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**A RESPONSE TO DOUGLAS J. FEITH'S  
LAW IN THE SERVICE OF TERROR — THE STRANGE CASE  
OF THE ADDITIONAL PROTOCOL**

by

WALDEMAR A. SOLF\*

INTRODUCTION

In the article mentioned in the title, Douglas J. Feith, Deputy Assistant Secretary of Defense for International Negotiation, characterizes the 1977 Protocol I Additional to the 1949 Geneva Conventions<sup>1</sup> as a “pro-terrorist treaty masquerading as humanitarian law.”<sup>2</sup>

He bases his vigorous objections to the most recent treaty codifying and developing international humanitarian law applicable in international armed conflicts,<sup>3</sup> on two provisions of Protocol I regarding:

- (1) The application of international armed conflicts rules to certain severely limited armed struggles for self determination (Article 1(4)); and
- (2) A revision of the standards under which members of irregular armed groups of a Party to an international armed conflict (guerrillas) may qualify as combatants and be entitled to be prisoners of war. The relaxation of these standards are described as greatly endangering the safety of civilians while they legitimize the acts of terrorists in disguising themselves as civilians (Articles 43 and 44).

Apparently, Mr. Feith's views have had decisive influence on the formulation of U.S. Government policy regarding the ratification of the 1977 Protocols. Recently the administration announced that Protocol II<sup>4</sup> would be ac-

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<sup>1</sup>In 1977 a Diplomatic Conference convened by the Swiss Government adopted two protocols updating the law of armed conflicts in armed conflicts. Mr. Feith vehemently objects to the first protocol dealing with international armed conflicts. The second dealing with non-international armed conflicts is considered acceptable by him. The two protocols are: Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), [hereinafter cited as Protocol I]; Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [hereinafter cited as Protocol II]. The text of the two Protocols is reprinted in U.N. General Assembly Doc. A/32/144, Anns. I and II, 15 Aug. 1977; International Review of the Red Cross No. 197-198, August-Sept. 1977; 16 Int'l Legal Materials 1391 and 1442 (1977); D. SCHINDLER & J. TOMAN, THE LAW OF ARMED CONFLICTS 551, 619 (1981).

<sup>2</sup>Feith, *Law in the Service of Terror — the Strange Case of Additional Protocol I*, 1 The National Interest 36, 47 (1985).

<sup>3</sup>Protocol I, *supra* note 1.

<sup>4</sup>*Supra* note 1.

ceptable, but that ratification of Protocol I would be unacceptable because it:

“... suffered from fundamental shortcomings that could not be remedied through reservations and understandings. In particular some key provisions of Protocol I, such as Article 1(4), risk introducing political elements into humanitarian law of armed conflict by making its applicability hinge on non-legal standards stated in highly charged rhetoric. These provisions also risk affording legal protection to terrorists and ‘national liberation movements’ at the expense of the civilian population, and would erase the traditional line between international and non-international armed conflicts.”<sup>5</sup>

Referring to the relaxation of standards for distinguishing guerrillas from the civilian population, Secretary of Defense Casper Weinberger recently stated: “The protocol provides that combatants need not distinguish themselves from civilians until the actual point of armed engagement . . .”<sup>6</sup> If it were so it were a grievous fault.

Like Mr. Feith, the Secretary of Defense appears to rely on bizarre interpretive statements made at the Diplomatic Conference by only the PLO and Qatar, while disregarding the contrary interpretive declarations expressed by the U.S. and the United Kingdom at the time they signed the Protocol, by many other states during the Conference, and by such allies as Belgium, Italy and the Republic of Korea in their instruments of Ratification.<sup>7</sup>

It is indeed regrettable that important policy level officials of the U.S. Government support the PLO's interpretation of critical provisions of Protocol I which may someday be cited as supporting claims of terrorists and war criminals for legitimacy. The tactic of advancing the worst possible interpretation of treaty provisions in order to defeat their ratification may provide a persuasive precedent for those claiming that interpretation in the future. In this case, it constitutes a grave disservice to our allies who have expressed contrary declarations when they ratified the Protocol. It would be tragic, if Mr. Feith's concept of its bias in favor of terrorism were to affect the application of the Protocol among its Parties.

The security of the civilian population in an international armed conflict does not hinge solely on the extent to which irregular combatants distinguish themselves from the civilian population. Protocol I not only updates the so-called “Law of Geneva” — the 1949 Geneva Conventions which protect the wounded, sick, shipwrecked, prisoners of war, and civilians in the power of a

<sup>5</sup>Letter to Senator Tribble from Hon. James W. Dyer, Acting Asst. Secretary of State for Legislative and Intergovernmental Affairs, dated June 3, 1986; Sofaer, *Terrorism and the Law*, 64 Foreign Affairs 901, 912-15 (1986).

<sup>6</sup>Statement of Secretary of Defense Casper Weinberger before the ABA National Conference on Law in Relation to Terrorism, June 5, 1986, 8 ABA Law and National Security Intelligence Report 9, (July 1986).

<sup>7</sup>See notes 58-60 *infra* and accompanying text.

Party to the Conflict of which they are not nationals,<sup>8</sup> but also the “Law of The Hague” — the rules relevant to the conduct of hostilities which were deemed, in 1949, to be beyond the scope of the Geneva Convention system. The dismal history of 20th Century wars bears witness that infinitely more civilians have lost their lives in indiscriminate bombardments than by the failure of guerrillas to distinguish themselves.

Nevertheless, Protocol I also updates the Hague rules regulating the conduct of hostilities including methods and means of warfare, the status of combatants, and the measures for preventing or minimizing civilian casualties and damage to civilian property from the effects of hostilities. These rules had not been updated since they were last codified in 1907,<sup>9</sup> notwithstanding their obsolescence and inadequacy demonstrated in two world wars and numerous other armed conflicts. Their failure to regulate the hostile use of air power and long range weaponry shattered the illusion, prevalent in 1907, that the civilian population outside the immediate land combat zone was relatively secure.

While the 1949 Diplomatic Conference was putting the finishing touches on the four Geneva Conventions, the United Nations International Law Commission was asked to undertake a project to codify the law dealing with the conduct of hostilities. It declined the task for the reason that “. . . war having been outlawed the regulation of its conduct has ceased to be relevant.”<sup>10</sup> Thus, the U.N. bowed out of this effort.

Because of the default of the U.N. organization to undertake the task of updating the Law of the Hague, the International Red Cross assumed the work of preparing Draft Rules for the Protection of the Civilian Population Against the Dangers of Hostilities.<sup>11</sup> By 1968, the U.N. General Assembly con-

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<sup>8</sup>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 cited as First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the 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 cited as Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as Third Geneva Convention]; 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 cited as Fourth Geneva Convention].

<sup>9</sup>Hague Convention (IV) of 18 October 1907, Respecting the Laws and Customs of War on Land, Arts. 21-41, 36 Stat. 2227, T.S. No. 539; *reprinted in* D. SCHINDLER & J. TOMAN, *supra* note 1, at 63-68; Annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land, 36 Stat 2295, T.S. 539, *reprinted in* D. SCHINDLER & J. TOMAN, *supra* note 1, at 69-87 (hereinafter cited as Hague Regulations) Hague Convention No. IX of 18 October 1907, Concerning Bombardment by Naval Forces, 36 Stat 351, T.S. 542, *reprinted in* D. SCHINDLER & J. TOMAN *supra* at 723-727.

<sup>10</sup>Report of the International Law Commission to the General Assembly on the Work of the First Session, 1949 Y.B. Int'l L. Comm 281. The I.L.C. apparently confused the international law relevant to the resort to armed coercion (*jus ad bellum*) with the rules relevant to rights and obligations in the conduct of hostilities and the treatment of victims (*jus in bello*). The Nuremberg Tribunals were emphatic in holding that the *jus in bello* must be applied equally without regard to the legality or illegality of the recourse to armed force. (U.S. v. List et. al. (The Hostage Case), XI Trial of War Criminals 1243-44, 1246-1248, 1272 (1950).

<sup>11</sup>ICRC, *Draft Rules for the Limitation of the Dangers Incurred By the Civilian Population in Time of War* (2d ed) (1958). *Reprinted in* D. SCHINDLER & J. TOMAN, *supra* note 1, at 187-193.

sidered that there was "a need for additional humanitarian conventions or other appropriate instruments to ensure better protection of civilians, prisoners of war and combatants in all armed conflicts and the prohibition and limitations of the use of certain methods and means of warfare's . . ." The necessary studies were to be conducted in consultation with the ICRC.<sup>12</sup>

The underlying implication was that if the ICRC efforts were to fail, the work would be undertaken in the more politicized U.N. forum. Thus stimulated and encouraged, the ICRC's preparatory work resulted in the submission of two draft protocols which formed the negotiating texts for a Diplomatic Conference convened by the Swiss Government in 1974. After four annual sessions attended by 135 states (and eleven liberation movements observers, entitled to speak, but not to vote), the Conference adopted the two protocols on June 10, 1977.<sup>13</sup>

It would appear that the Military Services and the Joint Chiefs of Staff have problems with provisions of Protocol I dealing with methods and means of warfare and with rules and precautions to be taken by attacking forces and defending forces dealing with the protection of the civilian population against the effects of hostilities, prescribed in Protocol I. The relevant provisions impose extensive duties on military commanders to ensure that objects of attack are military objectives and to avoid or minimize collateral damage to civilians and to civilian objects.<sup>14</sup>

<sup>12</sup>UNGA Resolution 2444 *Respect for Human Rights in Armed Conflicts* (19 Dec 1968). Reprinted in Schindler & Toman, *supra* note 1 at 199-200. The resolution also affirmed resolution XXVIII of the XXth International Conference of the Red Cross (Vienna 1965) which laid down the following principles for observance by all governments and other authorities responsible for action in armed conflicts:

- (a) That the rights of the parties to a conflict to adopt means for injuring the enemy is not unlimited;
- (b) That it is prohibited to launch attacks against the civilian population as such;
- (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

<sup>13</sup>*Supra* note 1. The Protocols entered into force on December 7, 1978. As of November 1986, 59 states will be Parties to Protocol I (international armed conflicts) and 52 to Protocol II (non-international). The Peoples Republic of China is the only permanent member of the Security Council to be a party to both Protocols. France is a party to Protocol II only and is the only state to be a party to Protocol II without also being a party to Protocol I. Angola, Cuba, Cyprus, Mexico, Mozambique, Syria, Vietnam and Zaire are parties to Protocol I, but not to Protocol II. (250 Int'l Review of the Red Cross 72-73, Jan-Feb 1986; 123 ICRC Bulletin 4 (Apr 1986; 125 Bulletin 4 (June 1986); 126 Bulletin 3 (July 1986).

Although the United States and most of its NATO and Pacific Allies signed both Protocols, the only NATO members to have ratified Protocol I are Belgium, Denmark, Italy and Norway. The Republic of Korea with which the United States has a Mutual Assistance Treaty and on whose territory substantial U.S. combat forces are stationed under a Combined Military Command, has also ratified both Protocols. (*Id.* Int'l Review *supra*).

<sup>14</sup>The presumption in Art. 50(1) that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian"; the rule of proportionality governing the expectation of incidental civilian casualties or damage to civilian property "which would be excessive in relation to the concrete and direct military advantage anticipated" (Arts. 51(5)(b), 57(2)(a)(iii)); the provision of Art. 52(2) which defines military objective in terms of a determination that the object is one "which by their nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage"; the presumption that "an object which is normally dedicated to civilian purposes is not being used to make an effective contribution to military action" (Art. 52(3)); the derogations stated in Art. 53(3)(b) relative objects used to support military action, the determination that attacks on military objectives near dams, dykes, and nuclear electric

In the final analysis, the implementation of these provisions must be made on the basis of subjective determinations made by commanders on the basis of information reasonably available to them at the time of decision. Sometimes that information is mistaken. Command decisions have to be made in the fog of battle under circumstances when clinical certainty is impossible and when the adversary is striving to conceal the true facts in order to deceive and to confuse.

These provisions were closely scrutinized by the military services and by the Joint Chiefs of Staff, as well as by the ministries of Defense of our allies. They were found to be acceptable subject to certain declarations and understandings, some of which may be regarded as reservations. Among these understandings was a declaration to the effect that the actions of commanders and others responsible for planning, deciding upon or executing attacks must be based on the state of facts as they appeared to the officer at the time he acted and not on the basis of hindsight. Some of these declarations were made by the United Kingdom and the U.S. at time of signature,<sup>15</sup> by Belgium, Italy and Korea at the time of ratification,<sup>16</sup> while others were expressed formally during the course of the conference with respect to Articles 35-60 of Protocol I.<sup>17</sup> Despite these concerns, which were well recognized and uppermost in the minds of the Military Services and military representatives of U.S. and Allied delegations during the negotiations, there has been virtually no public disclosure in the American media as to these problems or the declarations and reservations necessary to solve them consistent with the demands of military necessity.<sup>18</sup> Instead, the concerns of the Department of Defense, as disclosed in official statements and in the media, have been limited to those expressed, or inspired, by Mr. Feith, concerning wars of national liberation and the new standards for qualification as combatants and their entitlement to be prisoners

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generating stations will not cause the release of dangerous forces (Art. 56); the determination of feasibility in relation to precautions in attacks and against the effects of attacks (Arts. 57-58).

<sup>15</sup>D. SCHINDLER & J. TOMAN, *supra* note 1, at 634-636.

<sup>16</sup>Embassy of Belgium, Berne, Instrument of Ratification with Interpretive Declarations deposited with the Federal Department of Foreign Affairs 20 May 1986, to become effective 20 November 1986; *Reprinted in* 252 Int'l R. of the Red Cross 172-175 (May-June 1986); Embassy of Italy, Berne. Instrument of Ratification with Declarations deposited with the Federal Department of Foreign Affairs. February 27, 1986, to become effective August 27, 1986; Berne. Embassy of the Republic of Korea, Instrument of Ratification. Jan. 15, 1982.

<sup>17</sup>BOTHE, PARTSCH & SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS — COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 189-91, (1982); 224 (footnote 19); 253 (footnote 28); 254 (footnote 29, 1982); 255 (footnote 34); 280 (footnotes 32, 33); 307 (footnote 25); 333 (footnote 18); 359, 362 (footnote 8); 365 (footnote 18); 371, 373 (footnote 7).

<sup>18</sup>*But see* Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 Virginia J. of Int'l L. 109-76 (1985). In addition to criticizing the same provisions to which Mr. Feith objects, Major Roberts sets forth many criticisms of other provisions of Protocol I. Whether these objections reflect those of the military services and of the Joint Chiefs of Staff is not known. His objections are answered in detail by Ambassador Aldrich, head of the U.S. Delegation of the Diplomatic Conference that adopted the 1977 Protocols. (Aldrich, *Progressive Development of the Laws of War. A Reply to Criticisms of the 1977 Geneva Protocols*; 26 Virginia J. of Int'l L. 693 (1986).

of war.<sup>19</sup>

In this article, I expect to examine and strip away the emotional rhetoric which characterizes Mr. Feith's stated objections in order to place the provisions to which he objects in their true perspective, in the hope that public attention may then focus on the more important problems of the protocol's measures for protecting the civilian population against attack and the indiscriminate effects of attacks and to begin a debate as to whether these measures of the protocol are militarily feasible.

### THE ALLEGATION THAT PROTOCOL I IS A PRO-TERRORIST TREATY

While introducing a panel at a conference on International Humanitarian Law and Human Rights Law in Non-international Armed Conflicts, Professor John F. Murphy pointed out that terrorism may occur in the context of international armed conflict, non-international armed conflict or in time of peace.<sup>20</sup>

At the outset, it must be understood that Protocol I is not relevant to acts of terrorism committed in situations short of international armed conflicts. It does not apply to internal rebellions and insurgencies, and it certainly does not apply to situations of internal tensions and disorders.<sup>21</sup>

In the context of an international armed conflict or a belligerent occupation, the 1949 Geneva Conventions as supplemented by Protocol I, prohibits all acts usually associated with terrorism under all circumstances, whether committed by regular or irregular combatants. Breaches of the norms prohibiting such acts are punishable by penal sanctions.<sup>22</sup> Those classified as "grave breaches," such as murders, torture, summary executions, inhumane treatment, taking hostages, making civilians the object of attack and spreading terror among them, and indiscriminate attacks involving disproportionate civilian casualties,<sup>23</sup> are made universal crimes under the jurisdiction of all Parties to the relevant Convention or Protocol. The Party having control over an alleged offender is obliged to either prosecute him or extradite him to a requesting State that has made out a prima facie case.<sup>24</sup>

However one defines "terrorism" in other contexts, within the context of the Geneva Conventions, any violent act prohibited by the Conventions or Protocol I committed against persons or against property which affects the life

<sup>19</sup>Feith, *supra* note 2; L.H. Gelb, *War Law Faces Objection of Joint Chiefs*, New York Times, 22 July 1985 at 1, A7; W. Safire, *Rights for Terrorists? A 1977 Treaty Would Grant Them*, New York Times, Op. Ed. Nov. 15, 1985.

<sup>20</sup>Solf, *The Status of Combatants in Non-international Armed Conflicts Under Domestic Law and Transnational Practice*, 33 Am. U.L. Rev. 53 (1983).

<sup>21</sup>Geneva Conventions, *supra* note 8, Art 2 Common to the Conventions; Protocol I, *supra* note 1 Article 1(3) and (4).

<sup>22</sup>*Id.* at Common Articles 49/50/129/146; Protocol I, Art 85.

<sup>23</sup>*Id.* at Common Articles 50/51/130/147; Protocol I, Art 85(3).

or health of persons is an act of terrorism.

In the unlikely event that any liberation movement should qualify as a Party to an international armed conflict, the movement would be under the same obligations to repress grave breaches and to suppress ordinary breaches. Its guerrillas would be subject to the same sanctions on a universal basis.<sup>25</sup>

The comprehensive extent to which Protocol I prohibits virtually all violent acts committed by terrorists, making the more serious breaches universal crimes subject to the jurisdiction of all Parties can hardly be said to be a "pro-terrorist" treaty.

### *The Combatants' Privilege and Prisoner of War Status*

Mr. Feith dismisses the substantive norms, the penal sanctions, and other enforcement measures as insignificant:

. . . One can find phrases and even whole sentences in Protocol I that repudiate bald terrorism and deprecate attacks on civilians, but they are not the gist of the operative provisions. They are a faint counterpoint to the booming "progressive," collective, ends-justify-the-means blare of the innovative elements of the document. . . .<sup>26</sup>

Presumably this colorful rhetoric is intended to refer to the relaxation of the standards by which guerrillas may qualify for the combatants' privileges and entitlement to be prisoners of war if captured in occupied territory (where the new rules are likely to become applicable) and in struggles for self-determination (where their applicability is doubtful).

Mr. Feith's apparent assumptions are that the combatants' privilege and prisoner-of-war status provides immunity from prosecution by captors for terrorist acts such as direct attacks against the civilian population or indiscriminate attacks affecting them. It does not.

In international armed conflicts, those who are entitled to the status of "privileged combatants" are immune from criminal prosecution by their captors for only those warlike acts that do not violate the laws and customs of war, but might otherwise be common crimes under municipal law.<sup>27</sup>

The privilege was also recognized in Article 57 of the Lieber Instructions of 1863, which states that "[s]o soon as a man is armed by a sovereign govern-

<sup>25</sup>Protocol I, *supra* note 1, Arts. 80, 85, 86, 87, 91, 96(3).

<sup>26</sup>Feith, *supra* note 1 at 47.

<sup>27</sup>H. GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY 42, 45, 68, 81 (G. Williams trans. 1604), *reprinted in* 22 THE CLASSICS OF INTERNATIONAL LAW 1 (J. Scott ed. 1950); S. PUFENDORF, ON THE LAW OF NATURE AND NATIONS 1307, 1309 (C. Oldfather & W. Oldfather trans. 1688), *reprinted in* 17 THE CLASSICS OF INTERNATIONAL LAW 1 (J. Scott ed. 1934); E. DE VATTTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 280 (C. Fenwick trans. 1758), *reprinted in* 4 THE CLASSICS OF INTERNATIONAL LAW 1 (J. Scott ed. 1916).



ment and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."<sup>28</sup> Under the laws of the United States, any killing by a privileged combatant during combat operations that does not violate the laws of war is recognized to be a justifiable homicide.<sup>29</sup>

Civilians who participate directly in hostilities, as well as spies and members of the armed forces who forfeit their combatant status do not enjoy that privilege and may be tried, under appropriate safeguards, for direct participation in hostilities as well as for any act made criminal under municipal law which they might have committed.<sup>30</sup> It is readily understandable that the relaxation of the standards for qualification of privileged combatants was a high priority goal of those governments and authorities who employ guerrilla warfare in furtherance of their political objectives.

The nature of the combatants' privilege also demonstrates why the obligation to extend the combatant's privilege and prisoner of war status is strictly limited to international armed conflicts. Governments are reluctant to assume treaty obligations which require them to extend a license to domestic enemies to commit acts of violence against their security personnel and those objects which could be described as military objectives.

The real issue addressed by Mr. Feith is whether the new rules of the Protocol affecting the maintenance of the distinction between combatants and civilians are so relaxed as to permit guerrillas to use disguise as civilians as a means for achieving surprise in attacks against their enemy's military personnel or against objects which are legitimate military objectives. If they do, the innocent civilians would soon lose the benefit of the presumption that apparently unarmed persons in civilian dress do not attack. The result of undermining or eliminating this presumption is bound to have unhappy consequences for the civilian population.<sup>31</sup>

Mr. Feith's objection to the negotiating record is that the Western Delegations sacrificed their principle of the application of neutral law in the regulation of armed conflict to the political considerations of the Third World and Socialist majority in order to achieve a consensus.

<sup>28</sup>U.S. Dept. of War, Instructions for the Government of Armies of the United States in the Field (General Orders No. 100, Apr. 24, 1863) (Lieber Instructions), *reprinted in* D. SCHINDLER & J. TOMAN *supra* note 1, at 3, 11 [hereinafter cited as Lieber Instructions].

<sup>29</sup>U.S. Dept. of Defense, Manual for Courts-Martial United States § 197(b), at 351 (1951); *Arce v. State*, 83 Tex. Crim. 292, 202 S.W. 951 (1918) (soldiers who kill enemy during fire fight in undeclared state of war cannot be convicted of criminal homicide).

<sup>30</sup>Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas, Saboteurs*, 28 B.Y.I.L. 353 (1951).

<sup>31</sup>Press release. Delegation of Sweden, ICRC Conf. Govt Experts, Geneva, 15 May 1972, *reprinted in* BOTHE, PARTSCH & SOLF, *supra* note 17 at 254.

## THE ALLEGATION THAT NON-LEGAL CONSIDERATIONS AFFECTED THE DEVELOPMENT OF NEW RULES

The development of humanitarian law — whether by Diplomatic Conferences or by the slow process of custom — is a legislative process involving competing claims and counter claims in furtherance of the competing parties' national interests which ultimately result in a rule which meets the minimum requirements of the competing parties. The history of the rules concerning the qualification of combatant status and entitlement to be a prisoner of war has been a controversial subject at all lawmaking conferences, and has always resulted in compromise.

Historically, nations which view themselves as likely victims of aggression and enemy occupation have argued that guerrillas, partisans and members of resistance movements should be regarded as patriots and privileged combatants, while major military powers have argued that only regular, uniformed and disciplined combatants who distinguish themselves clearly from the civilian population should have the right to participate directly in hostilities.

National attitudes on this issue were subject to change and role reversals with altered circumstances.<sup>32</sup>

Although the thirteen American colonies relied heavily on such part-time combatants such as the "minute men" and Marion the Swamp Fox during our Revolutionary War,<sup>33</sup> the attitude of the Union during the Civil War toward irregular part-time combatants was one of harsh repression.<sup>34</sup> The circumstances were different, with some notable exceptions, Union forces operated in the South among an unfriendly population.

In 1874, upon the initiative of the Czar of Russia, the delegations of fifteen European states met in Brussels to examine a project for the codification of the Laws and Customs of War submitted by the Russian Government. The Russian draft was largely based on the principles stated in the Lieber instruc-

<sup>32</sup>During the peace negotiations at the end of the Franco-Prussian war, Favre complained to Bismarck that the Germans had acted with unreasonable severity against French partisans since they, the Germans, had engaged in partisan activities against the French in 1813. Bismarck responded that indeed the Germans had done so, and that the trees of Prussia still bore the marks of the ropes with which the French hanged them (G. Best, "Restraint, on War by Land Before 1945" in M. Howard, (ed.) *RESTRAINT ON WAR* 32-33 (1979).

<sup>33</sup>R.B. ASPREY, *WAR IN THE SHADOWS, THE GUERRILLA IN HISTORY*, 97-117 (1975); W. LAQUEUR, *Guerrilla* 18-22 (1976).

<sup>34</sup>Lieber Instructions, D. SCHINDLER & J. TOMAN *supra* note 1, Art. 82, at 14. While some of these groups may have been patriotic Southerners resisting Union invaders, others were marauders and bandits exploiting the opportunities afforded by the disruption of war for plunder. Although they might have been tried and punished, for their individual crimes, it was easier to punish them for their lack of status as "belligerents" — in the words of Art. 82: ". . . treated summarily as highway robbers or pirates" The preference for avoiding the necessity of proving individual guilt in the case of guerrilla members of groups which violate the norms of the law of conflict is still to be noted in the criticisms of the relaxation in the standards for entitlement to PW status. See Roberts, *supra* note 18, at 129. Those who make this argument seem to have overlooked Art. 33 of the Fourth Geneva Convention which provides that

"[n]o protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise measures of intimidation or terrorism are prohibited."

A person denied prisoner of war status is usually a civilian who is a 'protected person.'

tions.

The critical provisions of the Russian Draft<sup>35</sup> were:

That the rights of belligerents shall not only be enjoyed by the Army, but also by militia and volunteers “who meet the criteria of (1) military commander responsible for his subordinates, (2) wearing a distinctive badge recognizable at a distance, (3) carrying arms openly, and (4) adhering to the laws and customs of war”; but belligerent groups not complying with these conditions were to be denied the combatants’ privilege and its members were to be amenable to judicial proceedings.

The “inhabitants of a district not already occupied by the enemy, who shall take up arms in defense of their country shall be considered as belligerents, if they respect the laws and customs of war”; but the inhabitants of an effectively occupied territory were expressly denied such status and were to be handed over to justice.

Part-time combatants “who at one time take part independently in the operations of war, and at another return to their pacific operations . . .” were denied the rights of belligerents and were amenable to military justice.

The smaller European States who saw themselves as the potential victims of aggression and as occupied territories would not accept the negative provisions which attempted “to confine war to the regular forces of the belligerents . . .” or to “support any clause which has a tendency either to weaken national defense or to detach citizens from their duty towards their country.” Their firm opposition forced the deletion of the three negative proposals which would have explicitly provided that failure to meet the four criteria for privileged belligerence would render the irregular combatant liable to judicial action, the denial of privileged combatant status to spontaneous resistance fighters in occupied territory as well as the provision which outlawed the part-time combatant.

A declaration made by Italy and supported by the other small states interpreted the four conditions for undoubted belligerent status as not necessarily excluding others participating in national defense, but no specific text to that effect was adopted.

Twenty-five years later, the same issues nearly caused the failure of the 1899 Hague Regulations. The compromise solution was a reaffirmation of the relevant provisions of the 1874 Brussels Project in Articles 1 and 2 of the 1899 Hague Regulations with a clause in the preamble to the Convention that Articles 1 and 2 of the Regulations must be understood in the sense of the famous

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<sup>35</sup>Draft Project, The Brussels Conference of 1874, summarized in Mallison and Jabri, *The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population*. 42 GEO. WASH. L. REV. 196-200 (1974).

Martens clause “that in cases not included in the Regulations the population and belligerents remain under the protection and the rule of the principles of the law of nations as they result from the usages established among civilized nations, from the laws of humanity and the dictates of the public conscience.”<sup>36</sup>

In 1907, the requirement that arms be carried openly was added to the conditions applicable to civilians who take up arms to resist invaders in unoccupied territory.<sup>37</sup>

This qualification for combatant status and entitlement to prisoner of war status in the spontaneous resistance against an invader remains firm law as reflected in Article 4A(6) of the 1949 Third Convention. It virtually abolishes the distinction between peaceful civilians and the unorganized patriots during the invasion stage of an armed conflict until a stabilized occupation is established by the invader.<sup>38</sup>

The history of the development of treaty law on the qualification of privileged combatants show that the political considerations have always played an important part.<sup>39</sup>

#### THE CURRENT LAW

The state of the relevant law of the Articles 1 and 2 of the 1899 and 1907 Hague Regulations relevant to irregular combatants not formally integrated into the armed forces of a party to the conflict was that they were privileged combatants and entitled to be prisoners of war provided that they are organized and meet the four conditions.

It was clearly understood that compliance with these conditions would give privileged combatant status to those irregular combatants operating in occupied territory or elsewhere. Noncompliance was not a violation of the laws

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<sup>36</sup>*Id.* at 203-204; D. SCHINDLER & J. TOMAN, *supra* note 1, at 64. In explaining the compromise proposal, Mr. deMartens stated that the proposed re-adoption of Brussels Declaration provisions expressly extending privileged combatants status to those inhabitants who fight against the occupant in conformity with the stipulated requirements, could be taken neither to deny “the right of [the] population to defend themselves except when in compliance with these articles, nor to imply that partisans not specifically covered therein were to be placed outside the protection of international law.”

<sup>37</sup>1907 Hague Regulation, Art. 2, D. SCHINDLER & J. TOMAN *supra* note 1, at 69.

<sup>38</sup>1899 and 1907, Hague Regulations, Article 42, *Id.* at 82. “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

<sup>39</sup>Violations of the terms of an armistice by individuals was traditionally considered to be a serious war crime for which punishment might be demanded. (1907 HR Art. 41) After the German government surrendered unconditionally in 1945, the U.S. tried certain German Nationals for continuing to participate in the war effort of Japan (*Johnson v. Eisentrager*, 339 U.S. 763 (1950)). Notwithstanding this well established principle, the desire to legitimize the role of General DeGaulle and the Free French who continued to fight on the side of the Allies after the government of France surrendered in 1940, motivated the 1949 Diplomatic Conference to adopt Article 4A(3) which provided for prisoner of war status for “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.” Note the similarity to Protocol I, Art 43(1).

of war, but in the absence of a contrary rule, the hostile party was not obliged to recognize a captive irregular's immunity from prosecution and punishment for warlike acts which do not violate the laws and customs of war. Accordingly, the captor state could try and punish such irregulars under its municipal law for unprivileged belligerency and for any crime resulting from an unprivileged warlike act.<sup>40</sup>

But violations of the laws and customs of war are war crimes, whether committed by a privileged or unprivileged combatant. Among the war crimes relevant to this study is "treacherous" killing or wounding of individuals belonging to the hostile nation or army.<sup>41</sup> Use of civilian disguise in order to achieve surprise in a situation such as the one described by Mr. Feith involving a ". . . man with the bomb who is a civilian in all outward appearances but can blow you to smithereens as you pass him by . . ." <sup>42</sup> would certainly be a treacherous killing in violation of Hague Regulation, Article 23b.<sup>43</sup>

In the 1949 Diplomatic Convention, the compromise ultimately adopted amounted to a reaffirmation of the 1907 Hague Regulations, clarified by explicit recognition that the independent militia, volunteer corps or organized resistance movements be organized and belong to a Party to the conflict.<sup>44</sup>

Although a proposal for an explicit provision that the requirement for a fixed distinctive sign, recognizable at a distance *be worn at all times* was not adopted, it was nevertheless understood that it must be worn constantly in all circumstances.<sup>45</sup> This requirement was, of course, incompatible with privileged combatant status for part-time combatants. Realization of the inadequacy of these provisions to provide privileged combatant status for those who fight regular military forces in colonial wars, occupied territory and in struggles for self-determination, gave rise to strong initiatives to relax or abolish the 1949 convention standards for "freedom fighters," frequently coupled with measures to release them from an obligation to comply with the law of armed conflict in their relation with unjust oppressors.<sup>46</sup> Western states generally opposed these initiatives in U.N. Forums, but West European states who had ex-

<sup>40</sup>Baxter, *supra* note 30; Solf & Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES J. INTL L. 205, 215-216 (1977).

<sup>41</sup>1899 and 1907 Hague Regulations, Article 23b, *supra* note 1, at 76.

<sup>42</sup>Feith, *supra* note 12, at 43.

<sup>43</sup>It would also be a "perfidious killing" made punishable as a violation of Article 37(1) of Protocol I, which lists "the feigning of civilian, non-combatant status" as an act of perfidy. Failure to comply with the minimum standards of Article 44(3) would support a charge of perfidy (Protocol I, Article 44(3)).

<sup>44</sup>Third Geneva Convention, Article 4A(2).

<sup>45</sup>ICRC. Commentary Third Geneva Convention [J. Pictet, ed.] 55-56 (1960) [hereinafter referred to as Pictet Commentary, Third Convention].

<sup>46</sup>See UNGA Resolution 3103 (XXVIII) 12 Dec. 1973. *Basic Principles of the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*; Proposals by the Democratic Republic of Vietnam for the Revision of Drafts Protocol I, CDDH/41, 12 March 1974, IV Official Records, Diplomatic Conference on Humanitarian Law 177 (1977). The DRV paper was so brazen that it received only lip service support from the Soviets and other Third World Delegations; it was virtually ignored.

perienced Axis occupation during World War II or considered that they might again be subject to occupation, strove for some relaxation of the standard for resistance movement in occupied territory.<sup>47</sup>

The purpose of the rigid requirement for the fixed sign and the obligation to carry arms openly at all times was to:

- (a) Preclude irregular combatants from using a civilian disguise to achieve surprise against their adversary, and
- (b) To promote the security of civilians against the effects of hostilities.

Thus, in theory, the rules promote the principle of distinction between combatants and civilians which is an essential corollary of the rule that the civilian population and individual civilians may not be the object of attack. But, in the course of the negotiations, it became apparent to many Western Delegations that resistance movements and "freedom fighters" in territories effectively controlled by their adversaries could not comply with that standard. As Mr. Feith points out: "Unless [such a force] has a secure base in a region beyond the writ of the government it is fighting, wearing uniforms and carrying arms openly would be suicidal."<sup>48</sup> Since the standards could not be complied with in such circumstances, they were not complied with. Since the resistance fighters remained a legitimate target for attack, whether or not they distinguish themselves, the standard did not really protect the civilian population in those situations when guerrillas based themselves in a civilian environment and derived their logistics and intelligence support from the civilian population.

The winds of change were sufficiently strong during the Vietnam conflict to cause the United States Military Assistance Command and the Republic of Vietnam to classify as prisoners of war, members of Viet Cong guerrilla units who are captured while actually engaging in combat or in a belligerent act under arms other than an act of terrorism, sabotage or spying.<sup>49</sup>

#### THE ISSUE BEFORE THE DIPLOMATIC CONFERENCE

The task of the 1974-1977 Diplomatic Conference was to arrive at a balance which would relax the rigid requirements of the Hague and Geneva Standard sufficiently to provide guerrillas a possibility of attaining privileged combatant status without exposing the forces fighting them to the danger inherent in the use of civilian disguise in order to achieve surprise. The achievement of such a balance and reconciliation of conflicting positions was one of

<sup>47</sup>See interventions of Norway and France, respectively at Annex to CDDH/III/SR33-36; XV Official Records of the Diplomatic Conference on Humanitarian Law 400, 537 (1977). One reason why these views were not pressed more strongly in 1949 was that the states which had suffered Axis occupation during World War II were then Occupying Powers concerned with the security of their occupying force.

<sup>48</sup>Feith, *supra*, note 2, at 43.

<sup>49</sup>MACV Directive 381-46 Military Intelligence Combined Screening of Detainees. 27 Dec. 1967. Annex A. *Criteria for Classification and Disposition of Detainees*. 62 AM. J. INT'L L. 766 (1968). It is noteworthy that the U.S. Military Assistance Command drew a distinction between guerrillas and terrorists.

the most difficult and prolonged negotiations of the Conference.

The final result of the negotiations on this subject are embodied in Articles 37, 43, and 44 of Protocol I.

### PROHIBITION OF PERFDY

Article 37 reaffirms the explicit prohibition of Hague Regulation, Article 23(b) against the treacherous or perfidious killing or wounding of an adversary, and expands that prohibition to include the capture of an adversary by resort to perfidy. It defines perfidy<sup>50</sup> and provides illustrative examples which include "the feigning of civilian, non-combatant status." This is coordinated with Article 44 (which specifies the relaxation of the manner by which irregular combatants must distinguish themselves from civilians in order to qualify as privileged combatants) by a specific provision that acts which comply with the provision of Article 44(3) would not be considered to be perfidious within the meaning of Article 37. Conversely the killing, wounding or capture of an adversary by a combatant who fails to comply with the minimum standards of Article 44(3) could be prosecuted as a violation of Article 37 as well as any other offense such failure might involve.

#### *The New Rule of Distinction*

The first sentence of paragraph 3 states the basic rule:

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 a military operation preparatory to an attack.

Mr. Feith dismisses this provision as being "merely hortatory."<sup>51</sup> The significance of this sentence should not thus be underestimated.

By providing expressly that the protection of the civilian population is the value promoted by the rule, it provides direction and guidance for resolving controversies as to its interpretations in a manner consistent with the purpose of the rule.

The use of the word "obliged" in this context is highly significant. By stating that combatants are "obliged" to distinguish themselves, the rule makes failure to do so on the occasions and at the times specified a *breach* of the rules of international law applicable in armed conflict rather than merely a condition affecting loss of the combatants' privilege and entitlement to prisoners of war status. Under pre-existing law, failure to distinguish involved no breach of

<sup>50</sup>Article 37(1) defines "perfidy" as: "Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict with intent to betray that confidence . . . ."

<sup>51</sup>Feith, *supra* note 2, at 45.  
<http://ideaexchange.uakron.edu/akronlawreview/vol20/iss2/3>

any positive prohibition of international law<sup>52</sup> except to the extent that it might have involved a treacherous killing or wounding prohibited by Hague Regulation, Article 23(b). But in the absence of the combatants' privilege, the guerrilla or saboteur was amenable to trial and punishment for his unprivileged belligerence and also for any crime under domestic law which would be considered a legitimate act of war if done by a privileged combatant. A fair question is, what difference does it make to the guerrilla if his adversaries condemn him to death as a war criminal or merely as an unprivileged combatant who has committed common crimes? It must be conceded that, apart from considerations of honor,<sup>53</sup> it makes very little difference to the condemned guerrilla. Under pre-existing law, the superior who ordered the use of a civilian disguise, or failed to suppress it committed no offense. Under Article 44(3), however, failure on the part of superiors and commanders to enforce the new norm of international law becomes a breach of Articles 86 and 87.

In view of the change, making failure to distinguish oneself at the times and under the circumstances prescribed an offense under international law and extending liability up the chain of command, subject to the penal sanctions prescribed for breaches in Article 129(3) of the Third Convention, and Article 85 (1) of Protocol I, it is difficult to understand how Mr. Feith can declare that the first sentence of Article 44(3) is "merely hortatory."

The first sentence also puts to rest any residual claim that an irregular combatant must distinguish himself at all times while on active duty or even at all times when he is doing his military thing by participating in a military operation. The requirement is applicable when he is participating in a military operation *preparatory to an attack*. Thus, the farmer by day and guerrilla by night commits no offense and if apprehended, is entitled to be a prisoner of war. Just how a "military operation preparatory to an attack" is distinguished from other military operations remains a matter to be determined by the practice of states.<sup>54</sup> But such a combatant remains a legitimate target for attack whether or not he is preparing for an attack, and if a group of such combatants is based in a town or village and maintain its weapons, logistical supplies and equipment in that place, the danger of collateral casualties of civilians remains substantial, subject only to the prohibition against indiscriminate attacks and

<sup>52</sup>In *Ex Part Quirin*, 317 U.S. 1, 31 (1942), the United States Supreme Court indicated that acts such as espionage, sabotage and guerrilla warfare committed by individual combatants not fulfilling the criteria of Hague Regulations, Article 1, were war crimes in a broad sense. The common understanding after the war, however, has reflected the contrary views expressed by Professor Baxter in 1951 (*supra* note 30) which was later adopted by the Judicial Committee of the Privy Council [Mohammed Ali and another v. Public Prosecutor [1969] A.C. 430, 451, 453-54 (P.C. Malaysia 1968)]; See also J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 549 (1954), where the author comments "such unprivileged belligerents, though not *condemned* by international law, are not protected by it, but are left to the discretion of the belligerent threatened by these activities."

<sup>53</sup>Would Nathan Hale still be a national hero had he been condemned by the British for poisoning the British commander?

<sup>54</sup>In this connection the provisions of Article 46(3) pertaining to the resident combatant who gathers intelligence without any deceptive means other than his appearance as a civilian appear to be relevant.



the rule of proportionality.<sup>55</sup> This danger, however, is equally present under the Hague rules. Thus, although Article 44(3) of the new rule does not do much to enhance the protection of civilians from collateral casualties resulting from bombardment of military objectives situated in towns and villages, Articles 51(5) and 57(2) require substantial care in targeting only separate military objective (rather than the whole town) and avoiding attacks which may be expected to cause collateral civilian casualties excessive in relation to the concrete and direct military advantage anticipated from the attack on military objectives. These precautions should, as a minimum, ensure that the new rules do not enhance the dangers prevalent under the Hague rules.

### THE CONTROVERSIAL SECOND SENTENCE

The most controversial issue which confronted the Diplomatic Conference, and which most troubles Mr. Feith is the second sentence of paragraph 3.

As a part of the compromise accommodation to the problems confronting organized resistance movements in effectively occupied territories and to liberation movements engaged in armed conflict against a colonial power without, however, exposing their adversary to the danger that guerrillas might use civilian disguise to achieve a perfidious surprise, the second sentence of paragraph 3 relaxes the requirements of the basic rule in situations "where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself, 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."

Combatants who, under these specified circumstances, comply with the standard described in the second sentence continue to enjoy the combatant's privilege and immunity from prosecution for lawful acts of war, but they are not relieved of liability for the new offense established under the first sentence. In this connection, the Report of Committee III noted:

With one narrow exception, the Article makes the sanction for failure by a guerrilla to distinguish himself, when required to do so to be merely trial and punishment for violations of the law of war, not loss of combatant or prisoner of war status.<sup>56</sup>

The report of the Committee and numerous declarations by delegations express the understanding that the situations described in the second sentence of Article 44(3) are very exceptional and can exist only in occupied territory and

<sup>55</sup>See Protocol I, *supra* note 1, Articles 51(4) and (5), and 57(2).

<sup>56</sup>CDDH/407/Rev. 1, para 19, XV Official Records, *supra* note 47, at 453.

in conflicts described in Article 1(4).<sup>57</sup>

Whether the second sentence meets minimum expectation of a conventional armed force that it does not legitimize the use of civilian disguise to achieve surprise in an attack, depend on the construction of the word "deployment." The word has many different meanings in military usage and is admittedly ambiguous. In this connection the Report of the Committee states —

The one question of which the explanation of vote revealed a clear difference of opinion was the meaning of the term "deployment."

Most delegations stated that they understood it as meaning any movement toward a place from which an attack was to be launched.<sup>58</sup> Other delegations stated that it included only a final movement to a firing position.<sup>59</sup> Qatar and the PLO (which had no vote to explain), stated that they understood it as covering only moments immediately prior to attack.<sup>60</sup> This seems to be the interpretation on which Mr. Feith and the Secretary of Defense rely.

Construing the phrase in the light of the object of the rule, namely, the protection of the civilian population, the understandings expressed by Western delegations is undoubtedly correct.<sup>61</sup>

From a technical legal point of view, the declarations expressed by the U.K., the U.S. would limit their obligations under paragraph 3 of Article 44 if expressed in an instrument of ratification and would amount of reservations.<sup>62</sup> They would thus limit the obligation of the reserving states to accord prisoner of war status only to those hostile guerrillas who distinguish themselves by carrying arms openly in their tactical movement toward the place from which the attack is to be launched. If engaged in an armed conflict, it would be expected that the declaring states would act in accordance with their declaration. Any declaration of states expressing a lesser interpretation of "deployment" could not increase the obligations of any other state and would mean only that those

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<sup>57</sup>XV Official Records, 157(UK), 164(Australia), 170(Greece), 172(France), 176(Canada), 179(US), 186(New Zealand); VI Official Records (Plenary Session), 127(Greece), 132(UK), 135(France), 150(US), 152(Japan).

<sup>58</sup>Declaration in Committee: Australia, Canada, FRG, Republic of Korea, Netherlands, UK, USA (CDDH/III/SR55 and 56); XV Official Records 157, 162, 165, 167, 171, 176, 179; Additional Declarations in Plenary, Italy, Japan, VI Official Records, 123, 152. The U.S. and the U.K. expressed this declaration at the time they signed Protocol I, *supra* note 13; Korea, Belgium and Italy expressed the declaration in their instrument of ratification *supra* note 16. Italy omitted reference to Article 1(4) perhaps in the well founded belief that Article 1(4) could never be implemented.

<sup>59</sup>Declaration in Committee: Egypt, Sweden, Democratic Republic of Vietnam (CDDH/III/SR 53, 55, 56), XV Official Records 138, 160, 174; Additional Declaration in Plenary, United Arab Emirates, VI Official Records 146.

<sup>60</sup>Committee: PLO (CDDH/III/SR 53; XV Official Records 183-84); Plenary; Qatar (VI Official Records 149).

<sup>61</sup>*Supra*, note 31 and accompanying text.

<sup>62</sup>Vienna Convention on the Law of Treaties, Article 1(d) defines "reservation" to mean "a unilateral statement, however phrased or named, made by a State, when signing, ratifying . . . or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

states intend to treat the guerrilla fighters of their enemies more generously.<sup>63</sup> Of course, as the effect of a reservation is reciprocal, they would be free to operate under their adversaries reservation. This would soon establish the prevailing practice, and thus maintain a safeguard against legitimizing the use of civilian disguise as a means of achieving surprise and the disastrous consequences to civilians envisioned by Mr. Feith.

Instead of supporting the interpretation of the PLO, Mr. Feith should be exerting his talent and energy to urge those states who will ratify the Protocol to express an appropriate declaration regarding the word "deployment."<sup>64</sup>

### EFFECTS OF FORFEITURE OF COMBATANT STATUS

Mr. Feith dismisses the expectations of those who considered the relaxation of the Hague standards as providing guerrillas an incentive to comply with the laws of armed conflict with the assertion that the Protocol provides no effective sanction for non-compliance because paragraph 4 provides that even in this case the guerrilla shall "be given protection equivalent in all respects to those accorded to prisoners of war by the Third Convention and this Protocol."<sup>65</sup> This reflects a misunderstanding of the legal effects of the forfeiture of the combatants' privilege and prisoner of war status.

Having forfeited his combatant status such a prisoner forfeits his entitlement to prisoner of war status. He can therefore be prosecuted for acts, which if committed by someone who retains privileged combatant status, would be a lawful act of combat. With respect to his treatment in captivity, however, he must be given protection equivalent in all respects to those accorded to Prisoners of war by the Third Convention and the Protocol, including all judicial safeguards.

A prisoner of war has no immunity from prosecution for breaches of the law of armed conflict. As one of the most important protections of prisoner of war status is immunity from punishments under municipal law for acts of violence not prohibited by international law,<sup>66</sup> the question may arise whether "equivalent protection" includes the same immunity. It is clear that the Conference did not intend such a result.<sup>67</sup> In the Third Convention respect for the combatants' privilege is implemented through Article 87 which provides that

<sup>63</sup>C. Pilloud, *Reservations to the Geneva Convention of 1949*, 16 INT'L REV. RED CROSS 107, 129-30 (1976).

<sup>64</sup>See the Belgian, Italian and Korean declarations made at the time of their ratification, *supra* note 16.

<sup>65</sup>Feith, *supra* note 1, at 46.

<sup>66</sup>Third Convention Articles 85, 87, 99(1).

<sup>67</sup>The Committee Report states: ". . . In that extreme case, but in that case only, the sanction for failure to comply with the requirement of distinction is that the individual may be tried and punished for any crimes he has committed as a belligerent without privileges. Even then he must be given treatment in captivity equivalent in all respects to that to which prisoners of war are entitled (CDDH/407/Rev 1, Para 19, XV Official Records 453; See also CDDH/SR 40, Paras. 26, 48, 52, 74; SR 41 Para 22; VI Official Records 123, 127, 128, 132, and 145 for declarations of delegates expressing the same conclusion.

Prisoners of War may not be sentenced to any penalties except those provided for members of the Detaining Power's armed forces who have committed the same act. As failure to distinguish oneself is now a breach of the Protocol, the Detaining Power is under a duty to suppress or repress such conduct on the part of its own personnel. As the combatants' privilege has been forfeited, acts of violence committed are not privileged. Therefore, equivalent protection does not give immunity under Article 87 as to acts of violence which would have been privileged if committed by a privileged combatant.

Thus, the killing or wounding of an enemy combatant in a fire fight, or the burning of an object which is a military objective or even the capture of an enemy combatant could properly be charged as murder, infliction of grievous bodily harm, arson or kidnapping under the municipal law of the Detaining Power.

As there is no doubt that even a prisoner of war remains amenable for pre-capture breaches of the law of armed conflict, the unprivileged combatant is clearly amendable for all such breaches. In particular, the serious offense of perfidious killing, wounding or capturing of an enemy in violation of Article 37 of Protocol I or 1907 Hague Regulation, Article 23(b) ought always to hover over the guerrilla as a powerful deterrent against violating the minimum standard.<sup>68</sup>

Applying the foregoing rules to the traumatic terrorist car bombings in Lebanon, if set in the context of an international armed conflict with Protocol I in effect,

(a) The car bombing of the Marine Barracks would have been perfidious killings, and,

(b) The two car bombings of the Embassy would have been the grave breach of causing death or serious bodily injury by making civilians the object of attack denounced under Article 85 (3)(a). Grave breaches are universal crimes subject to the obligation of all parties to prosecute or extradite the offenders, who, in this case would be those who organized or ordered the car bombing attacks.

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<sup>68</sup>*But cf.* Sofaer, *Terrorism and the Law*, 64 FOREIGN AFFAIRS 901, 915 (1986) where the author construes the provision of Protocol I, Art 44(3) that "acts which comply with the requirements of this paragraph shall not be considered as perfidious" — might apply to "feigning protected status prior to a military engagement by using signs, emblems or uniforms of the United Nations, or nations that are not parties to the conflict." One might expect an ingenious, but desperate defense counsel to make such a claim. If Judge Sofaer were presiding over the trial in such a case, however, he would undoubtedly rule, as a matter of law, that the unlawful deception inherent in pretending to be an armed but protected U.N. peacekeeper is in no way excused by the provision of Article 44 (3), which is relevant only to the pretense of being an unarmed civilian about to engage in an armed attack. Moreover, the unauthorized use of the distinctive emblems of the U.N. or the use of the insignia of states not parties to the conflict need not be charged as perfidy in violation of Article 37; they are separate offenses laid under Articles 38(2) and 39(1). Terrorists would not be wise to follow Judge Sofaer's suggestion or to apply its reasoning to the pretense of being medical personnel armed with light individual weapons and displaying the distinctive emblem of the Red Cross or Red Crescent. (Arts. 13(2)(a); 38(1)).

As the United States and Libya were recently engaged in an international armed conflict within the meaning of Article 2 common to the Geneva Conventions,<sup>69</sup> and as Libya is a party to Protocol I, the bombing of the Berlin discotheque meets the criteria of the grave breaches denounced by Article 85 (3)(b) as an indiscriminate attack affecting the civilian population in the knowledge that such attacks would cause excessive loss of life or injury to civilians.<sup>70</sup> If the United States were a Party to Protocol I and if it had enacted the necessary legislation to implement the provisions regarding grave breaches, it would now be in a position to request the extradition of any terrorist involved in the bombing and of any Libyan authorities involved in the ordering or execution of the attack from any of the 59 parties to the Protocol in whose territory the offenders might be found.<sup>71</sup>

If avoiding the penal sanctions available under the law are not incentives to retain the combatants' privilege and to avoid breaches, one need only blame those governments which fail to avail themselves of the law enforcement means available, and mandated under the 1949 Geneva Conventions and Protocol I.

#### WARS OF NATIONAL LIBERATION<sup>72</sup>

In the highly politicized first session of the diplomatic conference, the only significant substantive work done was the adoption of Article 1, by Committee I of the Conference which provided in part that the international armed conflicts to which the 1949 Geneva Conventions and Protocol I apply, would also apply to a severely limited class of:

... armed conflicts 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 [U.N.] charter . . . and the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter . . .<sup>73</sup>

<sup>69</sup>See *ICRC Commentary III Geneva Conventions to the Treatment of Prisoners of War*, J. Pictet (ed) 23 (1960).

<sup>70</sup>As there was no conceivable military advantage to be obtained from the terrorist act of bombing the Berlin discotheque, even a single civilian casualty would be excessive.

<sup>71</sup>Common Articles 49/50/129/146 of the 1949 Geneva Conventions; Protocol I, Art 85(1). A draft of such legislation prepared by the Department of Defense Law of War Working Group in May 1979 was forwarded to the State Department for interagency coordination by the Office of the Assistant Secretary of Defense for International Security Affairs (I-5340/79).

<sup>72</sup>The present author is disappointed that the West has not moved vigorously to prevent the Soviets from appropriating the term "Wars of National Liberation," which was used by the Germans to describe their struggle to free themselves from Napoleon's conquest (*Befreiungs Krieg*) and which could justly be used to categorize the American Revolution, Simon Bolivar's revolt of the Central and South American colonies and which had been used by Carl Schurz in referring to the war against Spain over Cuba (See W. SAFIRE, *THE NEW LANGUAGE OF POLITICS* 478 (1968)).

<sup>73</sup>R.R. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 *HARV. INTL L.J.* 1-26 (1975).

As Mr. Feith points out, the U.S. Delegation and its friends vigorously opposed this provision. First, it injects subjective element as to the justice of particular causes, a factor which may be within the scope of the *jus ad bellum* (the circumstances under which resort to armed force may be justified), but which should not find a place in humanitarian law which is limited to the neutral *jus in bello* applicable to all parties to the conflict without regard to the justice of their cause.

Secondly, based on the rhetoric of some of the proponents, and the language of some UN Resolutions which had touched on the issue, the West feared that the revival of the *just war* concept would relieve the "just" side of the obligation to respect the prohibitions and restraints of humanitarian law.

Thirdly, the selection of certain conflicts only for special treatment would discriminate against the victims of other conflicts.

Fourthly, non-state parties are not likely to have the resources and capacity to fulfill the obligations under the Conventions and the Protocol.

The legal argument made in support of the provision was that the development of international law, as evidenced by many U.N. resolutions and the practice of numerous states had already elevated certain armed struggles against colonial domination to the status of international armed conflicts. The proposed provision merely recognizes a fact already accomplished.<sup>74</sup>

In 1974 Committee I adopted the provision by a vote of 70 for, 21 against and 13 abstentions.<sup>75</sup>

After the 1974 session there was serious consideration within the Defense and State Departments that the U.S. and many of its allies should not return to the conference, but on further consideration it began to dawn on those concerned that the provision would have no practical effect. The colonial power targeted by the provision, Portugal, was in the process of giving up its struggle. South Africa, Rhodesia and Israel and the other target states would not ratify or accede to the Protocol<sup>76</sup> and the reference to the U.N. Declaration of Friendly Relations would afford all other states which might be affected by dissident or separatist elements with a plausible basis for denying its application to their situation.<sup>77</sup>

<sup>74</sup>Protocol I, *supra* note 1, Art 1(4) Summarized in BOTHE, PARTSCH & SOLF, NEW RULES FOR THE VICTIMS OF ARMED CONFLICTS 40-43 (1980).

<sup>75</sup>CDDH/ISR13, para 42; VIII Official Records 102.

<sup>76</sup>Mr. Feith cites the Israeli Representative as stating "[P]rotocol I's national-liberation war provision] has within it a built-in non-applicability clause, since a party would have to admit that it was either racist, alien or colonial . . . such language . . . ensured that no state by its own volition would ever apply that article." (Feith, *supra* note 1, at 40).

<sup>77</sup>It is necessary to appreciate the dilemma of the Third World proponents of the drive to classify the struggles against Israel, Portuguese Colonialism and Southern Africa as international armed conflicts without also so classifying the revolt of the Kurds against Iraq, the secession of Biafra from Nigeria and the long standing revolt of the Eritreans against Ethiopia. The key to their solution lies in the reference in the text of Article 1(4) to the Declaration on Friendly Relations and Cooperation Among States insofar as it deals with

The U.S. delegation made it clear to the Third World sponsors, that the U.S. would not remain in the Conference unless the substantive obligations as well as the rights and benefits of the Geneva Conventions and the Protocol apply equally to all Parties to the conflict. This was accomplished in a preambular clause which reaffirms:

... that the provisions of the Geneva Conventions . . . and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict.

Moreover, under Article 96(3), the declaration by which a liberation movement may invoke the Convention, and Protocol I provides that the movement "assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol." The U.S. delegation also made it clear that ". . . we were not prepared to pay a high price in terms of military effectiveness or political barnacles in order to obtain treaty provisions that we desired."<sup>78</sup> After the political delegates from the Third World Permanent U.N. Missions in Geneva had achieved their red herring symbolic political victory, they lost interest in the pick and shovel work of the remaining negotiations. Thus, the really substantive issues were negotiated by representatives who honestly sought to find practical solutions, consistent with their country's interest, for the protection of the victims of war. In this climate it was possible to arrive at reasonable compromises with which all sides could live. The United States was successful in achieving many of the provisions we wanted including a better Protecting Power system, greatly improved protection for medical aircraft, specific requirements to account for the missing in action and the dead, a clear statement that prisoners of war

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the principle of self determination. This could plausibly immunize them from the legal effects of Article 1(4) based on the following propositions extracted from the text of the declaration:

- a. The *territory* of a colony or other non-self governing territory has . . . a status separate and apart from the territory administering it. (This established sufficiently the international personality thought to be essential to be a party to an international armed conflict.)
- b. . . . such status . . . shall exist *until* the people of the colony . . . have exercised their right of self determination.
- c. The establishment of a sovereign and independent state; the free association or integration with an independent state or the emergence into any other status freely determined by a people constitute modes of implementing the right of self determination. (Note that the essential separate status terminates when the people of the colony opt to become a new state or a subdivision of an existing state).
- d. Nothing in the foregoing shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states . . . possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.
- e. Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country. [The Principle of Equal Rights and Self-Determination of Peoples (UNGA resolutd 2625 (XXV)) Declaration of Principles of International Law Concerning Friendly Relations (Oct 24, 1979)].

<sup>78</sup>Report of the United States Delegation, Diplomatic Conference on Humanitarian Law, Fourth Session 29 (Sept. 8, 1977).

could not be denied protection on the ground that they were fighting an aggressive war, more specific rules protecting civilians who could not be classified as "protected persons" and reasonable clarifications of many ambiguities in the 1907 Hague Regulations on the conduct of hostilities such as a favorable definition of military objectives, the first definition of the rule of proportionality and a clear definition of non-defended localities.

The issue which must be faced is whether a theoretical provision relating to certain armed struggles for self determination which is unlikely to be implemented outweighs the many positive improvements embodied in Protocol I for strengthening the protection of victims of war.

The following are some of the evils alleged by Mr. Feith as flowing from Article 1(4) and a short answer as to why they are not as serious as perceived by him (and by Western Delegations in 1974):

. . . Allegation: Art 1(4) would legitimize wars of national liberation.

Answer: The preamble of Protocol I expresses the conviction of the parties: "That nothing in this Protocol or in the Geneva Conventions . . . shall be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the charter of the United Nations."

As a humanitarian instrument, the Protocol could no more legitimize the use of force to achieve self determination, than Article 2, common to the 1949 Conventions, legitimizes aggression. As a part of the *jus in bello* the Protocol lays down rules which must be applied in international armed conflicts without regard to the justice of the causes espoused by the Parties to the conflict. If the prevailing international law as to the *jus ad bellum* considers such conflicts as international armed conflicts, Art 1(4) provides that the rules of international armed conflict shall apply. In this regard, Article 4 of Protocol I provides

The application of the Conventions and of this Protocol, . . . shall not affect the legal status of the Parties in the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Relevant political instruments which would, if binding, tend to legitimize the use of force by peoples under colonial and racist regimes or other forms of alien domination to achieve self determination and to seek and receive support to that end are to be found in the Declaration of Friendly Relations<sup>79</sup> and in Article 7 of the *Definition of Aggression*.<sup>80</sup>

. . . Allegation: Article 1(4) licenses belligerent foreign meddling in the

<sup>79</sup>Supra note 77.

<sup>80</sup>UNGA Resolution 3314 (XXIX) 14 Dec. 1974. Paragraph 7 provides that nothing in the definition of aggression including the list of acts amounting to aggression could prejudice the right of self determining freedom or independence of peoples forcibly deprived of that right, particularly peoples under colonial and racist regimes or other form of alien domination; nor the right to struggle to that end and to seek and receive support



sovereign domain of affected states.

Answer: Covert, publicized covert or relatively open military assistance from States friendly to dissident groups may be expected to occur without the blessing of international law in any situation of internal armed conflict. There is nothing in the Geneva Convention or in Protocol I relevant to international armed conflicts which legitimizes military assistance or military support to either Party in an armed conflict. Support of a strictly humanitarian nature is encouraged including medical personnel and units,<sup>81</sup> relief<sup>82</sup> and civil defense units.<sup>83</sup> But in each such case the adverse Party must be notified in advance, and free passage of relief requires the consent of the Parties concerned.<sup>84</sup>

. . Allegation: In the absence of an objective standard for judging whether a group qualifies as a liberation movement under Article 1(4), "any separatist band of armed criminals might claim to be engaged in an armed struggle in furtherance of the right to self determination."

Answer: Article 1(4) limits its scope to "peoples," and the Declaration of Friendly Relations limits it further to the "peoples of a colony or non-self governing territory." Entities which do not qualify as the people of a particular territory, such as minorities or groups of political opponents simply do not qualify.

. . Allegation: Based on the manner used to determine what liberation movements would be invited to attend the diplomatic conference as observers, the power to determine which movement qualifies will be vested in the regional intergovernmental organizations such as the Arab League and the Organization of African Unity.

Answer: The Protocol makes no provision as to any authority to make this determination. Accordingly, the affected State is the ultimate decision maker. In signing the Protocol, the United Kingdom expressed an understanding that a liberation movement could not qualify as a party to an international armed conflict unless it was recognized by the appropriate regional intergovernmental organization.<sup>85</sup> The expectation of the UK, undoubtedly, was that the Council of Europe would not be likely to recognize the PIRA as qualifying under Article 1(4). During the diplomatic conference various Arab, African, Latin American and Southeast Asian States made similar declarations, ostensibly in the expectation that their regional organization is unlikely to recognize their dissident groups as qualifying, thus affording an additional layer of immunity against the effects of Art. 1(4) in relation to dissident movements within

<sup>81</sup>First Convention, Art 27; Second Convention, Art 25, 38; Protocol I Arts. 9(2), 22(2).

<sup>82</sup>Fourth Conv. Arts 23, 59-62, 109-111; Protocol I, Arts 70-71.

<sup>83</sup>*Supra*, note 1, Protocol I, Art 64.

<sup>84</sup>*Supra* notes 81-83.

<sup>85</sup><http://ideaexchange.uakron.edu/akronlawreview/vol20/iss2/3>  
D. SCHINDLER AND J. TOMAN *supra*, note 1, at 635.

their territory. In view of the foregoing, it follows that the self determination provision in Art. 1(4) is largely symbolic and is not at all likely to present any practical problems in operations except that it automatically excludes Israel and South Africa from becoming parties to the Protocol, an unfortunate consequence in view of the military capability of both states in relation to their neighbors.

#### THE 1979 CONVENTION AGAINST THE TAKING OF HOSTAGES

Despite the presence of the same offensive language in Article 12 of the 1979 International Convention Against the Taking of Hostages,<sup>86</sup> the United States ratified the Hostage Convention in December 1984, considering it to be an effective tool to combat hostage taking as an act of international terrorism because it:

. . . imposes binding legal obligations upon States Parties either to submit to prosecution or to extradite any person within their jurisdiction who commits acts of hostage taking, . . . attempts to commit such an act, or participates as an accomplice of anyone who commits . . . such an act.<sup>87</sup>

Article 12 of The Treaty is unique in that it coordinates its own application with that of the norms of the Geneva Conventions and its additional Protocols by providing a means for international enforcement of the norms of the Geneva Conventions prohibiting hostage taking even when the Geneva Convention system provides no such international enforcement means.

Under the Geneva Convention and the 1977 Protocols, there are prohibitions against hostage taking in non-international armed conflicts<sup>88</sup> and in international armed conflicts with respect to civilians who are "protected persons,"<sup>89</sup> and civilians who are not protected persons.<sup>90</sup> Only the hostage taking of "protected" civilians in an international armed conflict, however, is a "grave breach" and thus a universal crime subject to the mandatory obligation to submit to prosecution or to extradite.<sup>91</sup>

By virtue of Article 12 of the Hostage Convention, the strong obligation to prosecute or extradite is somewhat elliptically made applicable to any hostage taking prohibited under the Geneva Conventions or its Protocols whenever the obligations to prosecute or to extradite under these treaties are not applicable. Where the obligation to prosecute or extradite exists under the Geneva Convention system, the Hostage Convention is not applicable. Thus, the

<sup>86</sup>International Convention Against the Taking of Hostages, signed Dec. 21, 1979; ratified by U.S. Dec. 7, 1984, UST \_\_\_\_ TIAS, \_\_\_\_.

<sup>87</sup>Letter of transmittal, Aug. 4, 1980, Message from the President, Senate Document Executive N, 96th Cong. 2d Session., p. iii.

<sup>88</sup>Art. 3, Common to the Conventions, *supra* note 8; Protocol II, Art 4(2) *supra* note 1.

<sup>89</sup>Fourth Geneva Convention, *supra* note 8, Arts. 34, and 147.

<sup>90</sup>Protocol I, *supra* note 1, Art. 75(2)(c).

<sup>91</sup>*Supra* note 89, Art 147.

two regimes complement each other and cover almost every hostage taking situation.

In 1979, Ambassador Anthony Quinton, Director of the State Department's Office for Combating Terrorism considered Art 1(4) of Protocol I to be a positive development because it extended the grave breaches regime of international armed conflicts to wars of national liberation and thus facilitated the obligation to prosecute or extradite.<sup>92</sup>

The negotiating history of the Hostage Convention began in a setting as traumatic as that outlined by Mr. Feith with respect to Article 1(4) of Protocol I. Third World delegates demanded that Liberation Movement hostage taking be removed from the scope of the Hostage Convention, that only the taking of "innocent" hostages should be proscribed, that "guilty" persons such as Ian Smith should not be protected, and that political motivation should not only bar extradition, but also excuse the act.<sup>93</sup>

By careful and patient negotiation and Western willingness to accept the symbolism of wars of liberation formula, the provision was turned around to exclude from the scope of the Hostage Convention those hostage takings to which the Geneva Convention or either Protocol is applicable *and under which states parties were bound to prosecute or extradite the offender*. All other hostage taking prohibited under the Conventions and Protocols fall within the scope of the Hostage Convention.<sup>94</sup>

A question remains as to why the present administration was eager to ratify the Hostage Convention despite its use of the offensive wars of liberation clauses, because that Convention was perceived to facilitate the prosecution or extradition of terrorists who take hostages,<sup>95</sup> while it gasps over the identical language in Protocol I, which would facilitate the prosecution or extradition of terrorists committing a broader spectrum of terrorist acts?

## CONCLUSION

In announcing its decision not to ratify Protocol I, based primarily on its objection to the provisions applying the humanitarian rules of international armed conflict to certain very limited struggles by peoples for self determina-

<sup>92</sup>Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 420-21 (1980).

<sup>93</sup>Verwey, *The International Hostages Convention and National Liberation Movements*, 75 AM. J. INT'L L. 69, 70-76 (1981).

<sup>94</sup>*Supra*, note 86. Art 12.

<sup>95</sup>Sofaer, *supra* note 68 at 915-917. While deploring the rhetorical and symbolic effect of the wars of liberation clause, the present legal adviser of the State Department refers to the Hostage Convention as establishing "a useful scheme for combating hostage taking by terrorists . . ." He suggests, however, that Article 12 "requires, in specified circumstances, that persons like Abu Abbas must be treated as wayward soldiers, rather than as international criminals." Apparently, he has overlooked the point that under Protocol I (art. 85(5)), persons who commit grave breaches are "war criminals."

tion and changed standards which facilitate the capability for irregular combatants to qualify for the combatants' privilege and entitlement to be prisoners of war the administration notes: "that certain provisions of Protocol I reflect customary international law, and others appear to be positive developments." The administration, therefore, intends "to propose to our Allies and others a common understanding or declaration of principles incorporating these aspects, with the intention of securing their recognition as customary international law . . ."96

The administration states that Protocol I "suffered from fundamental shortcomings that could not be remedied through reservations and understandings."<sup>97</sup>

If those fundamental shortcomings are the two provisions most vigorously emphasized by Mr. Feith, their effect is seriously exaggerated.

The Wars of National Liberation provision of Article 1(4) is, for all practical purposes, a dead letter. It will never be implemented in practice; Israel and South Africa will not accede to Protocol I, and other states will never admit that "colonial domination, and alien occupation and racist regimes" are applicable to their situation.

The principal fear of Western States in the first session of 1974-1977 was that this provision might generate a version of the "just war" doctrine whereby the "just" side was relieved of the restraints imposed by the law of war on the parties to the conflict. After the politicized first session, Article 1(4) was attenuated by preambular provision that nothing in the Protocol can be construed to legitimize or authorize any aggression or other use of force inconsistent with U.N. Chapter; and that the Conventions and Protocol I must be fully applied to all persons protected by them without any adverse distinction based on the nature or origin of the armed conflict or on the cause espoused by or attributed to the Parties to the conflict. It was further attenuated by Article 96(3) which provides that, in order to make the Conventions and Protocol I applicable in a qualified struggle for self determination against a Party to Protocol I, the liberation movement must assume the same rights and obligations which have been assumed by the movement's adversary. If, as Mr. Feith believes, Liberation Movements generally practice terrorism, few if any would wish to assume these obligations.

In view of all of the circumstances, Article 1(4) has only rhetorical and symbolic significance, the risk of which the present administration did not hesitate to assume when, in 1984, it ratified the 1979 Hostage Convention.<sup>98</sup>

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<sup>96</sup>*Supra* note 5.

<sup>97</sup>*Id.*

<sup>98</sup>*Supra* note 95.

Because they are likely to be implemented with respect to resistance movements in occupied territory during future interstate armed conflicts, the new rules relevant to the conditions under which guerrillas may qualify for the combatants' privilege are of much greater practical significance.

Under the new rules members of the regular armed forces and other organized armed groups of a Party to the conflict in an International Armed Conflict are privileged combatants if they are under a command responsible to that Party for the conduct of its subordinates. Like the Free French of World War II, it does not matter whether that Party is represented by a Government or authority recognized by the adverse Party.<sup>99</sup>

All members of such armed forces are entitled to be prisoners of war, and although they may be tried and punished for any violation of the law of armed conflict, they do not lose their combatants' privilege or entitlement to be prisoners of war unless they fail to meet the minimum standard authorized for exceptional circumstances in the second paragraph of Art. 44(3).<sup>100</sup>

This rule was strongly supported by the U.S. government in order to prevent repetition of our unfortunate experience in the Korean and Vietnamese conflicts when captured U.S. personnel were denied treatment required for prisoners of war on the allegation that the armed force to which they belonged had committed war crimes or that their participation in an aggressive war made them guilty of a crime against peace.

In summary, the new rules of Article 44 legitimize part time combatants, and relax the standards for distinguishing guerrillas from peaceful civilians sufficiently to make it possible for guerrillas to retain the combatants privilege and thus avoid prosecution and punishment for legitimate acts of war. (But not for breaches of that law). It requires sufficient distinction, however, to protect the adversary from the use of civilian disguise to effect surprise.

Under the old rule, failure to meet any of the rigid standards resulted in loss of the combatants privilege and consequent liability, under the domestic law of the captor, for unprivileged belligerence and all violent acts whether or not such acts would have been legitimate acts of war if done by a privileged combatant. This provided no incentive for compliance with the law of armed conflict. On the other hand, the retention of the privilege coupled with the danger of penal sanctions for violations would seem to provide a powerful in-

<sup>99</sup>*Supra* note 1, Art 43(1) Protocol I.

<sup>100</sup>*Id.* Art 44 (1)(2)(3); cf. Third 1949 Convention, Art. 85 which repudiated World War II practice by providing that: "[P]risoners of war prosecuted under The Law of The Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present convention." Although the Soviet Union and all other Communist states interposed reservations to the effect that prisoners of war *convicted*, in accordance with the principles of The Nuremberg Trial, of war crimes and crimes against humanity, will be subject to the conditions for those undergoing punishment for such crimes. That reservation requires that, until the conviction is final, the accused retains his status as a PW. The reaffirmation of Art 85 in Protocol I, Art 44(a) will make it more difficult for Communist states to deny PW status to captured combatants on such grounds as North Vietnam advanced during the Vietnam conflict.

centive for complying with the law of armed conflict.

There are a number of ambiguities in Paragraph 3 of Article 44, which might result in the failure to provide the indispensable prerequisite for acceptability of the new rule: the prevention of the use of civilian disguise to achieve surprise. Most of these ambiguities, including the meaning of the critical word "deployment" have been corrected by formal understanding expressed by states at the time of signature or ratification. It might be well to formulate an understanding as to what is meant by "a military operation preparatory to an attack" and how that is distinguished from other "military operations" in which irregular combatants are not obliged to distinguish themselves.

On balance it would seem that the provisions vehemently attacked by Mr. Feith do not warrant rejection of the Protocol. When these issues are viewed in their proper perspective, the remaining question will be: What other provisions for the protection of civilians are deemed to be unacceptable by the administration and why they are so deemed? The debate on these matters should be enlightening.

