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PROS AND CONS OF THE 1977 PROTOCOL I

by

HOWARD S. LEVIE*

There are many provisions of value to be found in the 1977 Protocol Additional to the 1949 Geneva Conventions (Protocol I).¹ Unfortunately, there are also a number of provisions which would have been better left undrafted. This discussion will be limited to several provisions, or groups of provisions, which appear to be major advances in the humanitarian law of war — and several provisions, or groups of provisions, which appear to be retrogressive. Obviously, neither list will be all-inclusive; to make them so would require a listing and discussion of practically every substantive article in the Protocol. In fact, inasmuch as the lists must necessarily be rather short, it is extremely difficult to decide which “good” and which “bad” provisions should be included. Unquestionably, other students of the Protocol would not entirely agree with the selections to be found herein. Moreover, it must be borne in mind that the fact that an article is considered to be an advance in the humanitarian law of war does not necessarily mean that the writer believes that it is as well drafted as it could have been or that all of its parts should have been included therein.

First, let us identify and discuss those provisions which appear to be major advances in the humanitarian law of war. Articles 48 to 56, inclusive, of the 1977 Protocol I are concerned with the general protection of members of the civilian population, that is, non-combatants, from the hazards of war. This is a subject which was not included in the Convention Relative to the Protection of Civilian Persons,² which is primarily concerned with the protection of civilian enemy aliens in national territory,³ civilian residents of occupied territory,⁴ and civilian internees.⁵ Article 51 of the Protocol contains provisions prohibiting all attacks directed against the civilian population, including terror attacks and indiscriminate attacks. “Terror attacks” are those which have little or no military significance and which are really conducted in order to create panic and terror in the civilian population. “Indiscriminate attacks” are those

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

² Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter cited as Convention Relative to the Protection of Civilian Persons]; SCHINDLER & TOMAN *supra* note 1, at 427.

³ *Ibid.* Convention Relative to the Protection of Civilian Persons, *supra* note 2, at art. 35-46.

⁴ *Ibid.* at art. 47-78.

⁵ *Ibid.* at art. 79-135.

that were common during World War II in which, when a city contained several separate military targets, the entire city was bombed, without regard to the disproportionate loss of civilian life. This series of articles also prohibits: (1) attacks on civilian objects which make no effective contribution to military activities;⁶ (2) attacks on historic monuments, works of art, and places of worship;⁷ (3) attacks on objects indispensable to the survival of the civilian population such as foodstuffs, agricultural areas, crops, livestock, drinking water installations, and irrigation works;⁸ (4) attacks which would result in widespread, long-term and severe damage to the natural environment;⁹ and (5) attacks on works and installations containing dangerous forces, that is, dams, dykes, and nuclear electric generating stations.¹⁰

Article 75 is labeled "Fundamental guarantees" — but it is even more than that. First, it provides that it applies to persons affected by a situation referred to in Article 1 of the Protocol (which will be discussed below in the second list¹¹), who are in the power of a Party to the conflict, and who do not benefit from more favorable treatment under the 1949 Geneva Conventions¹² or the Protocol. It then prohibits any adverse distinction in the treatment of such persons "based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria." Next it prohibits violence to the life, health, or physical or mental well-being of protected persons, listing a number of specific examples, such as murder, torture, outrages upon personal dignity, the taking of hostages, collective punishments, etc. Then it provides that any person arrested, detained, or interned for actions relating to the conflict must be informed promptly, in a language which he understands, of the reasons for the action; and that, if he is tried, it must be by an impartial and regularly constituted court which applies "the generally recognized principles of regular judicial procedure." Those principles are then enumerated in some detail. The list includes just about all of the familiar judicial protections except that, understandably, there are no provisions for grand or petit juries. (The term "understandably" is used because except in countries which follow the English common law there

⁶Protocol I *supra* note 1, at art. 52, 16 I.L.M. at 1414.

⁷*Id.* at art. 53.

⁸*Id.* at art. 54.

⁹*Id.* at art. 55, 16 I.L.M. at 1415.

¹⁰*Id.* at art. 56, 16 I.L.M. at art. 1415, art. 35(3), 16 I.L.M. at 1409.

¹¹*See* p. 5, *infra*.

¹²In addition to the Civilians Convention cited in note 2, *supra*, these consist of:

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362; SCHINDLER & TOMAN *supra* note 1, at 305.

Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363; SCHINDLER & TOMAN *supra* note 1 at 333.

Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; SCHINDLER & TOMAN *supra* note 1, at 355.

are no grand juries and where there are petit juries they differ substantially from those known to us.) Finally, there is a provision guaranteeing to persons tried for war crimes, including grave breaches of the 1949 Geneva Conventions or the Protocol, the protections of this Article as a minimum. (It is of interest to note that, despite the urging of a number of the more developed nations, the Third World countries repeatedly refused to make this article specifically applicable to mercenaries, although some of them did state that they would do so.)¹³

Three articles set forth the obligations of the parties to the conflict to repress grave breaches of the 1949 Geneva Conventions and of the Protocol and to suppress other breaches. Article 85 sets forth what are such breaches and makes them "war crimes."¹⁴ Under Article 86 superiors are stated to be responsible for the breaches committed by their subordinates

if they knew, or had information which should have enabled them to conclude in the circumstances at the time that he [the subordinate] was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Similarly, Article 87 provides that military commanders are required "to prevent, and where necessary, to suppress and to report to competent authorities" breaches of the 1949 Geneva Conventions and of the Protocol; commanders have a duty to ensure that their subordinates are familiar with their obligations thereunder; and any commander who is aware that any of his subordinates are going to commit, or have committed, a breach of the 1949 Geneva Conventions or of the Protocol is required to take steps to prevent such a violation and, if it has been committed, to initiate disciplinary or penal action against the violators.¹⁵ Unfortunately, a parallel provision which would have placed limitations on the defense of "superior orders," that is, the claim by the subordinate that he committed the violation under orders of his superior officer, was rejected because of fears that it would encourage disobedience of orders and thus adversely affect discipline.¹⁶

Those, then, are the articles or groups of articles selected as constituting major advances in the humanitarian law of war. Now, let us look at those articles and groups of articles which appear to be a step backward or to have failed in their purpose.

Article 1(4) was probably the most controversial provision to come before the Diplomatic Conference which drafted the 1977 Protocol I. Under

¹³ H. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 33-52 *passim* (1979-81) [hereinafter cited as LEVIE].

¹⁴ See also Protocol I, *supra* note 1, at art. 11(4), 16 I.L.M. at 1401.

¹⁵ Articles 86 and 87 relate to what is known as "command responsibility." Protocol I, *supra* note 1, at art. 86, 87, 16 I.L.M. at 1428-29.

¹⁶ See Lieber, *supra* note 13, at 13; and U.A.Kron, 1986

customary international law the so-called "wars of national liberation" had always been considered to be civil wars and to be governed by the rules applicable to non-international armed conflicts. Article 1(4) would change that and would make them international conflicts, regulated by the laws applicable in this latter type of conflict. It brings within the ambit of the 1949 Geneva Conventions and of the 1977 Protocol I "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." It is undoubtedly one of the major reasons why the United States and some other countries will not ratify the 1977 Protocol I.

Article 44 is a provision implementing Article 1(4). In order to give additional protection to the members of national liberation armies the Diplomatic Conference elected to abandon the four requirements for a legal combatant, three of which had had their genesis in Article 2 of the Oxford Manual on the Laws and Customs of War on land,¹⁷ and all four of which were subsequently set forth in detail in Article 1 of the Regulations attached to the 1899 Hague Convention No. II,¹⁸ Article 1 of the Regulations attached to the 1907 Hague Convention No. IV,¹⁹ Article 1 of the 1929 Geneva Prisoner-of-War Convention,²⁰ and Article 4 of the 1949 Geneva Prisoner-of-War Convention.²¹ Those requirements were: (1) being commanded by a person responsible for his subordinates; (2) having a fixed distinctive sign recognizable at a distance; (3) carrying arms openly; and (4) conducting their operations in accordance with the law of war. Now the only requirement is that the individual combatant carry his arms openly while visibly deploying for an attack and during actual military engagements. He need not wear anything to identify him as a combatant — which will undoubtedly have a detrimental effect on the other attempts to protect the civilian population from the hazards of armed conflict because of the difficulties of identification; and even though he need not comply with the law of war, this Article assures him of all the protection which that law provides. (Incidentally, while it was extremely unfortunate that many of the provisions of this Article were included in the Protocol, the writer does not share the fears of the Reagan Administration that they will serve as a basis for the claim by terrorists that they come within its provisions and that they are, therefore,

¹⁷J. SCOTT, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 25, 28 (1916); SCHINDLER & TOMAN *supra* note 1, at 35.

¹⁸Convention No. II with Respect to the Laws and Customs of War on Land (with annexed Regulations), July 29, 1899, 32 STAT. 1893; SCHINDLER & TOMAN *supra* note 1, at 57.

¹⁹Convention No. IV with Respect to the Laws and Customs of War on Land (with annexed Regulations), October 18, 1907, 36 STAT. 2227; SCHINDLER & TOMAN *supra* note 1, at 57.

²⁰Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 STAT. 2021, 118 L.N.T.S. 343; SCHINDLER & TOMAN, *supra* note 1, at 271.

²¹Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364.

entitled to prisoner-of-war status when taken into custody.)²²

Articles 5 and 90, while concerned with completely different matters, have the same defect — they require that the adverse belligerents reach an agreement during the course of hostilities, something very difficult to obtain. Article 5 is an attempt to ensure that there will always be a Protecting Power, a Neutral Power charged with protecting the interests of one belligerent in the territory of the other. This includes the protection of civilians, internees, prisoners of war, etc., and its importance cannot be overemphasized. Although all of the belligerents had Protecting Powers during World War II, the Falklands conflict is probably the only one of a hundred or more international armed conflicts which have occurred since 1945 in which there were true Protecting Powers. In its Commentary on the draft article which was submitted to the Diplomatic Conference on this subject the International Committee of the Red Cross (ICRC) said that its purpose was “to strengthen the system of Protecting Powers.”²³ While there is a provision for the submission by each belligerent to the ICRC of a list of five Neutral Powers acceptable to act as Protecting Powers, with any Power named on both lists to be requested to act as such, this will probably turn out to be a wasted effort. (In a war between NATO and the Warsaw Pact countries, it can be envisaged that one of the NATO Powers would submit a list containing the names of such countries as Switzerland, Sweden, Argentina, Brazil, and India, while the Warsaw Pact Power would submit the names of such countries as Cuba, Libya, Nicaragua, North Korea, and Vietnam!) There is a further provision to the effect that if this operation fails, the belligerents will accept the ICRC as a substitute for the Protecting Power. However, that provision goes on to state that this is “subject to the consent of the Parties to the conflict” — and with their phobia concerning spies, occasioned, no doubt, by their own propensities in this respect, no Communist country has ever permitted the ICRC (or any other truly impartial international humanitarian organization) to function on its territory.

Article 90 is labeled “International Fact-Finding Commission.” It originated during the course of the Diplomatic Conference and its objective was to provide for an automatic method of determining the validity of allegations of violations of the provisions of the 1949 Geneva Conventions and the 1977 Protocol I. An example of the need for such a provision occurred during the Korean Conflict. North Korea, supported by Communist China and the Soviet Union, contended that the United States was using bacteriological weapons. The United States immediately proposed an investigation of that allegation by the ICRC and the World Health Organization of the United Nations. The

²²See, e.g., Feith, *Law in the Service of Terror — The Strange Case of the Additional Protocol*, NAT'L INTEREST, Fall 1985, at 36, 42-47.

²³INT'L COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, COMMENTARY, 11 (1973).
Published by the American Red Cross, 1966.

Communist nations would not accept this proposal and, instead, established their own "Scientific Commission" which, not unexpectedly, found that the allegation was true. The final chapter of this incident occurred when, some years later, a book was published in the Soviet Union in which every instance of the use of chemical and bacteriological warfare was set forth — and there is no mention of the Korean incident!²⁴ At Geneva the Soviet bloc opposed any provision for an International Fact-Finding Commission which would be empowered to investigate any allegation of violations basically on the ground that it would be a violation of their sovereignty — an assertion made by them whenever there is a proposal for an action which they cannot veto. Once again the provision ended up by requiring consent unless the belligerents involved had previously both filed statements accepting the jurisdiction of the Commission similar to the statements filed with the International Court of Justice under Article 36(2) of the Statute of that Court. No Communist State has ever filed such a statement with the Court; and it is hardly likely that any of them will file such a statement with respect to the jurisdiction of the Commission; nor will they permit investigations on their territory by impartial bodies.

These are a few of the advantages and a few of the disadvantages that are to be found in the 1977 Protocol I. Unfortunately, it appears that the United States, and other nations, believe that, however, many good provisions there are, the unacceptable provisions are so numerous and so weighty as to preclude its ratification.²⁵

²⁴Viney, *Research Policy: Soviet Union*, in *CBW: CHEMICAL AND BIOLOGICAL WARFARE* 133 (S. Rose ed. 1969).

²⁵At the time of writing (January 1986), the 1977 Protocol I had been ratified or acceded to by 54 nations, including Denmark and Norway from the NATO countries, none from the Warsaw Pact countries, and by the People's Republic of China.