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Identifying Customary International Law of War in Protocol I: A Proposed Restatement

L. LYNN HOGUE*

“While I was [working as a hospital volunteer], I saw the Iraqi soldiers come into the hospital with guns. They took the babies out of the incubators, took the incubators and left the children to die on the cold floor. It was horrifying.”¹

I. INTRODUCTION

Eyewitness accounts of Iraqi atrocities in the wake of the invasion of Kuwait are sober reminders of the suffering caused by war and the important role that the law of war should play in restraining military excesses against noncombatants. Two important modifications to the law of war—Protocols I and II Additional to the 1949 Geneva Conventions²—promise to significantly affect United States operational law governing United States military operations overseas,³ as well as the conduct of the armed forces of other states. The protocols’

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The opinions and conclusions expressed herein are those of the author and do not necessarily represent the view of the Judge Advocate General’s School, the United States Army, or any other governmental agency.

1. *Reports of Iraqi Atrocities in Kuwait: Hearing of the Congressional Human Rights Caucus Comm.*, 101st Cong., 2d Sess. 26 (1990) (testimony of Nayirah (an alias)) [hereinafter *Iraqi Atrocities*].

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

3. For a definition of operational law (“OPLAW”) see Graham, *Operational Law—A*

impact is not, however, dependent on ratification by the United States. Indeed, after review by the Departments of Defense and State, President Reagan sought Senate ratification of Protocol II but not Protocol I.⁴

Protocol II, when ratified,⁵ will make important alterations in the Geneva Conventions.⁶ Protocol I will influence the law of war to the extent that some of its provisions have, apart from any formal treaty process, become part of customary international law.⁷ This Article

Concept Comes of Age, ARMY LAW., July 1987, at 9. See also Barnes, *Operational Law, Special Operations and Reserve Support*, ARMY LAW., Dec. 1984, at 1.

OPLAW advisors must be familiar with both Protocols in order to properly advise commanders and assist them in carrying out their law of war responsibilities. "The operational law judge advocate must ensure that all [Rules of Engagement] are consistent with domestic law, as well as the law of war, and are sensible and easy to understand." Coleman, *Operational Law and Contingency Planning at XVIII Airborne Corps*, ARMY LAW., Mar. 1988, at 19. See also Meyer, *Training the Army in Military Justice and the Law of War*, ARMY LAW., Mar. 1984, at 5; Parks, *Teaching the Law of War*, ARMY LAW., June 1987, at 4.

4. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON JUNE 10, 1977, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess. (1987) [hereinafter Letter of Transmittal]; see also N.Y. Times, Feb. 16, 1987, § 1, at 1, col. 6.

5. On the status of a treaty between signing and submission, see M. WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW 40-45 (1970).

6. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter GCC] [GWS, GWS Sea, GPW, and GCC, collectively hereinafter The Geneva Conventions of August 12, 1949].

7. The preamble to The Fourth Hague Convention Respecting the Laws and Customs of War on Land speaks of "the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience." The Fourth Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.I.A.S. 539, reprinted in 1 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 631, 633 (1970) [hereinafter 1907 Hague Convention]. This provision, also known as the Martens Clause, recognizes the existence of a customary international law as a source of the law of war. See Meron, *The Geneva Conventions As Customary Law*, 81 AM. J. INT'L L. 348, 364-65 & n.52 (1987); Walker, *The International Law Applicable to Guerilla Movements in Internal Armed Conflicts: A Case Study of Contra Attacks on Nicaraguan Farming Cooperatives*, 21 N.Y.U. J. INT'L L. & POL. 147, 154-157 (1988). For a thorough discussion of the origins of customary international law, see M. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 3-39 (1985) and Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 39-41 (1988).

examines the generally accepted portions of Protocol I and proffers a suggested restatement of that law.⁸

The international community has been concerned with educating both military personnel and civilians in the law of war.⁹ A restatement of the customary international law principles embodied within Protocol I facilitates this educational process. Furthermore, the emergence of regional low intensity conflicts¹⁰ as the prevailing mode of modern warfare makes the careful analysis of the customary international law of Protocol I important, because Protocol I tends to blur the Geneva Conventions' traditional distinctions between international and internal conflicts. A restatement of the customary interna-

8. Two papers were helpful in identifying those provisions of Protocol I which have become part of customary international law: W. Hays Parks, *After Protocol I: A Military View*, 29 (unpublished manuscript) (reporting the conclusions of the United States Military Law Working Group with respect to those "provisions of Protocol I [identifiable] as customary law, or [supportable] for eventual incorporation into that law," and discussing those provisions of Protocol I "supportable for inclusion in customary law through state practice"); Michael J. Matheson, U.S. Position on the Relation of Customary International Law to the 1977 Additional Protocols presented at the Workshop on International Humanitarian Law, Washington College of the Law, (Jan. 22, 1987) (identifying provisions of Protocol I as "principles [which] should be observed and in due course recognized as customary law, even if they have not already achieved that status").

The selection and restatement of the provisions of Protocol I which likely have the status of customary international law is intentionally conservative and rejects many items from both Parks' second list and Matheson's list. This restatement primarily employs Parks' first list, but reflects the judgment and responsibility of the author alone. See *supra* note 7, at 350.

9. Protocol I, *supra* note 2, art. 82, at 1427 (legal advisors in the armed forces). Moreover, Protocol I article 83 states:

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and the civilian population.
2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Id. art. 83, at 1427. See also GWS, *supra* note 6, art. 47; GWS Sea, *supra* note 6, art. 48.

While Protocol I, articles 82 and 83 are not themselves part of customary international law, there is doubtless a requirement to disseminate through conventional military and civilian educational programs accurate information about the content of so much of Protocol I (and in the case of countries not ratifying Protocol II, its content as well) as is considered customary international law.

10. M. KLARE & P. KORNBLUH, *LOW-INTENSITY WARFARE: COUNTERINSURGENCY, PROINSURGENCY, AND ANTITERRORISM IN THE EIGHTIES* (1988); Barnes, *Legitimacy and the Lawyer in Low-Intensity Conflict (LIC): Civil Affairs Legal Support*, ARMY LAW., Oct. 1988, at 5.

tional law of Protocol I also offers the prospect of greater compliance with the requirements of humanitarian law in low intensity conflicts.

In addition, some measure of restating Protocol I's provisions is warranted on purely linguistic grounds. Protocol I is somewhat prolix and opaque. While many of these language-based problems can be traced to the conflation of initially unrelated texts,¹¹ poor draftsmanship also contributes to the confusion.¹²

This Article will first analyze why the United States chose not to ratify Protocol I. This Article will also summarize the substantive provisions of Protocol II. Then, the Article will synthesize and restate in twelve normative propositions those provisions of Protocol I which set forth customary international law. The Article will use examples from the recent Iraqi invasion of Kuwait to illustrate portions of the restatement. As a part of this restatement process, this Article also considers the degree to which Protocol I will be subsumed or displaced upon the ratification of Protocol II.¹³ The goal of this restatement is to promote greater awareness of this important part of the law of war.

II. BACKGROUND OF THE NONRATIFICATION DECISION: A UNITED STATES PERSPECTIVE

A diplomatic conference comprised of 124 states, 50 nongovernmental organizations, and 11 national liberation movements prepared Protocols I and II while meeting in four sessions from 1974 to 1977.¹⁴ The protocols were intended to augment and supplement the 1949 Geneva Conventions. The United States chose to submit Protocol II for ratification but not Protocol I. An analysis of Protocol I is helpful

11. *E.g.*, Protocol II, *supra* note 2, art. 4, at 1444; *see also* M. BOTHE, K. PARTSCH, & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 640-41 (1982) [hereinafter *NEW RULES*].

12. *E.g.*, Protocol II, *supra* note 2, arts. 2(2), 5(4), at 1443, 1445; *see also* *NEW RULES*, *supra* note 11, at 631, 648 ("a barely readable text" and "strangely drafted").

13. The issues presented by joint operations between United States forces and states which have ratified different protocols are not addressed in this Article. Such joint operations problems must be resolved with reference to the full content of the law of war applicable to the respective parties and the development of detailed operations plans to cover cases in which the practices of the parties differ.

14. 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 (1984); *NEW RULES*, *supra* note 11, at 1-10; DeSaussure, *Symposium of the 1977 Geneva Protocols: Introduction*, 19 *AKRON L. REV.* 521 (1986).

in understanding the United States' position. This analysis will provide a much clearer perspective on the proposed restatement.

Protocol I strengthens the Geneva Conventions by: 1) extending to civilian medical units the protections accorded to military medical units;¹⁵ 2) clarifying the protections accorded medical transport, including aircraft;¹⁶ 3) increasing the responsibilities of parties to search, report, and care for the missing and the remains of the dead;¹⁷ 4) providing expanded protection for civilians and civilian objects;¹⁸ and 5) insuring humane treatment for all persons.¹⁹ On the other hand, Protocol I weakens the conventions by politicizing the law of war. For example, certain types of irregulars, not previously covered by the law of war because they do not distinguish themselves from civilians or acknowledge their status as combatants, receive law of war protections.²⁰ This represents a marked departure from traditional norms.²¹

With United States participation, the diplomatic conference drafted the protocols bearing in mind two objectives: "first, to obtain better implementation of and compliance with existing international law and, second, to develop new rules of law that are clear, are capable of being accepted by States, and are capable of being applied in practice."²² In reality, Protocol I falls short of both goals. Protocol I neither fosters the application of existing international protections nor is it consistently clear and capable of practical application.

President Reagan's Letter of Transmittal to the Senate recommended that Protocol I not be ratified because it was "fundamentally and irreconcilably flawed."²³ President Reagan's rationale was that Protocol I would: 1) politicize the law of war, legitimizing so-called "wars of national liberation" and the national liberation movements

15. Protocol I, *supra* note 2, art. 22, at 1403.

16. *Id.* arts. 21-31, at 1403-07.

17. *Id.* arts. 32-34, at 1407-08.

18. *Id.* art. 54, at 1414.

19. *Id.* art. 75, at 1423.

20. *Id.* art. 44(3), at 1410-11. "[They must show that they are] commanded by a person responsible for his subordinates; . . . hav[e] a fixed distinctive sign recognizable at a distance; . . . [carry their] arms openly; . . . [and conduct] their operations in accordance with the laws and customs of war." GPW, *supra* note 6, art. 4(A)(2).

21. *See* GPW, *supra* note 6, art. 4(A)(2).

22. Remarks by G. Aldrich, United States Representative to the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Mar. 5, 1974), *quoted in* Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 122 n.78 (1985).

23. Letter of Transmittal, *supra* note 4, at iii.

which fight in them; 2) "grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war"; and 3) restrict or preclude previously lawful and necessary military options through certain provisions.²⁴

Protocol I would have substantially altered some of the distinctions inherent in the Geneva Conventions. For example, the Geneva Conventions draw a sharp distinction between captives of *international* conflicts and *internal* conflicts. Captured combatants in an international conflict are treated as prisoners of war.²⁵ In contrast, captured combatants in an internal conflict can be treated as mere criminals (e.g., tried for combat-related killing) with only the minimal protections of fair trial assured by common article 3.²⁶

Article 1 of Protocol I extends the coverage of the Geneva Conventions' common article 2,²⁷ to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes [(“CARs”)] in the exercise of their right of self-determination."²⁸ The recognition of CARs conflicts as international disputes extends Protocol I's protections to internal disputes which fall short of belligerency.²⁹ This change injects into the law of war an unprincipled, politicizing subjectivism,³⁰ which potentially affords a claim for preferential treatment to criminals³¹ and terrorists.³² President Reagan expressed a concern not to "give recognition and

24. *Id.* at iii-iv.

25. The Geneva Conventions of Aug. 12, 1949, *supra* note 6, common art. 2. The first four articles of each of the four conventions are identical, and as such, are often referred to as common articles.

26. *Id.* common art. 3.

27. See *supra* note 25 and accompanying text.

28. Protocol I, *supra* note 2, art. 1(4), at 1397.

29. DEPARTMENT OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE, ¶ 11 (1956) [hereinafter FM 27-10]. A belligerency is a contention between two or more states through their armed forces. See L. OPPENHEIM, 2 INTERNATIONAL LAW 201-06, 248-50 (Lauterpacht 7th ed. 1952).

30. Roberts, *supra* note 22, at 126-27.

31. United States v. Morales, 464 F. Supp. 325 (E.D.N.Y. 1979) is illustrative. William Guillermo Morales, a criminal defendant in New York, was charged with the federal crime of unlawful possession of firearms. Morales unsuccessfully argued that, as he was espousing the cause of Puerto Rican independence, the court should declare him a prisoner of war under Protocol I, article 1(4). *Id.* at 326.

32. Criticism of Protocol I's modification of the law of war to the advantage of terrorists developed early. Feith, *Law in the Service of Terror-The Strange Case of the Additional Protocol*, NAT'L INTEREST, Fall 1985, at 36. For Feith's later views, see Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 AKRON L. REV. 531 (1986). For extensive articles discuss-

protection to terrorist groups” when rejecting Protocol I.³³ Developing nations and national liberation movements that participated in the diplomatic conference supported the CARs article, believing that it would rectify perceived deficiencies. Groups fighting colonial powers—particularly African colonial powers—were concerned over the denial of their belligerent status under common article 2 of the Geneva Conventions.

In addition to the CARs conflict discussed above, Protocol I posed other problems that contributed to the United States’ decision not to ratify. For example, under article 47, “a mercenary shall not have the right to be a combatant or a prisoner of war.”³⁴ This provision violates both the letter and the spirit of the preamble, which provides that individuals who participate in war should not be discriminated against on the basis of their motive for engaging in combat.³⁵ Thus, this provision of Protocol I disserves the principle of humanitarian treatment of prisoners of war. Furthermore, if the United States ratified Protocol I, mercenaries would be deemed unlawful combatants under United States law by virtue of article 47. According to the United States Supreme Court in *Ex Parte Quirin*,³⁶ an unlawful combatant violates international law and may face sanc-

ing the theme that Protocol I abetted terrorism, see Roberts, *supra* note 22 and Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901 (1986).

Whether Protocol I fosters terrorists and terrorism is a disputed issue. 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, 700-01 n.32 (1986).

Roberts seems to agree with, if not be inspired by, a curious, passionate but uninformed attack on [Protocol I] made some months earlier by a Deputy Assistant of Defense, Douglas Feith. [T]here are indications that its portrayal of the Protocol as a ‘pro-terrorist treaty’ may have poisoned the atmosphere in official Washington—one hopes only temporarily.

Id. See also Levie, *Pros and Cons of the 1977 Protocol I*, 19 AKRON L. REV. 537, 541 (1986).

[W]hile it was extremely unfortunate that many of the provisions of [article 44] were included in the Protocol, the writer does not share the fears of the Reagan Administration that they will serve as a basis for the claim by terrorists that they come within its provisions and that they are, therefore, entitled to prisoner-of-war status when taken into custody.

Id.

33. “It is unfortunate that Protocol I must be rejected . . . [but] we must not, and need not give recognition and protection to terrorist groups as a price for progress in humanitarian law.” Letter of Transmittal, *supra* note 4, at iv; see also N.Y. Times, Feb. 16, 1987, § 1, col. 6.

34. Protocol I, *supra* note 2, art. 47, at 1412.

35. *Id.*, preamble, at 1396.

36. 317 U.S. 1 (1942). German saboteurs illegally entered the United States during World War II to destroy military installations. The Supreme Court held that their detention and subsequent trial in the appropriate military tribunal was lawful. *Id.*

tions under United States law.³⁷ Currently, the United States deals with mercenaries, if at all, under domestic laws, such as the Neutrality Act.³⁸ However, such prosecutions are sporadic.³⁹ Furthermore, at least one federal circuit court of appeals has held that mercenary activity outside the United States does not violate United States law.⁴⁰ Thus, ratification of Protocol I would have changed United States law on this matter.⁴¹

Both the Hague and Geneva Conventions distinguish combatants from noncombatants in order to advance the humanitarian protection of noncombatants.⁴² Protocol I frustrates this objective by legitimizing circumstances in which combatants may conceal themselves as civilians.⁴³ This increases the chances of hostile attacks on civilians. The text of Protocol I creates a broad exception to the traditional rule distinguishing combatants from the rest of the civilian population:

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.

Acts which comply with the requirements of this paragraph shall

37. *Id.* at 31.

38. 18 U.S.C. § 959(a) (1988) (enlistment within the United States in a foreign service). *See also id.* § 956(a) (conspiracy to destroy the property of a foreign government); *id.* § 960 (planning expeditions against a friendly nation).

39. *E.g.*, *Gayon v. McCarthy*, 252 U.S. 171 (1919) (expedition against Mexico); *Wiborg v. United States*, 163 U.S. 632 (1896) (expedition against Cuba); *see Cesner & Brant, Law of the Mercenary: An International Dilemma*, 6 CAP. U.L. REV. 339, 356 n.55, 356-57 (1977); Note, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT'L L. 589, 597 n.49 (1982) (noting a prosecution involving an expedition against Dominica).

40. *United States v. Dane*, 570 F.2d 840 (9th Cir. 1977), *cert. denied*, 436 U.S. 959 (1987).

41. *See Paust, Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988).

42. Protocol I, *supra* note 2, art. 43, at 1410; 1907 Hague Convention, *supra* note 7, annex art. 3, at 644.

43. Protocol I, *supra* note 2, art. 44(3), at 1410-11.

not be considered as perfidious within the meaning of Article 37, paragraph 1(c) [of Protocol I].⁴⁴

This provision is a substantial disincentive for guerrillas and other combatants to distinguish themselves from civilians. Thus, Protocol I reduces civilian protection because civilians will be suspected of harboring concealed guerrillas or combatants in their midst. In an effort to narrow the scope of this exception, the United States declared at the time of Protocol I's signing that "military deployment preceding the launching of an attack" in article 44(3)(b) means "any movement towards a place from which an attack is to be launched."⁴⁵ However, even this interpretation is insufficient to deal with the problem of concealed combatants.⁴⁶

Nonetheless, Protocol I does articulate several traditional humanitarian principles. Identifying customary international law in Protocol I will ensure that its positive contributions to the law of war will actually become the law of the United States and other nonratifying countries without the counterproductive elements which led the United States and other countries to reject ratification. Although there are those who urge reconsideration of the Reagan administration's position on ratification of Protocol I,⁴⁷ this issue appears to be conclusively resolved as a political matter. Thus, this restatement enumerates only those elements of Protocol I which are binding on nonratifying countries as customary international law. The following summary of Protocol II will place the restatement in a better perspective.

44. *Id.*

45. DEPARTMENT OF THE ARMY, PAMPHLET NO. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 138 (1979) [hereinafter DA PAM. 27-1-1].

46. Combatants in civilian dress in West Beirut following the deployment of Syrian troops in February 1987 presented such a problem. The *New York Times* reported:

[G]unmen had slipped out of sight Sunday night shortly after Syrian Army units began to deploy. But despite warnings from the chief of Syrian military intelligence, Brig. Gen. Ghazi Kanaan, that gunmen would be shot on sight, some reappeared today, wearing civilian clothes instead of their uniforms and trying to conceal their weapons.

N.Y. Times, Feb. 24, 1987, § 1, at 1, col. 3.

47. Bagley, *Ratification of Protocol I to the Geneva Conventions of 1949 by the United States: Discussion and Suggestions for the American Lawyer-Citizen*, 11 LOY. L.A. INT'L & COMP. L.J. 439 (1989).

III. SUMMARY OF PROTOCOL II⁴⁸

Protocol II consists of four preambular clauses and twenty-eight operative provisions, of which eighteen are substantive.⁴⁹ This section summarizes only the substantive provisions.

Article 1 explains that Protocol II "develops and supplements" common article 3 of the Geneva Conventions and applies to non-international or internal conflicts which

take place in the territory of a . . . [p]arty [to the Protocol] between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁵⁰

The protocol does not apply to internal disturbances which are not armed conflicts "such as riots [and] isolated and sporadic acts of violence."⁵¹ Thus, Protocol II recognizes the evolution of armed conflict. Article 1 in effect defines "a new form of non-international conflict, with a threshold of application clearly above that of common Article 3."⁵² No mechanism exists, however, to ascertain the capability of rebel forces to implement the protocol or insure compliance with its provisions.⁵³

Article 2 extends Protocol II's protection to "all persons affected by an armed conflict as defined in Article 1," whether they are "in the area affected by the conflict or elsewhere."⁵⁴ This protection is bestowed without any "adverse distinction based . . . on race, colour, sex, language, religion or belief, political or other opinion, national or

48. This summary draws upon but does not necessarily replicate the "Detailed Analysis" of Protocol II included as an attachment to Letter of Transmittal, *supra* note 4, 1-7.

49. Protocol II, *supra* note 2, at 1442-43.

50. *Id.* art. 1(1), at 1443.

51. *Id.* art. 1(2), at 1443.

52. NEW RULES, *supra* note 11, at 606.

53. *Id.* at 608.

It is . . . problematic that no attempt was made to insert a provision that the adverse party, i.e. the rebels, should declare that they are bound to observe this Protocol, in order to ensure that clear obligations from their side exist and cannot be questioned.

Under these circumstances, and in view of the near total absence of any provisions on the implementation of Protocol II, one can only hope that the *establishment of a new standard* for the protection of victims as such will have a certain effect, and that the *adverse party* in such conflicts *will itself be interested* in enjoying the protection provided for in the Protocol and will therefore respect its provisions.

Id.

54. *Id.* at 630.

social origin, wealth, . . . birth or other status” but not forbidding adverse distinctions based on the “status of military or civilian, [or] of combatant or non-combatant.”⁵⁵ In addition to these protections, all who suffer a loss or restriction of liberty as a result of the conflict receive the protections of articles 5 and 6 until their liberty is restored.⁵⁶

Article 3 asserts that nothing in Protocol II is intended to affect the sovereignty of the state although many military operations that satisfy the threshold of article 1 do affect sovereignty. For example, when an organized armed group controls part of a state’s territory, this type of conflict falls within Protocol II. This makes it difficult to pursue the humanitarian objectives of Protocol II without confronting the objection that state sovereignty has been impaired.⁵⁷ Similarly, the protocol cannot justify intervention, direct or indirect, “in the internal or external affairs of the . . . Party in [whose] territory . . . conflict occurs.”⁵⁸

Article 4 provides that nonparticipants in a conflict subject to the protocol, including individuals who have ceased participation, are entitled to humane treatment without adverse distinctions whether or not their liberty has been restricted.⁵⁹ All individuals “are entitled to respect for their person, honour and convictions and religious practices.”⁶⁰ Article 4 forbids violence to life, health, and physical or mental well-being.⁶¹ The article expressly bans murder and cruel treatment (e.g., torture, mutilation, or corporal punishment),⁶² as well as any “order that there shall be no survivors.”⁶³ Furthermore, collective punishments, hostage-taking, acts of terrorism, outrages on personal dignity (e.g., humiliating and degrading treatment, rape, forced prostitution, and indecent assault), slavery and slave trade, pillage, and threats to commit any of the foregoing acts are proscribed in

55. *Id.* at 630-31.

56. *Id.* at 631.

57. *See id.* at 607-08; compare Letter of Transmittal, *supra* note 4, at 6-7 (“[N]othing in Protocol II affects the sovereignty . . . of any state The recognition of this point is essential in persuading states to accept Protocol II and apply its provisions to conflicts within their territory.”) with discussion of Protocol II, art. 18 at *infra* text accompanying notes 125-29.

58. NEW RULES, *supra* note 11, at 632.

59. Protocol II, *supra* note 2, art. 4, at 1444.

60. *Id.* art. 4(1), at 1444.

61. *Id.* art. 4(2)(a), at 1444.

62. *Id.*

63. *Id.* art. 4(1), at 1444.

article 4.⁶⁴ All such violence is "prohibited at any time and in any place whatsoever."⁶⁵

These limitations present particular problems with respect to the law of reprisal, which is expressly preserved in United States law.⁶⁶ Commentators suggest that the text of the article forecloses the option of reprisal.⁶⁷ However, this argument is inferred solely from the fact that the drafters rejected several proposals dealing with reprisals. The text of article 4 contains no express language dealing with reprisals, so the argument for foreclosing reprisals is unpersuasive.⁶⁸

Article 4 also provides special protections for children, generally defined as "persons under 15 years of age."⁶⁹ Children must be provided with care, aid, and education. They cannot be recruited into armed forces nor take part in hostilities. If they do take part in hostilities and are captured, they nevertheless receive the special protection provided by article 4, which is more protection than is required for other prisoners of war.⁷⁰ Additionally, all appropriate steps must be taken to reunite separated families, and when possible, to remove children from areas of hostilities.⁷¹

Article 5 extends protections to persons whose liberty has been restricted by detention or internment arising out of armed conflict.⁷² Article 5 significantly expands the traditional protections of the Geneva Conventions, which did not previously apply to noninternational armed conflict.⁷³ Article 5 specifically requires two types of protections for all armed conflicts whether intentional or not: minimal protections⁷⁴ and protections "within the limits of [the] capabilities" of

64. *Id.* art. 4(2)(a)-(h), at 1444.

65. *Id.* art. 4(2), at 1444.

66. FM 27-10, *supra* note 29, ¶ 497.

67. NEW RULES, *supra* note 11, at 636-37.

68. *Contra id.* at 637. "[T]he question of reprisals could not arise, since under the terms of that Article, persons who did not take an active part or had ceased to take part in hostilities, were in all circumstances to be treated humanely." This argumentation is fully convincing."
Id.

69. *Id.* at 642 & n.5. See also Mann, *International Law and the Child Soldier*, 36 INT'L & COMP. L.Q. 32 (1987).

70. *Cf.* GPW, *supra* note 6, art. 38 ("[T]he Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits . . . and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.").

71. *Cf.* GCC, *supra* note 6, art. 14 (safety zones for children and others in a Party's own territory); *id.* art. 24 (reception into a neutral zone for the duration of the conflict).

72. Protocol II, *supra* note 2, art. 5, at 1444.

73. See, e.g., The Geneva Conventions of August 12, 1949, *supra* note 6, common art. 3.

74. Protocol II, *supra* note 2, art. 5(1), at 1444-45.

the captor, detainer, or interner.⁷⁵ Minimal protections require that the wounded and sick be treated in accordance with article 7 of Protocol II, be allowed to receive individual and collective relief, be allowed to practice their religion, and, if required to work, be subject to the same working conditions as local civilians. Protections dependent on the capabilities of the captor include spiritual assistance from clergy;⁷⁶ separate quarters for women under the immediate supervision of women, unless families are accommodated together;⁷⁷ the right to send and receive cards and letters (subject to a necessary numerical limit); the right to be interned or detained away from the combat zone and evacuated from such danger if it can be done safely; and the right to medical examinations.⁷⁸ Article 5 strictly prohibits involuntary medical experimentation.⁷⁹

Other persons who are not captured or detained but whose "liberty has been restricted in any way whatsoever for reasons related to the armed conflict," shall be treated humanely in accordance with articles 4 and 5.⁸⁰ This extends medical care in accordance with article 7, as well as a right to receive individual and collective relief, practice one's religion, and send and receive cards and letters. Beyond the right to relief from third parties, however, there is no provision allowing for necessary supplies of food and water to be brought into a particular area.⁸¹ Finally, the release of captive or detained persons should be conducted in a manner that assures their safety.⁸²

Article 6 defines substantive and procedural rules for penal prosecutions relating to armed conflicts.⁸³ National or rebel courts must be impartial and convict only "on the basis of individual penal responsibility."⁸⁴ The article further requires the following safeguards: 1) prompt notice of the particular charge(s) against suspects and "all

75. *Id.* art. 5(2), at 1445.

76. "[T]he right to receive spiritual assistance . . . is only granted 'if requested and appropriate' and therefore belongs to the second category of protections provided for in paragraph 2." NEW RULES, *supra* note 11, at 646.

77. Some have argued that children should be separated under the same conditions as women. *See id.* at 647.

78. *See id.*

79. *Id.* at 644.

80. *See* Protocol II, *supra* note 2, art. 5(1)(a), (c), (d) & (2)(b), at 1444-45.

81. NEW RULES, *supra* note 11, at 647.

82. *See id.* at 644.

83. Protocol II, *supra* note 2, art. 6, at 1445.

84. *Id.* An implicit assumption of article 6 is that the rebels will operate a court system with enough sophistication to apply the requirements of the article. If they do not, then they would doubtless fall short of the standards for application in article 1.

necessary rights and means of defense"; 2) a presumption of innocence; 3) the accused's presence at trial; and 4) freedom from compelled self-incrimination.⁸⁵ Conviction for an act which was not a criminal offense when it was committed is prohibited, as is imposing a heavier penalty than was in force when the criminal act was committed.⁸⁶ An accused may benefit from the adoption of a lighter penalty after the commission of the offense.⁸⁷ The accused must be advised of any judicial or other remedies, as well as applicable time limits.⁸⁸ Moreover, the death penalty shall not be applied to one under eighteen years of age when the offense was committed nor "carried out on pregnant women or mothers of young children."⁸⁹ At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, whether they are interned or detained.⁹⁰

Article 7 provides for prompt and humane medical attention to all wounded, sick, and shipwrecked persons.⁹¹ Any distinctions in treatment must be based solely on medical grounds such as triage.⁹² United States ratification of this article will render the corresponding provision under customary international law superfluous.⁹³

Article 8 imposes a duty to search for wounded, sick, and shipwrecked persons "[w]hen circumstances permit" following an engagement.⁹⁴ A comparison of the terms of this obligation for non-international armed conflicts with the language of the GWS⁹⁵ and the GWS Sea⁹⁶ which requires the search for wounded, sick, and shipwrecked persons "at all times, and particularly after an engagement . . ." and "after each engagement . . . without delay," discloses an

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. On article 6 generally, see NEW RULES, *supra* note 11, at 648-53.

91. Protocol II, *supra* note 2, art. 7, at 1446.

92. *Id.*

93. See *infra* note 131 and accompanying text.

94. Protocol II, *supra* note 2, art. 8, at 1446.

95. GWS, *supra* note 6, art. 15. "At all times, and particularly after an engagement, parties to the conflict shall . . . take all possible measures to search for and collect the wounded and sick . . ." *Id.* (emphasis added).

96. GWS Sea, *supra* note 6, art. 18. "After each engagement, parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick . . ." *Id.* (emphasis added). See NEW RULES, *supra* note 11, at 659.

apparent intent to reduce protection for those who become wounded, sick, or shipwrecked in non-international armed conflicts.

Article 9 mandates protection and respect for medical and religious personnel, assuring them all available aid in performing their duties.⁹⁷ Additionally, this article allows medical personnel to base their decisions on medical need rather than non-medical preferences imposed by armed forces.⁹⁸

Article 10 provides that no one shall be punished for rendering medical assistance so long as it is "compatible with medical ethics."⁹⁹ Thus, medical personnel can give needed medical assistance to either side in a conflict without fear of punishment.¹⁰⁰ This article is subject to the reservation that "to the extent that [article 10] would affect the internal administration of United States Armed Forces, including the administration of military justice," it does not apply.¹⁰¹ Persons engaged in medical activities should follow the rules of medical ethics and other rules in this protocol designed for the benefit of the wounded and sick. They cannot be compelled to act in a contrary manner.¹⁰² Subject to domestic law, the professional rights and duties of confidentiality of medical personnel shall be respected. Furthermore, medical personnel may not be penalized for refusing to disclose information about their patients.¹⁰³

Article 11 provides that medical units and transports shall be respected and protected, unless they are used to commit hostile acts.¹⁰⁴ Even then, an attack on medical units may only proceed after a warning followed by a reasonable time for response.¹⁰⁵

97. Protocol II, *supra* note 2, art. 9, at 1446.

98. This protection is a counterpart to Protocol II, article 7(2).

99. Protocol II, *supra* note 2, art. 10(1), at 1446.

100. This paragraph is a verbatim reiteration of Protocol I, article 16(1).

101. See Letter of Transmittal, *supra* note 4, at viii. The purpose of this reservation is to avoid the defense of "medical ethics" by "military medical personnel . . . as an excuse to refuse to perform their military duties or to disregard established treatment priorities and methods." Smith, *New Protections for Victims of International Armed Conflicts: The Proposed Ratification of Protocol II by the United States*, 120 MIL. L. REV. 59, 71 (1988).

102. Protocol II, *supra* note 2, art. 10(2), at 1446.

103. Because the provisions of paragraphs 3 and 4 are subject to national law, "[t]his means that at the least the government in power is free to deviate from those obligations if the necessary legal regulations exist. The obligations of the government are thus reduced to respecting the rule of law." NEW RULES, *supra* note 11, at 662.

104. Protocol II, *supra* note 2, art. 11, at 1446-47.

105. See NEW RULES, *supra* note 11, at 663-64. Paragraph 1 is a verbatim reiteration of Protocol I, article 12, except for adding the words "and transports." Compare Protocol II, *supra* note 2, art. 11(1), at 1446 with Protocol I, *supra* note 2, art. 12(1), at 1401.

Article 12 requires the display of the red cross, red crescent, or red lion and sun by medical and religious personnel, medical units, and transports.¹⁰⁶ In addition, article 12 prohibits improper use or disrespect for any of these symbols.¹⁰⁷

Article 13 protects the civilian population from the dangers of military operations by providing that neither the civilian population nor individual civilians shall be made the object of attack.¹⁰⁸ Acts or threats of violence which are primarily intended to spread terror among the civilian population are also prohibited.¹⁰⁹ United States ratification of this article will render the corresponding provision under customary international law superfluous.¹¹⁰

Article 14 prohibits starvation of civilians as a method of combat.¹¹¹ The article also prohibits attacking, destroying or otherwise removing or rendering useless "objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works."¹¹²

Article 15 provides protection against attacks on dams, dikes, and nuclear power generating stations.¹¹³ This protection extends even to military objectives "if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."¹¹⁴ There are targeting problems under the novel strictures of article 15. Dams, dikes, and nuclear power generating stations are protected even if they are lawful targets as military objectives, but only if *severe* civilian casualties would result from an attack. Thus,

[c]ommanders and targeting staffs would not only have to decide whether severe losses might occur in a particular area, they must also weigh whether any 'doubt' exists as to whether the persons affected are civilians. (Aerial photographs might show, for example, that flooding caused by a dam attack would wipe out a system of roads heavily used by military trucks carrying military supplies;

106. Protocol II, *supra* note 2, art. 12, at 1447.

107. *Id.*; see NEW RULES, *supra* note 11, at 665.

108. Protocol II, *supra* note 2, art. 13, at 1447.

109. *Id.*

110. See NEW RULES, *supra* note 11, at 676-79.

111. Protocol II, *supra* note 2, art. 14, at 1447.

112. *Id.*; see NEW RULES, *supra* note 11, at 680-82.

113. Protocol II, *supra* note 2, art. 15, at 1447. The article uses the phrase "[w]orks or installations containing dangerous forces." *Id.*

114. *Id.* Article 15 is a verbatim reiteration of the first sentences of Protocol I, article 56(1).

they would be unlikely to show whether the drivers, who might suffer severe losses from drowning, are civilian or military.)¹¹⁵

Article 15, in effect, provides a gloss on the rules of proportionality, necessity, and the avoidance of unnecessary suffering that usually guide the operational law advisor in targeting situations.¹¹⁶

Article 16 prohibits any acts of hostility directed against historic monuments, works of art, and places of worship which constitute the cultural or spiritual heritage of peoples.¹¹⁷ The article also bars their use in support of a military effort.¹¹⁸ The United States has an understanding that article 16 establishes a special protection for a limited class of objects that, "because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort."¹¹⁹ The provisions of article 16 are expressly made "[w]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954."¹²⁰

That convention by its terms relieves a party from compliance in cases "where military necessity requires such a waiver."¹²¹ Without an understanding, the United States—which has signed but not ratified the Hague Convention of 1954—would not be able to disregard article 16 in cases of military necessity. Commentators have suggested that the understanding by the United States grants it broader power to disregard the provisions of article 16 in cases of military necessity than are available under the Hague Convention of 1954.¹²²

115. Carnahan, *Additional Protocol I: A Military View*, 19 AKRON L. REV. 543, 547 (1986).

116. "[T]he judge advocate may advise and assist the [Corps Targeting Board] by providing general targeting guidance consistent with the requirements of the Hague and Geneva Conventions, reviewing pertinent [Rules of Engagement] for conformity with domestic and international law . . ." Coleman, *Operational Law and Contingency Planning at XVIII Airborne Corps*, ARMY LAW., Mar. 1988, at 20. See also NEW RULES, *supra* note 11, at 683-85.

117. Protocol II, *supra* note 2, art. 16, at 1447.

118. *Id.*

119. Letter of Transmittal, *supra* note 4, at viii. In his Letter of Transmittal, the President recommended that the United States ratify Protocol II subject to certain conditions or "understandings." *Id.*

120. Protocol II, *supra* note 2, art. 16, at 1447.

121. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, art. 4(2), 249 U.N.T.S. 215, reprinted in THE LAWS OF ARMED CONFLICT 657 (D. Schindler & J. Toman ed. 1981).

122. See Smith, *New Protections for Victims of International Armed Conflicts: The Proposed Ratification of Protocol II by the United States*, 120 MIL. L. REV. 59, 72-75 (1988):

The understanding . . . is not consistent with the Hague Convention of 1954 or the

Article 17 limits combat-related displacement of the civilian population to instances in which civilian safety requires displacement or where "imperative military reasons so demand."¹²³ Displacements must include the assurance of satisfactory shelter, hygiene, health, safety, and nutrition at the receiving site. Civilians cannot be displaced from their own territory even for reasons connected with the conflict.¹²⁴

Article 18 provides that relief societies located in the territory of a conflict may offer to perform traditional functions and services to the victims of armed conflict.¹²⁵ An offer of medical assistance, food, shelter, family reunion assistance, and victim information should be given sympathetic consideration. The armed force in control, however, is not obligated to accept the offer.¹²⁶ Similarly, civilians may also offer to collect and care for the wounded, sick, and shipwrecked, but a party need not accept the offer.¹²⁷ Since, however, parties do have an obligation under both common article 3 of the Geneva Conventions and article 7 of Protocol II to collect and care for the wounded and sick, there would be an obligation to accept offers of relief unless the armed forces assumed responsibility.

Impartial, exclusively humanitarian relief, such as providing food and medical supplies essential for survival, may be undertaken on behalf of civilian victims. Such relief is to be administered without adverse distinctions such as nationality, but is "subject to the consent of the High Contracting Party concerned."¹²⁸ As a practical matter,

drafting history of Article 16. The understanding draws upon two of the Hague Conventions of 1907, which are binding on all nations during international armed conflict as customary international law. The Hague Convention of 1954, however, increased the protection afforded cultural property by permitting waiver only in cases of imperative necessity. If cultural objects are used in support of the military effort, this violates the Hague Convention of 1954, but does not necessarily justify attacking them. The proposed understanding is therefore consistent with customary international law, but is broader than permitted under the Hague Convention of 1954.

... If the United States reserved the right to waive the protections of Article 16 to the same extent as provided in the Hague Convention, this reservation would be consistent with the intended application of Article 16. The proposed waiver provision, however, is broader than that allowed under the Hague Convention of 1954. For this reason, the recommended 'understanding' to Article 16 must be understood as a reservation that changes the obligations under the Article.

Id. at 74-75 (citations omitted); see also NEW RULES, *supra* note 11, at 686-89.

123. Protocol II, *supra* note 2, art. 17, at 1447.

124. *Id.*; see NEW RULES, *supra* note 11, at 690-93.

125. Protocol II, *supra* note 2, art. 18, at 1447-48.

126. *Id.*

127. *Id.*

128. *Id.* art. 18(2), at 1448.

relief is subject to the approval of those granting and receiving relief and those permitting transit of the relief aid. The established government's consent is not required in areas where the affected territory and civilian victims are under rebel control. Those in actual or effective control may consent to the relief without any special formalities.¹²⁹

In short, Protocol II extends the traditional norms of war to a broader class of armed conflicts. While certain practical shortcomings remain, the goal of providing protections to more people is important given the prevalence of armed conflict throughout the world. Moreover, Protocol II does incorporate some of the protections contained in Protocol I, which the president did not submit to the Senate for ratification.¹³⁰

IV. A RESTATEMENT OF CUSTOMARY INTERNATIONAL LAW IN PROTOCOL I

Protocol I reflects certain core principles which have long been respected in the law of war: the avoidance of unnecessary suffering, proportionality, and military necessity. States have acknowledged these principles through their involvement in the process that resulted in the draft of Protocol I under the sponsorship of the International Committee of the Red Cross. Twelve norms of customary international law reflective of these principles can be identified in Protocol I. These norms are restated below. Also noted is the extent to which these norms are replicated in Protocol II.

A. *Humane Medical Attention*

All wounded, sick, and shipwrecked persons must be given prompt and humane medical attention with distinctions in care based solely on medical grounds such as triage. This principle is contained in article 10.¹³¹ A state's ratification of Protocol II will subsume this

129. See NEW RULES, *supra* note 11, at 694-97.

130. See *supra* text accompanying note 4.

131. Protocol I, *supra* note 2, art. 10, at 1400. This article corresponds to GWS *supra* note 6, art. 12 and GWS Sea *supra* note 6, art. 12. It augments those requirements by requiring protection and care for civilians. "It is . . . forbidden to treat one's own wounded first, or to give priority to soldiers over civilians. The one whose treatment is most urgent for medical reasons must be treated first." NEW RULES, *supra* note 11, at 108. Although article 10 of Protocol I speaks of "[a]ll the wounded, sick and shipwrecked, to whichever Party they belong . . .," the scope of the obligation created by customary international law doubtless extends to *all* those injured as a result of their presence in a conflict, even those not technically belonging to a party to the conflict. For example, war correspondents who have not received the authori-

provision.¹³²

Iraq's recent invasion of Kuwait provides an example of a violation of this norm. According to one eyewitness account, Iraqi soldiers entered a hospital's Intensive Care Unit where they removed tubes and equipment from heart patients.¹³³ The patients subsequently died.¹³⁴

B. Respect for Medical Units

Medical units and personnel shall be respected and protected. Such units should not be the object of attack nor should they be used to shield military objectives from attack or to acquire military advantage. Furthermore, medical units should not be in a location that will imperil their safety. Several articles within Protocol I address this concept.¹³⁵ Medical units, transports, and personnel that claim protection shall be identified by a distinctive emblem.¹³⁶ Thus, ambulances, vehicles transporting medical personnel or equipment, and medical air or sea craft receive special protection.

C. Disabled Aircraft

Troops descending by parachute from disabled aircraft may not be fired upon,¹³⁷ at least until they are given an opportunity to surrender. Airborne troops or others on hostile missions may be fired upon.¹³⁸ This distinction furthers the principle of protecting non-

zation described in GPW article 4(A)(4) ("authorization from the armed forces which they accompany") do not waive their right to protection. *Accord*, Protocol II, *supra* note 2, art. 7, at 1446.

132. See Protocol II, *supra* note 2, art. 7, at 1446.

133. *Iraqi Atrocities*, *supra* note 1, at 18.

134. *Id.*

135. See, e.g., Protocol I, *supra* note 2, arts. 12(1) & (4), 15(1), 21, 24, 28(1) at 1401, 1402, 1403, 1404, 1405. Article 12 corresponds to GWS, *supra* note 6, art. 19. Protection is extended "to both civilian and military medical units," NEW RULES *supra* note 11, at 118, including ambulances and similar medical vehicles, *id.* at 142-43, and personnel, *id.* at 125.

136. Protocol I, *supra* note 2, art. 18(1), (2), (4), (7), at 1403. Provision for a distinctive emblem for medical units, transports, and personnel is made in GWS, *supra* note 6, arts. 38-44 and GWS Sea, *supra* note 6, arts. 41-43. See NEW RULES *supra* note 11, at 135.

137. Protocol I, article 42 virtually adopts the language of FM 27-10, ¶ 30, which is the basis for this restatement:

The law of war does not prohibit firing upon paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from disabled aircraft may not be fired upon.

FM 27-10, *supra* note 29, ¶ 30.

138. Protocol I, *supra* note 2, art. 42, at 1410; see also NEW RULES, *supra* note 11, at 226-31.

combatants. Troops whose equipment have become disabled are presumed to have lost combatant status, but must still be treated as prisoners of war.

D. *Humane Treatment of Prisoners*

Persons taking part in hostilities, but who are not entitled to prisoner-of-war status or more favorable treatment under the Geneva Convention on Civilians, are entitled to the guarantees of humane treatment.¹³⁹ The purpose of this provision is to provide at least minimum protections for prisoners. A state's ratification of Protocol II will subsume this provision.¹⁴⁰

E. *Protection of Civilians from Attack*

Neither the civilian population nor individual civilians shall be made the object of attack. Acts or threats of violence with the primary purpose of spreading terror among the civilian population are prohibited.¹⁴¹ This provision will be subsumed upon ratification of Protocol II.¹⁴²

The Iraqi army repeatedly violated this principle in Kuwait, as amply illustrated by the following chilling testimony:

While at the market, trying to buy food for my family, I saw two Kuwaiti young boys, 15 or 16 years old, in handcuffs, escorted by Iraqi soldiers. And the soldiers knocked on the door and a child answered. They asked her to call her mother or father. And when the woman came out, they asked her . . . if she knew these two boys. She said, "Yes, they are my sons." Then the soldiers asked her to come out and to call all family members out of the house. . . . And in full view of the mother, sister and young brother, and as well as around 50 men and women in the market-

139. Protocol I, art. 45(3), at 1411.

140. Protocol II, *supra* note 2, arts. 4-6, at 1444-46. Article 45(3) includes a cross reference to the protection of article 75 of Protocol I. As detailed in NEW RULES, *supra* note 11, at 456-66, the provisions of Protocol I, article 75 were drawn from Protocol II, articles 4-6, but differ in some respects. In view of the decision of the United States to ratify Protocol II, the sole measure of obligation in this respect is assumed to be that of Protocol II, articles 4-6. Accordingly, no restatement of Protocol I, article 75 is attempted.

141. Protocol I, *supra* note 2, art. 51(2), at 1413. FM 27-10, *supra* note 29, at ¶ 25 states that "it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them." However, "[a]s a practical matter, some fear and terror will be suffered by civilians whenever military objectives in their vicinity are attacked." NEW RULES, *supra* note 11, at 300-01.

142. See Protocol II, *supra* note 2, art. 13, at 1447.

place, they shot and killed the two boys.¹⁴³

F. Proper Objects of Attack

Only military objectives constitute lawful targets for attack.¹⁴⁴ Military objectives are those objects which by their nature, location, purpose, or use effectively contribute to military action. Additionally, any object whose partial or total destruction, capture, or neutralization offers a military advantage must be considered a military objective.¹⁴⁵ The Iraqi army reportedly fired on Kuwaiti homes from their tanks—a clear violation of this norm, assuming no hostile activity was associated with those houses.¹⁴⁶

G. Advance Warning of Attacks

Precautions shall be taken in the conduct of military operations to spare the civilian population, civilians, and civilian objects.¹⁴⁷ While some attacks on population centers may be inevitable, military commanders must still exercise restraint. Effective advance warning of attacks affecting the civilian population shall be given unless prevented by unforeseen circumstances.¹⁴⁸

H. Treatment of undefended localities

Undefended localities may not be attacked.¹⁴⁹ Appropriate authorities may declare any inhabited place in or near an area where armed forces are in contact to be open for occupation by opposing forces under the following conditions: 1) all combatants, mobile weapons, and mobile military equipment have been evacuated; 2) the forces do not make hostile use of fixed military installations or equipment; 3) neither the authorities nor the population commit any hostile acts; and 4) the forces do not undertake any activities in support of military operations.¹⁵⁰ Using police forces solely to maintain law and order or

143. *Iraqi Atrocities*, *supra* note 1, at 21 (testimony of Abdullah (an alias)).

144. Protocol I, *supra* note 2, art. 52(1), (2), at 1414.

145. *Id.*; see NEW RULES, *supra* note 11, at 320-25; see also FM 27-10, *supra* note 29, ¶¶ 56, 58 (limiting the scope of permissible devastation to the strict necessities of war).

146. *Iraqi Atrocities*, *supra* note 1, at 24.

147. Protocol I, *supra* note 2, art. 57(1), (2)(c), at 1415-16.

148. *Id.* art. 57(2)(c), at 1416. The 1907 Hague Convention annex article 26 provides: "The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities." 1907 Hague Convention, *supra* note 7, annex art. 26, at 648; see also NEW RULES, *supra* note 11, at 368.

149. Protocol I, *supra* note 2, art. 59, at 1416-17.

150. *Id.* art. 59(2), at 1416-17.

to aid persons protected under the Geneva Conventions—those who are wounded and sick and medical or religious personnel—does not violate the conditions for declaring an inhabited place open for occupation. A declaration that an inhabited place is open for occupation must reach the attacking force. The declaration shall include precise demarcations of the inhabited place for which protection is sought. In the event that these conditions are not met, or the attacking force does not recognize the place as open, the locality nevertheless continues to enjoy the protection of all other rules of international law applicable to armed conflicts.¹⁵¹

I. Demilitarized Zones

As a means of protecting civilians who take no part in hostilities and perform no work of a military character, as well as wounded and sick combatants or noncombatants,¹⁵² parties to a conflict may agree to establish demilitarized zones. The requirements for a demilitarized zone include:

- (a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated; (b) no hostile use shall be made of fixed military installations or establishments; (c) no acts of hostility shall be committed by the authorities or by the population; and (d) any activity linked to the military effort must have ceased.¹⁵³

Once established by agreement, a party may not extend its military operations or activities into the zone.¹⁵⁴ Violations of such agreements deprive the zone of its demilitarized status but do not obviate the protections of other rules of international law applicable in armed conflict.¹⁵⁵

151. "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." 1907 Hague Convention, *supra* note 7, annex art. 25, at 648; *see also* NEW RULES, *supra* note 11, at 380-85.

152. Protocol I, *supra* note 2, arts. 10, 51, at 1400, 1413-14.

153. *Id.* art. 60(3), at 1417.

154. *Id.* art. 60(1), at 1417.

155. *Cf. GCC, supra* note 6, art. 15 (a more limited provision stating that "[a]ny Party to the conflict may . . . propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war . . . wounded and sick combatants or non-combatants [and] civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character."). An innovative neutral zone at sea was established without any special written agreement during the Falkland-Malvinas Islands conflict in 1982. "This zone, called the Red Cross Box with a diameter of approximately twenty nautical miles apparently worked well." S. JUNOD, PROTECTION OF THE VICTIMS OF ARMED CONFLICT FALKLAND-MALVINAS ISLANDS 26 (1984). For a dis-

J. Protection for Stateless People

Stateless people who were stateless or refugees before the outbreak of hostilities are protected persons. This protection is consistent with traditional norms such as the Geneva Convention on Civilians.¹⁵⁶

K. Special Protections for Women

Women are to be given special protection against rape, forced prostitution, and other forms of indecent assault.¹⁵⁷ These special protections are in addition to other protections which all civilians enjoy. Iraqi soldiers ignored this norm, engaging in widespread sexual violence against Kuwaiti women.¹⁵⁸

L. Special Protections for Children

Children are also entitled to special protections. Children are to be given the necessary care and aid appropriate for their age and condition. Children must additionally be protected against any form of indecent assault.¹⁵⁹ The Iraqi soldiers in Kuwait reportedly have a practice of killing all male children.¹⁶⁰

These twelve principles from Protocol I represent significant clarifications of traditional law of war prescriptions. Customary international law will subsume some remaining provisions of Protocol I. Other portions of Protocol I which contain textual defects, such as vagueness or generality, are not likely to be added to the law of war and therefore have not been considered in this restatement. In addition, provisions such as articles 35 and 40, which merely restate existing law of war, have not been considered.¹⁶¹

cussion of the international zone of refuge established by the Council of the Organization of American States in Santo Domingo in 1965, see M. WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 440-41 (1968).

156. Protocol I, *supra* note 2, art. 73, at 1423. This article is a reaffirmation of existing law clearly implicit from the terms of the Geneva Convention on Civilians, article 4. NEW RULES, *supra* note 11, at 448. For a discussion of the background and effect of this provision, see *id.* at 446-50.

157. Protocol I, *supra* note 2, art. 76, at 1425; *accord* GCC, *supra* note 6, art. 27; see NEW RULES, *supra* note 11, at 468-70.

158. See, e.g., *Iraqi Atrocities*, *supra* note 1, at 20 (testimony of Ms. Ruth Al-Qallaf).

159. Protocol I, *supra* note 2, art. 77(1), at 1425; see NEW RULES, *supra* note 11, at 474-76.

160. *Iraqi Atrocities*, *supra* note 1, at 20 (testimony of Ms. Ruth Al-Qallaf).

161. See NEW RULES, *supra* note 11, at 193, 216-18.

V. CONCLUSION

Protocol I contained serious deficiencies leading numerous countries, including the United States, to reject the final document. Portions of Protocol I are nevertheless applicable to these countries because they are part of customary international law. In addition, Protocol II in certain respects subsumes Protocol I.

This Article restates those normative provisions of Protocol I which are fairly incorporated into customary international law. Hopefully, this restatement will promote greater awareness of both the traditional norms contained within the law of war and the attempts to expand those norms as represented by Protocols I and II. The dissemination of these normative principles is of the utmost importance, given the proliferation of nontraditional armed conflicts throughout the world today.

