protocol.

167. This requires that at all times a distinction be made between the civilian population and combatants and between civilian objects and military objectives. *See generally* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 93 (R. Bernhardt ed. 1982). With regard to Protocol I, this distinction is codified in art. 48. *See also supra* text accompanying notes 109-114 for application of the principle in the context of guerrillas and irregular forces.

168. 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 96 (R. Bernhardt ed. 1982). Under this criterion, the incidental damage to civilian objects in a military attack must not be excessive in comparison to the military advantage to be gained. Its enactments in Protocol I are principally at art. 51, para. 5 and art. 57, para. 2.

refuse to ratify the Protocol will be offered.¹⁶⁹

1. Criticisms

It is first alleged that the portions of Protocol I dealing with the protection of civilians and civilian objects present excessive operational and interpretive problems.¹⁷⁰ Specifically, articles 50 (defining civilians and civilian population) and 52 (limiting attacks to military objectives) are said to invite second-guessing on the part of those who may wish to judge the conduct of field operations after the fact,¹⁷¹ and to inject a functionally unusable element of subjectivity into the determinations to be made.¹⁷² Moreover, the imprecision of the proportionality principle has been the source of serious concern to some observers. These persons have suggested that the respect of military professionals for humanitarian law might be undermined if they must abide by rules which cannot be implemented.¹⁷³

Arguments have also been advanced that the relief requirements of the Protocol are so onerous as to impede effective military operations.¹⁷⁴ Further, some critics have contended that Protocol I inadvisably proscribes the use of sieges and blockades, which previously were both legal and serviceable.¹⁷⁵

Protocol I places limitations upon the destruction of certain works and installations.¹⁷⁶ It has been argued that these limitations are too restrictive because they provide safe havens for the enemy due to the requirement that such potential targets enjoy special protection (unless it is virtually certain they are being used for military opera-

169. The treatment of these provisions, and the remaining substantive ones to be addressed *infra*, will be less in depth. The reason for this is that the denunciations of the Protocol with regard to them has been less widespread and fervent than with respect to the matters previously considered.

170. See Carnahan, *supra* note 124, at 548; Roberts, *supra* note 37, at 150.

171. Carnahan, *supra* note 124, at 544. Therein, the author notes that such determinations have previously remained beyond the scope of ordinary judicial review if made in good faith.

172. Cassese, *supra* note 146, at 161, 175.

173. Carnahan, *supra* note 124, at 549. See also Cassese, *supra* note 34, at 478 (quoting Baxter, *Criteria of the Prohibition of Weapons in International Law, Festschrift fur U. Scheuner, Berlin* at 46 (1973)), stating that insofar as the rule suggests an exact measure, it is "so far removed from reality as to be unthinkable."

174. Roberts, *supra* note 37, at 153 (calling the requirements of art. 70 "burdensome and self-defeating").

175. This reference is to art. 54 dealing with objects indispensable to the survival of the civilian population.

176. Protocol I, *supra* note 1, art. 56. That is, works and installations "containing dangerous forces" (such as dams, dikes and nuclear generating stations) which would wreak undue destruction if released by the force of an attack. *Id.*

tions).¹⁷⁷ Further, there is criticism that the language of these provisions improperly implies that objective criteria exist allowing determination by commanders,¹⁷⁸ and that the distinctions drawn with respect to different types of installations are so irrational as to interfere with operational morale.¹⁷⁹

2. Counterarguments

The objections set forth in the preceding paragraphs are easily countered. First, based on commentaries to Protocol I, it appears the Protocol demands only that commanders make responsible decisions. This means taking into account all information available to them at the time of decision. Judgments of their actions will not be based upon hindsight.¹⁸⁰ Second, although the rule of proportionality cannot be made precise, this is not a valid reason to eschew the duty to apply it as much as possible.¹⁸¹ The relief requirements of article 70 of the Protocol do impose some limited burdens upon military operations,¹⁸² but it is unlikely that anyone really considers sieges and blockades directed toward starvation of the enemy to be pivotal components of modern United States military doctrine.

Third, in response to objections of circumscribing attacks upon works and installations containing dangerous forces, it must be restated that such attacks are in fact permitted under article 56 *if* the

177. Roberts, *supra* note 37, at 155, referring to art. 56, para. 2.

178. In other words, a fiction would be created that there will be gauges whereby field commanders can determine when installations "may cause the release of dangerous forces" under art. 56. See Carnahan, *supra* note 124, at 547. This should be contrasted with the complaints noted above (*supra* notes 170-72 and accompanying text) regarding subjectivity, which refer to after-the-fact evaluations of field operations, in order to avoid concluding that a false dichotomy exists.

179. Carnahan, *supra* note 124, at 547.

180. BOTHE, *supra* note 2, at 246; Aldrich, *supra* note 36, at 713.

181. In Aldrich, *supra* note 36, at 713, the author notes that the "clearly separated and distinct" requirement of art. 51, para. 5 was designed to prevent World War II-type "target-area bombardment," not to immunize military objectives from attack simply because they are located in urban areas; the targets must be sufficiently separated so as to be susceptible to being attacked by the weapons used. See also discussion *infra* in text accompanying notes 185-87. As Ambassador Aldrich emphasizes, this requirement is no more subject to abuse than most other protective provisions.

182. They are subject to agreement of the parties concerned, and generally consist of allowance of relief consignments where the basic needs of the civilian populace cannot be met. The military can impose conditions of search and proper distribution. It is all but inconceivable that the United States should wish its forces to have the option to do otherwise, especially in view of the horrific results of recent past practices in locales such as Ethiopia and elsewhere. See, e.g., *Seemingly Endless War is Strangling Mozambique*, N.Y. Times, Jan. 25, 1988, at A1, col. 1.

objects are used to support military operations and no feasible alternative exists.¹⁸³ Thus, the difficulty with this provision seems to be essentially interpretive. However, in view of the criteria which are to be employed in evaluating the decision-making of operational leaders,¹⁸⁴ judgments in this area should be no more exacting than is normally the case in the arduous tasks of command.

Finally, and most significantly, the objections to Protocol I discussed in this section are handily countered by pointing out their acknowledged consistency with United States military doctrine and operational requirements. At the time of its drafting and signature, no military critic ever suggested that the strictures of Protocol I posed insuperable obstacles to military effectiveness.¹⁸⁵ And perhaps the most eloquent expression of the compatibility of the Protocol with the needs of the United States' military forces may be found in writings evaluating their activities. For example, it has been authoritatively and unequivocally stated that United States' bombardments can be, and have been, carried out in civilian urban areas consistently with the requirements of the Protocol.¹⁸⁶ Thus, established military doctrine coincides with the application of Protocol I in the safeguarding of civilians and civilian objects.¹⁸⁷

E. Other Interferences with Conduct of Military Operations

Two additional objections to Protocol I as it bears upon the activities of the United States military forces will briefly be considered.

1. Use of National Emblems

The Protocol contains a virtual prohibition upon the use of na-

183. Protocol I, *supra* note 1, art. 56. See also *supra* notes 176-77 and accompanying text.

184. See *supra* note 180 and accompanying text.

185. See *supra* notes 41-43 and accompanying text, in which the role of the United States military in the preparation of Protocol I is noted.

186. See Carnahan, 'Linebacker II' and Protocol I: *The Convergence of Law and Professionalism*, 31 AM. U.L. REV. 861 (1982).

187. In Carnahan, *supra* note 186, at 868, the following conclusion is stated:

The legal principles that appear in articles 51, 52 and 57 of [Protocol I] point military commanders and planners in the same direction as do such classic principles of war as objective, mass, and economy of force. [citing two U.S. Air Force publications] . . . In most cases, therefore, the military professional will respect the principles underlying articles 51, 52 and 57 simply as a matter of sound military judgment. *Thus, the articles of Protocol I serve not so much to limit military effectiveness as to provide legal reinforcement for professional military values.*

Id. (emphasis added).

tional emblems not one's own in the conduct of military actions.¹⁸⁸ This is a departure from previously-existing principles of law¹⁸⁹ and has been asserted to unduly impede such military conduct during warfare by United States forces.¹⁹⁰ However, the importance of the availability of such ruses in modern warfare may be subject to question.¹⁹¹ In a real sense, the objection is inconsistent with what American strategists would seem to require of irregular and guerrilla forces.¹⁹² A reservation could probably be made to this provision,¹⁹³ but before doing so, careful consideration should be given to balancing the needs of all classes of participants.

2. Environmental Damage

An interpretive difficulty has been raised with regard to the provisions of Protocol I which preserve the natural environment from harm.¹⁹⁴ It is argued that the Protocol employs too low a threshold of applicability, and that the measuring standard is too ambiguous and subject to differing interpretations.¹⁹⁵ But this rather strained interpretation of the Protocol's requirements is not supported by the negotiative history. In fact, that history makes it clear that even severe damage is not to be considered included unless it is both widespread and long-term, *i.e.* measurable in decades.¹⁹⁶ Moreover, the United States is party to another multilateral treaty which imposes stricter requirements in the same field.¹⁹⁷

188. Protocol I, *supra* note 1, art. 39. Art. 39 bars altogether the use of emblems (including uniforms) of neutral or other non-party states, and that of the adversary while engaging in attacks or otherwise in aid of military operations.

189. The United States has interpreted non-Protocol law to prohibit the use of enemy uniforms and insignia in combat, but not otherwise. *See Roberts, supra* note 37, at 148, and citations contained therein.

190. *Id.*

191. *See Aldrich, supra* note 36, at 712.

192. *See supra* text accompanying notes 111-12.

193. *See supra* notes 159-61 and accompanying text regarding the permissibility of reservations.

194. Protocol I, *supra* note 1. Art. 35, para. 3, prohibits the use of "*methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment.*" *Id.* (emphasis added).

195. *See Roberts, supra* note 37, at 146, in which it is asserted that the provision could *conceivably* subject a member to prosecution for war crimes if he should have known damage would occur, by virtue of the "is or may be expected" language.

196. BOTHE, *supra* note 2, at 348; *see also* other authorities cited in Aldrich, *supra* note 36, at 711.

197. Convention on the Prohibition of Military or Any other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614, proscribing damage which is *long-term or severe*. (emphasis added).

F. *Applicability to Weapons of Mass Destruction*

Concern has been expressed that Protocol I's provisions with respect to indiscriminate attacks and disproportionate civilian damage and loss might be construed to render culpable, as war crimes, the use of nuclear weapons.¹⁹⁸ Because the final version of the Protocol contains no express exclusion, it is argued that the use of tactical nuclear weapons is prohibited. Such a prohibition is problematic for those who consider the use of tactical nuclear weapons to be among the foundational underpinnings of United States policy.¹⁹⁹ It follows, under this view, that any attempt to reserve from this provision would carry with it the threat of rejection of the Protocol by other parties.²⁰⁰

This apprehension may, however, be allayed by examining the historical circumstances connected with the drafting and signing of the Protocol. Whatever the deficiencies in the stated *travaux préparatoire*,²⁰¹ the drafters and commentators are uniform in their expression that Protocol I does not encompass nuclear weapons.²⁰² Moreover, the United States and other nations²⁰³ stated their express understanding on this point prior to signature.²⁰⁴ If this understand-

198. The reference is generally to Protocol I, *supra* note 1, arts. 35 and 51.

199. Roberts, *supra* note 37, at 165 cogently makes this point with regard to the United States' "flexible response" doctrine in Western Europe.

200. *Id.* See also *supra* notes 159-61 and accompanying text regarding reservations and the law of treaties.

201. This refers to the preparatory work of a treaty or convention, and may include documents, memoranda, minutes of meetings, drafts and other expressions. The extent to which these may be considered in the interpretation process is almost always controversial. See L. McNAIR, *LAW OF TREATIES* 411 (1961); Glennon, *Interpreting 'Interpretation': The President, the Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U.C. DAVIS L. REV. 913 (1987).

202. See Aldrich, *supra* note 36, at 693, 718, in which the author demonstrates that this expression was in accordance with the negotiating history. In the introduction to the draft Protocols, the I.C.R.C. stated that problems regarding atomic, bacteriological and chemical warfare were the subjects of separate international agreements and negotiations by governments, and were not intended to be broached by the Protocols. I.C.R.C. COMMENTARY, *supra* note 25 at xxxii. See also International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of 12 August 1949* (1973), cited in BOTHE, *supra* note 2, at 188-189.

203. Included formally were France, Great Britain and Sweden; the U.S.S.R. is said to have agreed privately, and among major states only India expressed a view to the contrary. Aldrich, *supra* note 36, at 718; Roberts, *supra* note 37, at 164; Ciobanu, *supra* note 19, at 422. It is said that the People's Republic of China, having now come to regard itself as a first-tier nuclear power, also does not view the Protocol as applicable to nuclear devices. Farina, *The Attitude of the People's Republic of China*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 453 (1979).

204. At signature, the United States stated it understood the Protocols "are not intended to have an effect on, and do not prohibit, the use of nuclear weapons." 7 OFFICIAL RECORDS,

ing is further enumerated at ratification, the Protocol should not be subject to misinterpretation or ambiguity.²⁰⁵ Thus, the potential that the Protocol might be interpreted as criminalizing the use of nuclear weapons should not be considered a valid reason for the United States' refusal to ratify.

G. Additional Concerns

1. Mercenaries

The proscriptions upon mercenary activity contained in Protocol I are carefully drawn and absolute.²⁰⁶ Yet despite this careful drafting, arguments have been advanced against this portion of the Protocol. Such criticisms include the notion that the prohibition violates the principle of non-discrimination on the basis of motive, the lack of a humanitarian rationale, and assertions that being a mercenary has not previously been regarded as a violation of international law.²⁰⁷ The more serious concerns in this area relate to a balance of policy issues. First, the label "mercenary" has been used, and no doubt will continue to be used, as a justification for the denial of humanitarian protections.²⁰⁸ Second, it is argued that the criminalization of mercenaries, whatever its deterrent effect, could lead to a no-holds-barred attitude on the part of the war hirelings actually employed. Unfortunately, "mercenaries" may rely on these arguments and extend no better treatment to their prisoners of war than they themselves could

supra note 29, at 295, cited in Roberts, *supra* note 37, at 164, and Aldrich, *supra* note 36, at 718.

205. See Vienna Convention, *supra* note 159, arts. 31 and 32. See also Aldrich, *supra* note 36, at 718.

206. Art. 47 provides as follows:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the Conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Protocol I, *supra* note 1, art. 47.

207. See generally, Roberts, *supra* note 37, at 134.

208. Roberts, *supra* note 37, at 135.

expect.²⁰⁹

Conversely, it may be urged that this prohibition recognizes the sufferings of smaller and weaker nations at the hands of foreign mercenaries,²¹⁰ and that the Protocol does not infringe upon legitimate national interests.²¹¹ Any power, including the United States, could voluntarily agree to extend prisoner of war status to mercenaries. Indeed, objections to the criminalization of such behavior may indicate a stake in the perpetuation of mercenary practice. Furthermore, it is arguable that principles of non-discrimination should not be enlisted for the benefit of persons outside the system of humanitarian law.

Finally, on a more technical level, the strict conjunctive definition in the Protocol should suffice to protect legitimate foreign advisers and other military personnel.²¹² Therefore, the prohibition against mercenaries cannot be the basis of a principled attack on Protocol I.

2. Grave Breaches

As previously noted, certain passages in the Protocol dealing with grave breaches²¹³ appear politically-motivated and out of place in a humanitarian legal instrument.²¹⁴ This over-inclusion is said to be harmful, in that it dilutes the agreement and undermines respect for humanitarian law.²¹⁵ Nevertheless, Protocol I marks a badly needed expansion of the concept of grave breaches and the concomitant obligations of prosecution and cooperation.²¹⁶ Although some of the definitions, notably apartheid, seem inappropriate as the Protocol reaches general acceptance and is interpreted, these passages will come to be applied only in the context of war crimes.²¹⁷ Further, the United States cannot object to such definitions without appearing to

209. Ciobanu, *supra* note 19, at 414.

210. *See supra* text accompanying notes 34-36.

211. It has been suggested that the Protocol does not go far enough in this respect. Perhaps it should make the employment of mercenary forces by a party to a conflict a breach, or even a grave breach of humanitarian law.

212. *See Yusuf, Mercenaries in the Law of Armed Conflict*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 115 (1979). *See also* Aldrich, *supra* note 36, at 708.

213. These include apartheid by name, and "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" (an apparent reference to Jewish settlements). Protocol I, *supra* note 1, art. 85, para. 4.

214. *Id.* arts. 85-89, but especially the definitional provision of art. 85.

215. Roberts, *supra* note 37, at 162.

216. *See supra* text accompanying note 69; *see also* Rubin, *supra* note 127, at 195, and Remarks of F. Kalshoven, in *Proceedings*, AM. SOC. INT'L J. 210 (1980).

217. This is the view of Ambassador Aldrich, *supra* note 36, at 718.

favor abhorrent policies. In sum, these relatively minor problems are no reason to reject the Protocol *in toto*.

3. Impact Upon Military Justice

It has been suggested that certain portions of Protocol I undermine the force of military justice.²¹⁸ This suggestion derives from two articles, one of which would purportedly allow disobedience of orders on the basis of medical ethics,²¹⁹ and the other which would justify the refusal of attack orders.²²⁰ Although the strict wording of articles 16 and 57 may permit this idea, it is equally apparent that such a strained and literalistic reading is not a proper interpretation.²²¹ Rather, it seems that the thrust of article 16 is not to allow disobedience of orders, but instead to insulate healing arts practitioners from fear of military orders in ordinary medical practice. The article 57 provision is to cover situations in which a military group discovers after an attack is launched that such attack would violate the principle of proportionality.²²²

H. Concluding Comments Regarding Criticisms of Protocol I

The preceding section of this Article has recounted the major objections to Protocol I with some specificity, and has provided a definite response, particularly to the decision of the President not to submit it to the Senate for ratification. However, not all of the criticisms of the Protocol have been discussed above. Similarly, there are arguments which may be advanced to refute the criticisms which have not been developed herein. However, it is hoped that this rather laborious process will serve to highlight the parts of the Protocol which have generated the most controversy, in order to enable further discourse to be as exact and informed as possible. The central theme of this

218. Roberts, *supra* note 37, at 159.

219. *Id.* The reference is to art. 16, which, *inter alia*, prohibits the punishment of a person for carrying out activities in accordance with medical ethics, regardless of the beneficiaries.

220. *Id.* Here, it is said that art. 57, para. 2(b), which is not specifically directed to those persons in supervisory positions who plan attacks, would authorize the individual soldier to cancel or suspend an attack, based on the exercise of his own judgment.

221. According to art. 31 of the Vienna Convention, *supra* note 159, a treaty is to be interpreted in context, and in light of its object and purpose.

222. This is in accord with the interpretation found in Aldrich, *supra* note 36, at 716. In this connection, as regards the alleged change in the law regarding terminating attacks, there are already circumstances in which a soldier can, and indeed must, do so under the Uniform Code of Military Justice. See discussion in *United States v. Calley*, 22 C.M.A. 534, C.M. Rep. 19 (1973). Thus, to require a field commander to do so under an additional set of circumstances is no departure from established rules and procedures.

writing is that there are no disqualifying deficiencies in Protocol I which cannot be dealt with by reservation or other expression of condition, or by subsequent interpretation; therefore, there are no contentions which will withstand scrutiny that can be raised in opposition to its ratification.

The following section will set forth political and philosophical arguments (and less strictly legal ones), and general responses to such arguments.

III. GENERAL CONSIDERATIONS WHICH URGE UNITED STATES RATIFICATION OF PROTOCOL I

A. *Fundamental Infirmities in Contentions of Opponents*

The arguments of some antagonists to the Protocol are indistinguishable from those which are raised against humanitarian law, the rules of armed conflict, and international law in general.²²³ Perhaps the core idea underlying these arguments is the oft-stated notion that there can be no law where there is war.²²⁴

The only answer is that the belief in such a thing as the law of war requires *a priori* acceptance of the idea that wars are limited in character in a civilized world. It follows from this premise that war must be confined to its objectives, leading to such essential principles as economy of force and war as an expression of national policy.²²⁵ Another notion requiring acceptance is that nations will, to greater (and unfortunately lesser) degrees, prosecute wars with the purposes of humanitarian law and the precepts of civilized behavioral norms in mind.²²⁶

223. This facet of the arguments must be divined from the interstices of some of them. This is not meant to suggest that the bulk of the criticisms are disingenuous. However, aspects of some of them seem contrived and procrustean, and express an uneasiness with the whole notion that there can be law in this realm at all.

224. "[I]f international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law . . ." Lauterpach, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L 360, 382 (1952). "Silent enim leges iner arma," Cicero, *Pro Milone* 4.11 (A. Clark, ed., Oxford Classical Text 1901) (In time of war, the law is silent). Under the doctrine of Nazi Germany, the concept *kriegsraison* meant that any method is permissible if necessary to success, notwithstanding laws to the contrary. O'Brien, *The Meaning of Military Necessity in International Law*, 1 WORLD POLITY 119 (1957). See also, Roberts, *supra* note 37, at 110-111. As will be noted, that article's criticisms were much more specific and incisive than any of these citations would, without more, indicate.

225. War is "the continuation of policy by other means." C. VON CLAUSEWITZ, ON WAR 87 (1976).

226. Each multilateral agreement on the law of war expressly dictates that it be supple-

Numerous polemics against the Protocol are transparently interest-based. From a political standpoint, several interests may readily be identified. First, Protocol I, with its humanitarian law underpinnings (which are to many somewhat cabalistic and tend to run contrary to much of conventional popular wisdom), may be an attractive target of opportunity for those who wish to be seen as "tough on terrorism."²²⁷ Such thinking may make it useful to adopt a posture of distrust of international law and organizations in general. This is particularly true insofar as such regimes are perceived to give sway to third world countries at the expense of the United States.²²⁸

The American military establishment, despite its regard for the observance of the laws of war,²²⁹ may reflexively resist any attempted imposition of strictures upon its latitude of operation.²³⁰ In the case of Protocol I, this is ironic in the sense that certain of its provisions actually operate in favor of the United States armed forces.²³¹

The hyperbolic emphasis upon the deficiencies of the Protocol by the foreign and military policymakers of the world's leading government has several undesired consequences, not the least of which is the fostering of skepticism concerning humanitarian law. An objective of this article is to demonstrate that Protocol I advances the United States' interests as well as humanitarian law.

B. Continuing the Progression of the Law of Armed Conflict and Humanitarian Law

Protocol I represents a significant expansion of the coverage of

mented by "the principles of humanity and the dictates of public conscience." See, e.g., the *de Martens* clause at art. 1 of Protocol I, *supra* note 1.

227. For examples of works which support this hypothesis, see Sofaer, *Terrorism and the Law*, *supra* note 75; Schultz Letter, *supra* note 76.

228. Letter of Transmittal, *supra* note 77; Feith, *supra* note 109. This interest may lie at the root of the forensic mixing of "terrorism" with wars of national liberation, and the assertion that the blurring of the distinction between civilians and military personnel is the object of terrorism and is aided by the Protocol. This line of argument, while suggestively clever, when considered in light of what the Protocol actually provides is a specious canard which glosses over important distinctions.

229. See Aldrich, *supra* note 36, at 710-20.

230. It is established United States institutional policy to abide by the laws of war. See Department of Defense Directive 5100.77, July 10, 1979, Subject: Law of War Program. Thirty-six members of the U.S. Army were tried by court martial for violations during the Vietnam War. See G. PRUGH, *LAW AT WAR: VIETNAM 1964-1973* (1975). See also Carnahan, *supra* note 124, at 543.

231. This should not be allowed to detract from the quality of advocacy contained in Roberts, *supra* note 37, and Carnahan, *supra* note 124, both of which were written by military members.

humanitarian law and the laws of war, both with respect to their coverage *ratione personae* and *ratione materiae*.²³² Such a step forward should be welcomed as an opportunity to inspire wider adherence to, and reaffirmation of, those legal precepts, particularly with reference to the current politico-military environment.

It has been asserted that if some, but not all, nations ratify the Protocol, the community of nations will be weakened by controversy.²³³ This could lead to a debilitating effect upon current law, and difficulties might arise with respect to allies and their operations.²³⁴ But is this proverbial two-edged sword an argument against ratification when the larger picture is considered? The aims of humanitarian law are best served when as many nations as possible adhere to such law.

The defects which do exist in Protocol I are the direct result of obtaining as broad a consensus as possible among the traditional and evolving inhabitants of the world community.²³⁵ This explains some of its language, which was deliberately left vague in places.²³⁶ More specifically, it has been averred that the failure to adapt the Geneva Conventions to the realities of guerrilla warfare and the use of irregular forces would have meant the failure of the Conference.²³⁷ Relevant inquiries which remain are the extent to which humanitarian law

232. It will be recalled that under the Protocol, protection can no longer be denied to captured Americans on the basis of alleged violations such as over-inclusive bombings and the like. See *supra* note 59 and accompanying text, and notes 128-129 and accompanying text. In addition, protection is now afforded to United States medical evacuation aircraft. See *supra* notes 52-53 and accompanying text. Furthermore, arts. 35 and 36, which do not, in the last analysis, impose specific limits on weaponry, and art. 85, which does not make any related offense a grave breach, operate very much to the advantage of the more established and larger powers. Cassese, *supra* note 34, at 474. Cf. Farina, *supra* note 203, at 457, in which he argues that the Geneva Conventions and Protocols are "merely a humanitarian cloak upon perpetuation of a mechanism for continued aggression by the two superpowers."

233. This refers to coverage by reason of the person, and coverage by reason of the subject matter. W. SHUMAKER & G. LONGSDORF, *THE CYCLOPEDIA LAW DICTIONARY* (3d ed. 1940). The terms are often used concurrently with respect to humanitarian law because the law's coverage is defined with regard both to type of conflict and type of person. Art. 1 defines the material field of application, and art. 2, the personal field of application. Protocol I, *supra* note 1, arts. 1-2.

234. Roberts, *supra* note 37, at 170 (citing R. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L. J. 1, 25 (1975)).

235. *Id.*

236. See Aldrich, *supra* note 36, at 719.

237. See DeSaussure, *supra* note 28, at 522.

and the law of warfare are to be transformed by the Protocol,²³⁸ and where the real interests of the United States lie.

C. *The United States Interests*

The primary interest of the United States in this context²³⁹ is that of world leadership. This leadership role has been manifest in numerous settings, including American civilian and military participation in the drafting of the Protocol at the Diplomatic Conference.²⁴⁰ The United States' pre-eminence has been nowhere more evident than in its overall and generally continuous support for the growth and observance of international law norms. The ratification of the Protocol, even with appropriate alterations to safeguard its interests, would be an action worthy of such leadership.

The United States has an interest in being perceived as consistent and dependable in its policy formulations—in a current phrase, a “reliable partner.”²⁴¹ But this desire would better be served by an approach which affords the policy actions of previous administrations a strong presumption of rightness, rather than a complete disavowal and reversal, jingoistic in tone and connotative of a “shift in regime” in a lesser nation.

The United States also has an interest, as do all countries, in fostering the development and observance of the postulates of humanitarian law. Therefore, it follows that it would wish to do everything possible to convince other countries to observe the same norms. The critics of Protocol I (and the laws of armed conflict in general) have offered no alternatives which will serve our national needs—there can be no return to simpler answers in the modern era of arms and worldwide diversity of aspiration—and there is no global custom nor law

238. Gasser, *A Brief Analysis of the 1977 Geneva Protocols*, 19 AKRON L. REV. 525, 528 (1986).

239. In this connection, it bears mention that many of the provisions of Protocol I are considered to represent merely a codification of customary international law, and are thus binding regardless of whether a nation is a party. See Penna, *Customary International Law and Protocol I: An Analysis of Some Provisions*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET 201 (1984), in which a case for inclusion of a large number of such provisions as customary law is made. See also Aldrich, *supra* note 36, at 719; Carnahan, *supra* note 124, at 548; Ciobanu, *supra* note 19, at 411.

240. This is in addition to the substantial benefits which would be conferred upon United States' military forces by the Protocol. See *supra* notes 22-24 and accompanying text, and *supra* note 231.

241. See *supra* text accompanying notes 41-43. As previously noted, the chief United States' delegate to the Convention has urged ratification. See Aldrich, *supra* note 36, at 720.

nor any other justification which will support their worst-case analyses.²⁴²

Policies which lend support to the true interests of the United States should be contrasted with what the unseemly alternative may be: the active maintenance of a posture of protest and expressed unwillingness to be bound by evolving humanitarian law.²⁴³

D. Reservations, Conditions, and Interpretation

Another consideration which strongly supports the United States' ratification of Protocol I is the ability to state reservations and other qualifying conditions as part of the ratification process.²⁴⁴ There is nothing in its provisions which cannot be addressed to satisfy all legitimate concerns.²⁴⁵

In a related vein, it is critical to bear in mind that the interpretation of the Protocol will also permit the United States sufficient lati-

242. This expression has lately been used to denote the approach which must be taken if the United States is to avoid policy damage which occurs if it is unable to respond adequately to the needs of its allies, with resulting losses in terms of economic, diplomatic, and military ties. For example, this expression, "reliable partner," was articulated by President Reagan upon taking office in connection with the administration's intended loosening of restrictions upon nuclear exports. Statement on Nuclear Nonproliferation, contained in Department of State, *Bureau of Public Affairs*, Current Pub. No. 303 (July 16, 1981). Regarding the United States as a supplier of conventional arms, see Stevenson, *No Longer the Only Game in Town*, N.Y. Times, Dec. 4, 1988, § 3, at 1, col. 2.

243. In Gasser, *supra* note 91, at 921, this is eloquently put as follows:

It is not helpful for the future of humanitarian law for the United States Government to be on record as adhering to such an interpretation of an extremely important and delicate rule of Protocol I [referring to the "terrorism" argument as applied to the combatant status of irregulars]. A treaty should be understood in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [Citation omitted] . . . *The worst case approach is not an appropriate way to understand an international agreement as delicate as a humanitarian law treaty.*

Id. (emphasis added).

244. A treaty which creates norms can become, at a point when it reaches sufficient widespread acceptance, customary international law. See, e.g., North Sea Continental Shelf Cases (Fed. Rep. of Ger. v. Den. & Neth.), 1969 I.C.J. 3, at 28-29, 36-45; see also Vienna Convention, *supra* note 159, art. 38. In order to avoid thereby being bound even though not a party, a nation must indicate its non-acquiescence by maintaining what is sometimes called "persistent objector" status. See Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985); RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment d (1987); See also M. SHAW, INTERNATIONAL LAW 74-76, 80 (1986); MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115 (1957).

245. The subject of conditions and reservations is developed further *infra* notes 258-274 and accompanying text.

tude to serve its national interests.²⁴⁶ International law, humanitarian law, and law in general are not a gnostic catalogue of aphorisms which can be mechanically applied. Interpretation has been and will always be required.²⁴⁷ This is especially so in view of the absence of any entity with final arbitral authority concerning observance of humanitarian legal norms.²⁴⁸

Of course, interpretation of a treaty must always be done in good faith consistent with its objectives.²⁴⁹ However, such criteria will allow the United States to construe any ambiguous portions of the Protocol in a way which is advantageous to itself, and to the orderly growth and development of the law.

E. *A Victory for the Talismanic Terrorist?*

One of the facets of the *modus operandi* of the terrorist is his or her ability to blend with the surroundings and, except for the infliction of brutal violence, to be indefinite and unidentifiable.²⁵⁰ In a similar way, despite the plague of terrorism which has been visited upon the postwar world, the term "terrorist" has resisted definition outside of a specific context. Today it remains a vague term whose application varies with the circumstances.

It is well known that "terrorism" is much used for nefarious purposes. In many cases, like the concept of "reprisal," it has become a

246. See also Aldrich, *supra* note 36, at 719; See also *supra* notes 159-161 and accompanying text.

247. In the specific context of terrorism, for example, the United States could by interpretation simply take the position that a given act was merely an isolated instance of criminality and below the threshold of applicability of Protocol I.

248. According to RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 244, § 326, the President "has the authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other nations." *Id.* (emphasis added).

249. Witness the interpretation of many Israelis that the Fourth Geneva Convention (*supra* note 10) is inapplicable to the West Bank and Gaza because Israel is not occupying the territory of another country, as contemplated by art. 2 of the Convention. See Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968). Indeed, it is unfortunate that one of the principal difficulties faced by international humanitarian law has been the refusal of states to apply the positive law in cases where it should be relevant, prompting the observation the "[t]he first line of defense against international humanitarian law is to deny that it applies at all." Baxter, *Some Existing Problems of Humanitarian Law*, in *The Concept of International Armed Conflict: Further Outlook I* (Proceedings of the International Symposium in Humanitarian Law, Brussels 1974), quoted in Meron, *supra* note 18, at 598.

250. Vienna Convention, *supra* note 159, art. 31.

device to justify all means of pernicious actions and policies.²⁵¹ Moreover, the over-utilization of the concept has the long-term effect of reducing its forensic vitality where it might properly be employed, even if a temporary political advantage may be won.²⁵²

Insofar as Protocol I is concerned, "real" terrorists may have achieved a major triumph, deplorably and ironically based upon the misapplication of the very concept of "terrorism" itself, by the refusal of the United States to ratify it under the same rubric.²⁵³ Protocol I, which not only contains numerous anti-terrorism provisions²⁵⁴ but obligates would-be combatants to commit themselves to observe humanitarian norms in order to obtain protection under the laws of war,²⁵⁵ can be viewed as an important weapon against terrorism. Conversely, its non-acceptance would perversely nourish a climate in which insurrectionist groups may claim to occupy a moral plane equivalent to governments—if they are denied the means to obtain protection, then they may credibly say they have no moral, much less legal, obligation to attempt or equip themselves to follow the rules of the law of armed conflict. In addition, there would still be no legal means to differentiate true terrorists from those national liberation movements which might rightly argue they should be entitled to receive the protection of humanitarian law.

In these ways, the absence of clear legal norms would foster an

251. See generally Cooper, *Terrorism and the Intelligence Function*, in INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 287 (1978); Baxter, *The Geneva Conventions of 1949 and Wars of National Liberation*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 120 (1975).

252. Some sad illustrations include the hanging of Zimbabwean rebel forces by the Rhodesian government prior to its 1980 downfall, as noted in Austin, *supra* note 96, at 180, and the adoption of a "Prevention of Terrorism Act" in 1979 by the government of Sri Lanka, permitting lengthy incommunicado detention without charge or meaningful judicial review. In addition, the Act permitted the use in court of confessions made to police officers unless the defendant could prove duress, and the significant easing of restrictions upon the disposal of dead bodies and requirements to hold inquests. Report of Asia Watch Committee, *Cycles of Violence: Human Rights in Sri Lanka Since the Indo-Sri Lanka Agreement* at 24 (1987). The government of Chile defined terrorism so broadly in 1979 legislation that strikes and public protests could be included. *Human Rights Interest Newsletter*, June-August 1979 at 75, cited in R. FRIEDLANDER, *TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL* 184 (1983).

253. The United States' explanation of its 1986 bombing of Libya continues to be justified as a response to instances of state-sponsored terrorism causing injury to United States' nationals, notwithstanding the absence of any discernible connection between the odious Qaddafi regime and the terrorist attacks which supposedly prompted the air raid.

254. See *supra* notes 116-23 and 135 and accompanying text.

255. See *supra* notes 72-78 and 109-17 and accompanying text.

atmosphere of moral anarchy in which the abhorrent practices of terrorism are abetted rather than obstructed.

IV. RESERVATION AND CONDITIONS: A SUGGESTED APPROACH TO RATIFICATION

In addition to the decision between ratification and non-ratification of Protocol I, a wide variety of alternatives exist for the United States under the law and accepted practice concerning treaties.²⁵⁶ The United States may select among them by determining the qualifying statements to which its ratification is subject and communicating them at the time of ratification. Thus, the portions of the Protocol which are considered objectionable or problematic may be tailored to meet the United States' interests.²⁵⁷

A. Identifying the Necessary Qualifiers

In view of their pivotal role in delineating the exact parameters of the United States' commitments under Protocol I, the expressions which qualify the obligations of the United States, whether by reservation or other condition, must be carefully and deliberately selected.²⁵⁸

256. See *supra* notes 49-50 and 92-93 and accompanying text.

257. See *supra* notes 158-61 and accompanying text regarding reservations to Protocol I and the potential limitations thereon. The United States will presumably take the position that reservations and other expressions of condition to the Protocol are allowed with regard to the provision it wishes to modify.

In general, a "reservation" is a unilateral statement by a contracting party which purports to exclude or modify the terms of a treaty of the legal effect of certain provisions. See 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 177 (1970). On the other hand, an "understanding" is a statement which interprets or clarifies the obligation undertaken by a party to a treaty. A "declaration" is a formal statement, explanation or clarification made by a party concerning its opinion or intentions relating to issues raised by the treaty. Because of the obvious potential for overlap in coverage of these two definitions and the general confusion which has arisen out of the imprecise use of the terms, it has been suggested that the better practice is to refer simply to *conditions* which must be communicated to other parties to the treaty, and which may or may not require their agreement or give rise to a right of objection under arts. 19-23 of the Vienna Convention (*supra* note 159). See Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257, 263-66 (1983). See also Note, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. J. INT'L L. 71 (1982). Herein, the use of the term "reservation" will be preserved because it is used in the Vienna Convention, but "condition" will be used to refer to qualifying statements of other kinds.

258. The details of the process could be, and it is hoped will be, the subject of an extensive analytical writing when the proceedings of the Senate concerning ratification are chronicled, if not earlier. However, such details are well beyond the scope of this particular effort, which is intended as merely introductory.

First and foremost, it appears advisable to include a reservation to the ratification of Protocol I with respect to the subject of reprisals.²⁵⁹ This reservation would seem prudent with regard to articles 50 and 51 of the Protocol, which deal with the general protection of the civilian population and civilian objects. It is less clear whether the same would be true concerning articles 53 (cultural objects and places of worship) and 54 (objects indispensable to the survival of the civilian population).²⁶⁰

Next, a condition would be in order in the form of a restatement of the United States' understanding expressed at the signing of the Protocol. This statement could set forth the definition of "military deployment" under article 44 imposing an obligation on guerrillas to carry their arms openly.²⁶¹ This would represent a workable adjustment of the competing concerns of the operational needs of irregular forces on the one hand and protection of civilian population and military security on the other.²⁶² A similar condition concerning the inapplicability of Protocol I to nuclear weapons should likewise be expressed.²⁶³

Many other conditions may be imagined and perhaps ought to be considered. Those discussed are intended to furnish clarification, and if consistently and carefully drafted, will serve as the beginning of a jurisprudence of interpretation for the future. However, caution is equally well advised for at least two reasons. First, it is impractical because of the sheer effort involved to arrive at anything resembling a *numerus clausus* of interpretive guides. Second, and more important, it may be unwise to express prematurely one's reading of Protocol provisions with particularity on too many specific points, in case a current judgment is later deemed ill-conceived.²⁶⁴ It is inevitable that opinions will vary regarding the number and character of condi-

259. See *supra* notes 138-65 and accompanying text.

260. This distinction is noted in Aldrich, *supra* note 36, at 709. The reason is, of course, that under art. 21 of the Vienna Convention and established treaty practice, if a reservation is objected to by another party but the agreement is nevertheless considered as entering into force between them, *neither* party is bound with regard to the subject matter of the reservation. See *supra* notes 159-62 and accompanying text.

261. See Aldrich, *supra* note 36, at 705; see also *supra* note 132 and accompanying text regarding the United States' expression of understanding upon signing concerning the term.

262. See *supra* notes 108-37 and accompanying text.

263. See *supra* notes 198-205 and accompanying text regarding the reasons for this condition, and the United States' statement on the point at signature.

264. This is perhaps too much the common-lawyer's rendering of the *gestalt* of the Geneva Conventions and Protocols, but there does not appear to be any reason to renounce the flexibility of subsequent explication. Such would seem the preferred approach in light of the momen-

tions,²⁶⁵ and this must be resolved in the process of the debate.

B. *Crafting the Statements of Reservation and Condition*

It is of paramount importance that each reservation or condition be the result of careful legal craftsmanship. In addition to reasons already discussed, it must be remembered that once the Protocol is ratified, it cannot be transformed by unilateral acts of legislation.²⁶⁶ The same considerations dictate that economy of expression be employed in drafting the provisions. This will allow flexibility in subsequent interpretation of obligations in those areas where it is "safe" to do so.

The reservation on reprisals should be drafted in a manner which directly addresses the reasoned apprehensions of the United States.²⁶⁷ The reservation should require that warning be provided to the opposing power before reprisals are initiated and the adversary must be given the opportunity to cease wrongdoing. In addition, both humanitarian and military purposes are served when reprisals are limited by the principle of proportionality. Above all, the reservation must insure that decisions concerning reprisals are taken seriously. A form of such reservation might be the following:

RESERVATION CONCERNING REPRISALS

In the event that an opposing party to the United States commits one or more serious, manifest and deliberate breaches of this agreement, and the United States determines it is necessary to act to compel said party to rectify its breach, the United States may take measures to repress the breaches and induce the party to im-

tous role of interpretation in humanitarian law application. *See supra* notes 132-34 and 222, and accompanying text.

265. For example, see the ten declaratory statements contained in the Text of the United Kingdom Declaration on Signature of the 1977 Geneva Protocols, *reprinted in* Wortley, *supra* note 29, at 190. An example of an ill-advised statement of condition might be one to the effect that the practice of apartheid shall not be considered a grave breach under art. 85 of the Protocol unless connected to other war crimes; although it is the best explication, such an expression would cause profound damage from an image standpoint while serving no interest of the United States. Therefore the matter is best left for subsequent interpretation.

266. If ratified, Protocol I would be a *self-executing* treaty. This means it would require no enabling legislation. Whether an international agreement is self-executing under the United States' practice depends upon the type of treaty concerned and the intent of the United States regarding it. For a discussion and examples, *see* T. FRANCK & M. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 274 (1987). Of course, even if it were not self-executing, any subsequent act by the United States to alter its terms, by legislation or otherwise, would be a breach of the Protocol.

267. *See supra* text accompanying notes 138-65.

mediately return to compliance with the conditions of this agreement.

The measures described in the preceding paragraph may be taken only upon the following conditions:

(1) That the breaching party is given specific prior warning that such measures will be taken if the breaches are continued or resumed, or all available measures must be taken to attempt such warning (this subparagraph shall not apply to a single breach which justifies the taking of such measures);

(2) That such measures will be implemented only when other efforts to induce the breaching party to comply have failed or are not feasible, and no other means exist to end such breaches; and

(3) That the decision to take reprisal action will be made by the highest echelon of United States command responsible for strategic decisions in the conduct of military operations.

The reprisal shall at all times be proportionate to the breach or breaches committed by the said party. Nothing herein contained shall be considered or construed to prevent the taking of such measures by the United States in the event of a single such breach, subject to the limitation contained in this paragraph.

The application of the foregoing shall be in accordance with the purposes of this agreement, the principles of humanitarian law, and the dictates of public conscience.²⁶⁸

The following may be considered as an expression of condition with respect to article 44 of the Protocol concerning irregular forces:²⁶⁹

With respect to paragraph 3 of article 44 of this agreement, the United States intends and understands that "deployment" shall include any movement toward a place from which an attack is to be launched.²⁷⁰

Similarly, the following expression should be added concerning the non-applicability of the Protocol to weapons of mass destruction:²⁷¹

268. Portions of the language of the reservation are borrowed from a proposal for amendment by the French delegation to the Diplomatic Conference (*see supra* notes 25-43 and accompanying text), made on Apr. 22, 1976, contained in 3 OFFICIAL RECORDS, *supra* note 29, at 324.

269. *See supra* notes 108-15 and 124-34 and accompanying text.

270. This is a restatement of the United States' declaration upon signing; *see supra* note 132 and accompanying text.

271. *See supra* notes 198-205 and accompanying text.

This agreement is not intended to have any effect on, nor to regulate nor prohibit, the use of nuclear weapons.²⁷²

Thus, it appears that the necessary reservation and conditions may be readily identified and drawn, based upon the efforts of those present at the Conference, as reflected in its history. These relatively simple measures should allow the needed safeguarding of the United States' interests to permit ratification of Protocol I.

V. CONCLUSION

As the United States has a proud history of world leadership regarding observance of international law norms, its lawyers have an equal tradition of fealty to sponsorship of policies which serve the common good. Hopefully, as leaders and advocates, lawyer-citizens of the United States will work toward advancing humanitarian law as represented by Protocol I to the Geneva Conventions.

Although some people may not regard ratification of Protocol I as compelling, its urgency is manifest. First, the benefits which will be afforded to participants in armed conflict (the vast majority of whom are not volunteers) and especially those who serve the United States, are palpable. The Geneva Conventions represented a paradigmatic milestone in this regard and Protocol I is generally a worthy adaptation to the demands of the present era. Second, Protocol I calls upon belligerents to afford much greater respect to the humanitarian rights of those civilians entrapped in warfare. If observed, it can only have a profoundly meliorative effect upon their situation. Third, it is equally possible to foretell the outcome of failure to develop relevant humanitarian law norms by reference to recent American experience in Vietnam and to the conflicts which erupt with dismaying regularity over the world. Unless rights and responsibilities are better defined, egregious abuses will continue with impunity. Moreover, in the absence of standards against which the conduct of those in conflict may be measured, the post-war order is bound to rest upon repeated and endless cycles of retributive mistreatment and oppression.

As regards the substance of the Protocol itself, it should be apparent from the foregoing that any perceived imperfections, from the standpoint of the legitimate national interests of the United States, can be rectified through the process of interpretation or with statements of condition and reservation upon ratification. An approach

272. This restates the United States' declaration on signing, *supra* note 204.

grounded upon a combination of interpretation and reservation will allow the United States to reassert and maintain its position of world leadership in international and humanitarian law. The result would also supply the normative framework whereby protection may be afforded in greater measure to soldier and citizen alike. In contrast, the objections against ratification, other than those which can be met by condition and reservation, are not well founded. In reality, these objections reflect in some degree a systemic interest in the regressive subversion of international humanitarian law.

The Reagan administration did not seek ratification of Protocol I or give it the attention it deserves. It is commended to every lawyer and citizen to urge President Bush to complete the task which began at the Geneva Diplomatic Conference in 1977. It is hoped that this Article will serve as a portal to further understanding of the Protocol and what its ratification means to the United States. The development of humanitarian law norms for the protection of our military personnel deserves the same dedication and diligence those persons have displayed in their discharge of duty to the nation. Ratification of Protocol I will also signify that the United States has been at the forefront of perpetuating good in the face of evil, which provides the impetus toward decency and civilization.

Perhaps it is appropriate to conclude with what remains the first inquiry—whether it is possible to have rules of law which offer meaningful protection to the rights of persons in the context of warfare. The teachings of history may be understood for or against the proposition, but the continuing endeavors of scholars and statesmen to refine and fortify humanitarian norms argue forcefully that it is obligatory to make the attempt. Only then will the regimen be in place to provide a necessary, if not yet sufficient, condition to the improvement of the plight of those involved in armed conflict. The ultimate hope is that along the road toward greater observance, some may actually be given help.

