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Additional Protocol I: A Military View

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ADDITIONAL PROTOCOL I: A MILITARY VIEW*

by

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This paper is intended to analyze Additional Protocol I from a military perspective. More specifically, it presents the views of a United States military officer (albeit an officer who is also a lawyer) on the Protocol.

To begin with, the Protocol, if ratified by the United States, would be taken seriously by our armed forces. It is United States policy to comply with the law of war in the conduct of military operations, and this body of law is regularly applied in American military courts.[1] During the war in Southeast Asia, for example, 36 members of the U.S. Army were tried by courts-martial for violations of the law of war.[2]

It should be expected, then, that if the United States were to ratify the Protocol, that document would have a major impact on the conduct of the armed forces in war. It is not realistic to assume that the United States could ratify the Protocol, for whatever diplomatic and political benefits that might entail, and that its armed forces could simply ignore any inconvenient provisions of the Protocol in practice.

As compared with the earlier Geneva Conventions,[3] the Protocol breaks new ground by attempting to regulate the actual conduct of combat operations. It is in these new provisions (principally Articles 48 to 60) that there are military difficulties with the Protocol. Articles 50 and 52, for example, establish a presumption that in case of "doubt" as to whether a person or object is civilian, he, she, or it shall be considered to be civilian, and thus not subject to attack.[4]

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*The views expressed in this paper are solely those of the author and do not necessarily represent the views of the Department of Defense, the United States Air Force, or any other agency of the United States government.

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[1]*See* Department of Defense Directive 5100.77, July 10, 1979, Subject: DOD Law of War Program; Carnahan, *The Law of War in The United States Court of Military Appeals*, 22 A.F.L. REV. 120 (1980-81).

[2]G. PRUGH, LAW AT WAR: VIETNAM 1964-73 74 (1975).

[3]Geneva Convention on the Wounded and Sick, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362 [hereinafter cited as Geneva Convention on the Wounded and Sick]; Geneva Convention on the Wounded, Sick and Shipwrecked at Sea, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, Geneva Convention on Prisoners of War, August 12, 1949, 6 U.S.T.3316, T.I.A.S. No. 3364; Geneva Convention on Civilians, August 12, 1949, 5 U.S.T. 3516, T.I.A.S. No. 3365.

[4]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflict (Protocol I), June 8, 1977, art. 50, para. 1, art. 52, para. 3, 16 I.L.M. 1391 [hereinafter cited as Protocol I] D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICTS 551, 580, 582 (2d ed. 1981) [hereinafter cited as SCHINDLER & TOMAN].

In war, however, decisions are almost never free of doubt. Commanders must constantly make important decisions on the basis of imperfect information of questionable reliability. Clausewitz wrote the classic description of this problem 150 years ago:

> Many intelligence reports in war are contradictory; even more are false, and most are uncertain. What one can reasonably ask of an officer is that he should possess a standard of judgment, which he can gain only from knowledge of men and affairs and from common sense. He should be guided by the laws of probability. These are difficult enough to apply when plans are drafted in an office far from the sphere of action; the task becomes infinitely harder in the thick of fighting itself, with reports streaming in.
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> Everything in war is simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war.[5]

As a concrete example of the "fog of war," consider this recent description, by Secretary of Commerce Baldridge, of Marine combat in Okinawa in World War II:

> On the front lines, it's kill or be killed, and you have to be passable at it if you are going to last more than a night or two.
>
> And the longer you last, if you're going to beat the odds, the more you are brutalized. Question: Otherwise how could you give the order to fire on a bunch of Okinawan women looking for their dead near your lines on a quiet night lighted by a full moon? Answer: Because you suspected they were Japanese soldiers dressed in women's robes. Question: Did you try to warn them off to see whether they were women and would leave? Answer: No. Thought about it, but a warning would have given away our location. Question: Shouldn't you have been sure before firing? Answer: Being sure can get you killed — and they did turn out to be Japanese soldiers, every one.[6]

It can hardly be said that Lt. Baldrige was free from doubt as to the civilian status of the Japanese "women." Had he anachronistically followed the guidance of Additional Protocol I, he would have regarded them as civilians, not subject to attack. As he notes, however, such an approach might have cost he and his men their own lives.

In recognition of this phenomenon, Anglo-American law has traditionally accorded great weight to the good-faith judgments of military decision-makers, and has usually considered such decisions to be beyond the scope of ordinary

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[5]C. VON CLAUSEWITZ, ON WAR 117, 119 (M. Howard and P. Paret trans. 1976).

[6]Baldrige, *An American in Japan*, Wash. Post, Aug. 20, 1985, § A, at 15, col. 1.

judicial review.[7] The Protocol, by requiring decisions to be made a certain way whenever "doubt" exists, virtually invites "second-guessing" of decisions reached in the midst of combat, including judicial review of such decisions.

Another military concern with the Protocol arises from that document's treatment of regular armed forces vis-a-vis guerrilla fighters. The law of war has traditionally discouraged fighting, gathering information or conducting other military operations while not in proper military uniform. Enemy personnel captured while engaged in sabotage or other combat operations in civilian clothing, or while gathering military intelligence under false pretenses, have been subject to punishment under the law of the capturing power.[8] This rule is based on the need to protect the civilians from the effects of warfare as much as possible. If military personnel are not clearly separated from the civilian population, it will be difficult for the enemy to accord that population full immunity from attack.

Guerrilla organizations, of course, often reject any effort to distinguish themselves from the civilian population and instead try to hide from the enemy by blending in with that population. On capture, a guerrilla practicing such tactics would traditionally be subject to trial and punishment for violation of the law of war. The Protocol changes this situation, however, by stating that in certain "situations" where, "owing to the nature of the hostilities" (i.e., guerrilla warfare), a combatant cannot distinguish himself from the civilian population during all military operations preparatory to an attack, such combatants will still be entitled to prisoner of war status and treatment if they carry their arms openly during an attack and deployments preceding the launching of an attack.[9] While relaxing the principle of distinction from the civilian population for guerrillas, the Protocol also makes it clear that this relaxation does not apply to the regular armed forces who typically fight guerrillas: "This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict."[10] The Protocol thus places the guerrilla in a legally advantageous position, since he may lawfully use tactics that are still forbidden to his regular forces opponent. The guerrilla's right to blend in with the civilian population (short of deployments preceding an attack) takes on even more importance in light of the Protocol's presumption (discussed above) that "in case of doubt" a person must be considered to be a civilian.

The guerrilla may even have a privileged position in relation to regular armed forces friendly to him. Traditionally, a member of the armed forces who

[7] *See, e.g.*, Chappell v. Wallace, 462 U.S. 296 (1983); Moyer v. Peabody, 212 U.S. 78 (1909).

[8] *See ex parte* Quirin, 317 U.S. 1 (1942); Baxter, *So-Called 'Unprivileged Belligerency:' Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323 (1951).

[9] *See* Protocol I *supra* note 4, at art. 44, para. 3.

[10] Protocol I *supra* note 4, at art. 44, para. 7.

engages in espionage against the enemy (i.e., gathering military information while dressed as a civilian, or under other false pretenses) is not subject to punishment if he is able to rejoin his own army before capture.[11] In trying to adapt this rule to the needs of guerrillas, Article 46 of the Protocol provides that a member of a guerrilla organization "who is a resident of territory occupied by an adverse Party," and who gathers military information may only be punished as a spy if captured while actually engaging in espionage. Members of regular armed forces must still rejoin their forces before becoming safe from punishment as a spy.

Consider, for example, the situation of a patrol of regular forces sent into enemy-occupied territory to cooperate with a local resistance movement. After making contact with each other, a regular and a resistance fighter together reconnoiter, in civilian clothing, an enemy installation. Both have committed espionage under the law of war. However, the resistance member could not, under the Protocol, be punished for espionage by the occupying power unless he had been captured in the act of gathering information; the regular is still subject to punishment if he is captured at any time before he rejoins his own army, outside the occupied territory.

Friends of the Protocol might concede that, while Articles 44 and 46 do appear to give the guerrilla legal privileges not enjoyed by members of regular national armed forces, this is no more unfair than existing law, which "discriminates" the other way, in favor of regulars. Still, these new provisions are not calculated to endear the Protocol to members of regular, uniformed armed forces.

The same is true of Article 56, though here the professional military reaction is likely to be one of frustration rather than a feeling of discrimination. Article 56 prohibits attacks on certain dams, dikes, and nuclear power stations and creates a new symbol — three orange circles in a row — to designate protected facilities.[12] Perhaps the most basic problem with Article 56 is that it is not clear which facilities will be entitled to display this new symbol and which will not. Dams, dikes, and nuclear power stations are protected under Article 56 only if "severe" civilian casualties might result from flooding or the release of radioactivity. There is no internationally agreed criterion to determine if losses are "severe," so the application of this standard will be completely subjective. This uncertainty is amplified by the use of the term "may"; dams, dikes, and nuclear power stations are protected whenever severe civilian losses

[11] "A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage." Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) on Land Warfare, October 18, 1907, art. 31, 36 STAT. 2227, T.S. 539 [hereinafter cited as Hague Regulations on Land Warfare]; *compare* Protocol I *supra* note 4, at art. 46.

[12] SCHINDLER & TOMAN, *supra* note 4, at 583-84. The new sign is illustrated in Annex I to Protocol I *supra* note 4, at article 16.

from the release of dangerous forces are objectively foreseeable, rather than whenever such effects are likely or probable.[13] Coupling the use of the term "may" with the presumption of civilian status in Article 50 expands the potential impact of Article 56, but also expands its uncertainty in application. Commanders and targeting staffs would not only have to decide whether severe losses might occur in a particular area, they must also weigh whether any "doubt" exists as to whether the persons affected are civilians. (Aerial photographs might show, for example, that flooding caused by a dam attack would wipe out a system of roads heavily used by military trucks carrying military supplies;[14] they would be unlikely to show whether the drivers, who might suffer severe losses from drowning, are civilian or military.)

In practice, states party to the Protocol are likely to claim protection for their own dams, dikes, and nuclear power stations whenever there is any colorable basis for such a claim. When carrying out combat operations against the dams, dikes, and nuclear power stations of other parties, however, they are likely to reject, as unfounded and even perfidious, the claims of adversaries that their dams and dikes are subject to protection. This situation is in turn likely to lead to charges and countercharges of violations of Article 56 and other "war crimes," and eventually to a breakdown of respect for the law of war on both sides, as each perceives that the other is acting in bad faith.

This element of subjective judgment is not a factor in other international agreements establishing protective signs and symbols for armed conflict. There is usually little doubt in the mind of an objective observer as to whether a particular building is being used solely as a hospital, and thus is entitled to display the Red Cross or Red Crescent.[15] One agreement which did establish a subjective standard, the 1954 Hague Convention on Cultural Property, limits an attacker's obligation to respect the protective symbol by the principle of military necessity.[16]

There are other problems with the wording of Article 56. A nuclear power station loses its protection if "electric power" from the station provides "regular, significant, and direct support of military operations." At the diplomatic conference where the Protocol was drafted it was pointed out that this standard neglects the existence of modern power grids, which make it impossible to tell whether power from a particular plant is going to a particular user.[17] Nothing was done in response to this criticism, however. This standard also makes

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[13] *See* M. BOTHE, K. PARTSCH, & W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICT 353 (1982) [hereinafter cited as BOTHE, PARTSCH & SOLF].

[14] The United States carried out attacks for this purpose during the Korean conflict. *See* R. FUTRELL, THE UNITED STATES AIR FORCE IN KOREA, 1950-1953, 668-69, 673 (1983).

[15] *See* Geneva Convention on the Wounded and Sick, *supra* note 3, at art. 42.

[16] *See* Hague Convention for the Protection of Cultural Property in Armed Conflict, May 14, 1954, art. 4, 11 249 U.N.T.S. 240.

[17] BOTHE, PARTSCH, & SOLF, *supra* note 13, at 355.

no provision for other types of military support that might be furnished by a nuclear power plant, such as providing material for use in nuclear weapons.

For a dam or dike to lose its protection, it must not only provide "regular, significant, and direct support of military operations," but must also be "used for other than its normal function" at the time. The placing of anti-aircraft guns on dams or dikes is a clear example of use for other than a normal function, in direct support of military operations. However, a hydroelectric dam providing electric power in regular, significant, and direct support of military operations would not be subject to attack under Article 56, while a nuclear power station providing identical support would lose its protection. Similarly, placing anti-aircraft guns on or around a nuclear generating plant would not cause the plant to lose its protection, while such use of a dam or dike would cause loss of protection. There appears to be little rational basis for these distinctions.

The preceding is certainly not an exhaustive discussion of all the military concerns with Protocol I. It should, however, give some idea of the kinds of practical military problems raised by many of the Protocol's provisions. In the long run, effective implementation of such provisions in the actual conduct of combat operations is unlikely, even if the Protocol is technically in force for the parties to the conflict. Other parts of the Protocol, of course, do reflect modern military practice and may already be part of the customary law of war, or are likely to ripen into customary law. The definition of perfidy in Article 37, for example, clarifies and updates an important rule of customary law.[18] Similarly, the definition of "military objectives" in Article 52 has already been adopted in United States military publications,[19] even though the United States has not ratified Protocol I, and is probably well on its way to incorporation into international customary law. Finally, the rule in Article 57 on warning the civilian population prior to an attack is already a more accurate reflection of actual state practice than the earlier rule in Article 26 of the 1907 Hague Regulations.[20]

Provisions such as these will probably be regarded as accurate statements of customary law, regardless of how many nations ultimately ratify Protocol I, and will make an important contribution to the codification and development of the law of war. However, many other provisions of the Protocol are, quite

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[18] *Cf.* Article 23b of the Hague Regulations on Land Warfare, *supra* note 11: "it is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army."

[19] *See* US AIR FORCE PAMPHLET 110-31, INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, para. 5-3b (1976); US ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 40c (Change 1, 15 July 1976).

[20] "Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit," Protocol I *supra* note 4, at art. 57 para. 2(c). The Hague Regulations on Land Warfare, *supra* note 11, had required warnings prior to bombardment of towns, "except in cases of assault." For the negotiating history of this provision and its application in practice, *see* Carnahan, *The Law of Air Bombardment in Its Historical Context*, A.F.L. REV., Summer 1975, at 39, 45-48.

simply, militarily impractical. Governments that have not yet ratified or acceded to the Protocol should give full consideration to the problems that it could create for their armed forces before they decide whether to become a party to this treaty. The formal adoption of rules of war that cannot be implemented in practice does not, in the long run, advance the development of international humanitarian law, and will undercut the credibility of this body of law with the very military professionals who must apply it on the battlefield.