PRISONERS OF WAR UNDER THE 1977 PROTOCOL I

by
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ARTICLE 1(4) OF THE Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I),1 bringing national liberation movements within the ambit of the Protocol and thus making the conflicts in which they engage international in scope, was probably the most controversial provision adopted by the Diplomatic Conference which met in Geneva from 1974 to 1977. However, Article 44, which implements Article 1(4), has been the object of almost equal controversy.2 The purpose of this paper is to determine whether the objections to that article were and are justified.3

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1 Swiss Federal Political Department, 1 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN INTERNATIONAL ARMED CONFLICTS (Geneva, 1974-1977), Part One, 115 (1978) [hereinafter OFFICIAL RECORDS], U.N. Doc. A/32/144, Annex I (1977), 72 A.J.I.L. 457 (1978), 16 I.L.M. 1391 (1977). This Protocol was opened for signature on December 12, 1977. As of 31 December 1988 there were 78 States Parties to it. No member of the Warsaw Pact is a Party. Belgium, Denmark, Iceland, Italy, and Norway are the only NATO countries which are Parties. The People's Republic of China is the only major military power which is a Party.

2 The record of its negotiation covers 167 printed pages. 2 H. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 378-545 (1980) [hereinafter PROTECTION]. The records of the negotiations of only two other articles exceeded 100 pages, that of Article 85 covering 119 pages and that of Article 90 covering 101 pages. Strange to relate, Article 44 was ultimately approved in Committee III of the Diplomatic Conference by a vote of 66 for (including the United States), and 2 against (Brazil and Israel), with 18 abstentions (including Canada, Italy, Japan, Spain, and the United Kingdom). XV OFFICIAL RECORDS, supra note 1, at 155-56, 2 Protection, supra, at 486. Forty-one delegations found it necessary to explain their votes. XV OFFICIAL RECORDS, supra note 1, at 156-87, 2 PROTECTION, supra, at 486-512. It was approved by the Plenary Meeting of the Diplomatic Conference by a vote of 73 for (including the United States), 1 against (Israel), and 21 abstentions (including Brazil as well as those mentioned above). VI OFFICIAL RECORDS, supra note 1, at 121, 2 Protection, supra, at 516. Once again a very large number of delegations found it necessary to explain their votes. VI OFFICIAL RECORDS, supra note 1, at 121-55, 2 PROTECTION, supra, at 516-44.

3 In a talk delivered at a Symposium conducted at the University of Akron Law School in 1985 the author listed this article as being one which was a step backward in the development of the law of war. Levie, Pros and Cons of the 1977 Protocol I, 19 AKRON L. REV. 537 (1986). However, that was a one-paragraph discussion — and even there issue was taken with one argument advanced against it by the Reagan Administration!
The XXIst International Conference of the Red Cross, held in Istanbul in September 1969, adopted a resolution requesting the International Committee of the Red Cross (ICRC) "to pursue actively its efforts with a view to proposing, as soon as possible, concrete rules which would supplement the humanitarian law in force." A Conference of Government Experts, sponsored by the ICRC, took place in Geneva in 1971. For the second session of that conference the ICRC prepared a Draft Additional Protocol to the Four Geneva Conventions of August 12, 1949. The relevant portion of one article of that Draft stated:

**Article 38. — Guerrilla fighters**

1. In the event of their capture, members of militias or volunteer corps, including those of organized resistance or independence movements not belonging to the regular armed forces but belonging to a Party to the conflict, even in the case of a government or of an authority not recognized by the Detaining Power, shall be treated as prisoners of war within the meaning of the Third Convention, provided that such militias, volunteer corps or organized resistance or independence movements fulfill the following conditions:

   (a) that in their operations they comply with the requirements of the principles of the law of armed conflicts and of the rules laid down in the present Protocol;

   (b) that in their operations they show their combatant status by openly displaying their weapons or that they distinguish themselves from the civilian population either by wearing a distinctive sign or by any other means;

   (c) that they are organized and under the orders of a commander responsible for his subordinates.

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6 The French version of this provision used the term "autodetermination". "Self-determination" would have been a better translation than "independence".
It is to be noted that two of the four requirements of provisions of the first three *1949 Geneva Conventions*, those of having a distinctive sign and of carrying arms openly, were included in paragraph 1(b), but in the alternative. This caused considerable controversy at the Conference of Government Experts at which it was discussed. The ICRC reported that discussion as follows:

3.65. *Sub-paragraph 1(b) of Article 38 was vigorously opposed by several experts who demanded, either by written amendments or in the course of discussion, that it be removed, while others called for a more flexible wording, better suited to the special circumstances of the struggle. Other experts, on the contrary, proposed a reinforcement of the requirement that guerrilla fighters distinguish themselves from civilians, and referred back to the terms used at The Hague and Geneva in 1949 which stipulated both the carrying of arms openly and the wearing of a distinctive sign. Yet others agreed with the ICRC text, which required only one or the other of those conditions to be fulfilled, but proposed striking out the words “or by any other means” as too vague. All three schools of thought were concerned with the effectiveness of such requirements for protecting civilians against the dangers of hostilities.*

As an outgrowth of that discussion the ICRC prepared what became Article 42 of the *Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts*. The relevant portions of that article provided:

**Article 42. — New category of prisoners of war**

1. In addition to the persons mentioned in Article 4 of the Third Convention, members of organized resistance movements who have fallen into the hands of the enemy

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are prisoners of war provided such movements belong to a Party to the conflict, even if that Party is represented by a government or an authority not recognized by the Detaining Power, and provided that such movements fulfill the following conditions:

(a) that they are under a command responsible to a Party to the conflict for its subordinates;

(b) that they distinguish themselves from the civilian population in military operations;

(c) that they conduct their military operations in accordance with the Conventions and the present Protocol.

*Note

If, as many Governments wished, the Diplomatic Conference should decide to mention in the present Protocol members of movements of armed struggle for self-determination, a solution would be to include in this article a third paragraph worded as follows:

3. In cases of armed struggle where peoples exercise their right to self-determination as guaranteed by the United Nations Charter and the “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,” members of organized liberation movements who comply with the aforementioned conditions shall be treated as prisoners of war for as long as they are detained.

The foregoing provisions are the basic sources of what evolved as Article 44 of the 1977 Protocol I. An attempt will now be made to trace the evolution of Article 42 of the Draft Additional Protocol into Article 44 of the 1977 Protocol I during the course of the discussions which took place at the Diplomatic Conference and which required four annual sessions, from 1974 to 1977, to accomplish its overall objective.

Article 44 of the 1977 Protocol I is entitled “Combatants and prisoners of war.” Its paragraphs 1 and 6 read as follows:

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10 The article is set forth in its entirety in the Appendix.
1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

Article 43 of the Protocol, entitled “Armed forces” defines combatants as “members of the armed forces of a Party to a conflict,” other than medical personnel and chaplains. As this provision is not as comprehensive as Article 4 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War,11 paragraph 6 was necessary in order to indicate clearly that there was no intention to remove from entitlement to prisoner-of-war status the categories of persons, other than combatants, specified in the latter article as being so entitled. There does not appear to be anything controversial in either of these paragraphs as they do no more than reiterate long-standing rules.

Paragraph 2 of Article 44 states:

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant, or if he falls into the power of the adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

Omitting for the moment all reference to the final clause of that paragraph (“except as provided in paragraphs 3 and 4”), we find that if an individual who is a combatant (“a member of the armed forces of a Party to a conflict”) falls into the power of the adverse Party, the fact that he is alleged to have violated the laws of war does not deprive him of his right to be a prisoner of war. Of course, he may be tried and convicted of a grave breach of the 1949 Geneva Conventions or of the 1977 Protocol I, or of any other war crime which he may have committed—but, at least until that event,12 he is a prisoner of war and is entitled

12 This limiting phrase is necessary because the Soviet Union and all of its satellites made a reservation to Article 85 of the 1949 Geneva Prisoner-of-War Convention under which, once tried and convicted of a war crime or a crime against humanity, the convicted prisoner of war becomes “subject to the conditions obtaining in the country in question [the Detaining Power] for those who undergo their punishment”. The Soviet reservation may be found in SCHINDLER & TOMAN, supra note 7, at 516-18. For the reaction of the reserving nations to paragraph 2 of Article 44, see XV OFFICIAL RECORDS, supra note 1, at 375, 402, 2 PROTECTION, supra note 2, at 482, 483-84.
to all of the rights and protections provided by the 1949 Geneva Prisoner-of-War Convention and by the 1977 Protocol I.

The argument is sometimes advanced that this provision, entitling a combatant to prisoner-of-war status even though, prior to capture, he has violated the rules of international law applicable in armed conflict, was included in order to give additional protection to members of national liberation movements, combatants not known for their steadfast compliance with the law of war. But this provision is merely a reiteration of already existing law. Moreover, it is so clear and unambiguous that, although this was not the motivation for its drafting and adoption, it should certainly make it far more difficult for the "law-defying nations" to follow the formulae adopted by the North Koreans and the Chinese Communists during the Korean hostilities and by the North Vietnamese during the hostilities in Vietnam. North Korea and Communist China contended that individuals captured by their armed forces, although they were unquestionably members of the regular armed forces of the enemy, were not entitled to prisoner-of-war status until they had repented their misdeeds, the misdeeds not being specified but probably being the act of fighting a communist nation's attempted extension of communism. North Vietnam followed a somewhat similar pattern, contending that all members of the United States armed forces who were captured were "pirates," major war criminals caught in flagrante delicto, who were not entitled to the status of prisoners of war although no war crimes trials were ever conducted. Once again, the "crime" in which they were allegedly engaged when captured in flagrante delicto was apparently that of fighting a communist nation's attempted extension of communism. While Article 44(2) is no panacea, its provisions will make it considerably more difficult for the three named countries, all of which have ratified the 1977 Protocol I without relevant reservation, to claim that a captured member of the regular armed forces of the enemy is not a prisoner of war until he "repents" or because, without a trial, he is administratively declared

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13 After World War II the Soviet Union tried many prisoners of war in its custody for violation of the humanitarian law of war by "supporting capitalism". H. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 351 n.36 (1978).

14 Levie, Remarks at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, 2 Am. U.J. Int’l L. & Pol’y 415, 534-35 (1987); Levie, Maltreatment of Prisoners of War in Vietnam, 48 B.U.L. Rev. 323, 324 and 344-52 (1968), reprinted in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 361 (R. Falk, ed., 1969). This appears to have continued to be the position of the Democratic Republic of Vietnam during the course of the discussions on Article 44. XIV OFFICIAL RECORDS, supra note 1, at 362-63, 2 PROTECTION, supra note 2, at 435. Moreover, that country’s delegation submitted a proposed amendment (later withdrawn) which would have codified its procedure of denying prisoner-of-war status to “[p]ersons taken in flagrante delicto when committing crimes against peace or crimes against humanity”. III OFFICIAL RECORDS, supra note 1, at 191, XIV id. at 464, 468, 2 PROTECTION, supra note 2, at 397, 400-01.
to be a war criminal, captured in flagrante delicto. Unfortunately, based upon experience, one cannot be too optimistic in this respect. One can expect that the mentioned nations, and others of their ilk, will either claim that the 1949 Geneva Conventions and the 1977 Protocol I are not applicable, or will just disregard the provisions of those agreements, while, perhaps, asserting that, nevertheless, the captured personnel receive "humane treatment" — such "humane treatment" consisting of insufficient food, inadequate shelter, lack of medical treatment, torture, etc.

Now let us look at paragraphs 3 and 4 of Article 44, the provisions which provide the exception to the applicability of the rule of paragraph 2 entitling a combatant to prisoner-of-war status even if he has, prior to capture, violated the law of war. These paragraphs state:

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

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

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).\textsuperscript{15}

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those

\textsuperscript{15}The sentence with respect to perfidy was included at the demand of the representative from Tanzania who made it "a test case for African participation in the Conference and respect for Protocol I". XV OFFICIAL RECORDS, supra note 1, at 101-21, 2 PROTECTION, supra note 2, at 466.
accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

It will be recalled that the article drafted by the ICRC for the use of the second (1972) session of the Conference of Government Experts required individuals to comply with the law of war, to display their weapons openly or to distinguish themselves from the civilian population by wearing a distinctive sign, and to have a responsible commander; and that the article drafted by the ICRC for the Draft Additional Protocol prepared in 1973 required that there be a responsible command, that they distinguish themselves from the civilian population, and that they comply with the Conventions and the Protocol. While Article 43 of the 1977 Protocol I still requires the responsible command (and an internal disciplinary system which enforces compliance with the law of war), under paragraph 3 of Article 44 the individual is no longer required to distinguish himself from the civilian population; and he need only carry his arms openly when actually engaged in hostilities and when visible to the enemy during a military “deployment” for an attack.

The requirements to carry arms openly and to distinguish oneself from the civilian population had met with disfavor from the very opening

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16 See page 30, supra.

17 See pages 31-32, supra.

18 The meaning of the word “deployment” has occasioned considerable difficulty. When the issue was raised during the discussion of Committee III’s 1976 Report, the Rapporteur said: “With regard to deployment, he did not think it was possible to define the term ‘military deployment’ at the present stage.” XV OFFICIAL RECORDS, supra note 1, at 135, 138, 2 PROTECTION, supra note 2, at 477, 479. In the final (1977) Report of Committee III the following statement appears:

20. The one question on which the explanations of vote revealed a clear difference of opinion was the meaning of the term “deployment”. Some delegations stated that they understood it as meaning any movement toward a place from which an attack was to be launched. Other delegations stated that it included only a final movement to firing positions. Several delegations stated that they understood it as covering only the moments immediately prior to attack.

Upon signing the Final Act of the Conference, the British delegation stated:

[T]he Government of the United Kingdom will interpret the word “deployment” in paragraph 3(b) of the Article as meaning “any movement towards a place from which an attack is to be launched”.

SCHINDLER & TOMAN, supra note 7, at 634, 635. The statement made by the United States at the time of signing was as follows:

2. It is the understanding of the United States of America that the phrase “military deployment preceding the launching of an attack” in Article 44, Paragraph 3, means any movement towards a place from which an attack is to be launched.

Id. at 636. Neither country has ratified the 1977 Protocol I.
of the Diplomatic Conference. Thus, on March 27, 1974, during the First Session of the Diplomatic Conference, and a year before Committee III of the Diplomatic Conference began to discuss this article, Madagascar and the South West African People's Organization had submitted a proposed amendment to Article 42 of the Draft Additional Protocol. This proposed amendment omitted paragraph 1(b) thereof, thus eliminating the requirement to carry arms openly or to wear a distinctive sign.¹⁹ A statement by the representative of Lesotho is typical of the arguments advanced during the course of the discussion of that article in Committee III. He said:

7. It must be noted that national liberation movements are fighting for their people's right of self-determination but, because of their material situation and military inferiority in the field, combatants belonging to those movements cannot wear distinctive signs or carry arms openly. Experience shows that it is not difficult for the enemy regime to identify national liberation combatants in battle. For these reasons paragraphs 1(b) and (c) are not acceptable to my delegation. What is needed here is a simple and explicit statement of international law providing protection to the members of a national liberation movement who are engaged in armed conflict in pursuance of their people's right of self-determination.²⁰

In other words, members of national liberation movements should not be required to carry their arms openly, should not be required to distinguish themselves from the civilian population, and should not be required to comply with the provisions of the Conventions and of the Protocol. Understandably, the speaker did not take exception to the provision requiring them to have a command responsible to a Party to the conflict.

The representative of the Democratic Republic of Vietnam would have gone even further. He named two categories of individuals who should be entitled to prisoner-of-war status upon capture: (1) members of resistance movements; and (2) members of national liberation movements. He then said:

¹⁹ III OFFICIAL RECORDS, supra note 1, at 179, 2 PROTECTION, supra note 2, at 379-80. Paragraph 3 of this proposed amendment provided that violators of the Conventions and of the Protocol "even if sentenced, shall retain the status of prisoners of war". This follows the provisions of Article 85 of the 1949 Third Geneva Convention, but is contrary to the reservation made to that article by the Communist countries. See supra note 12.

²⁰ XIV OFFICIAL RECORDS, supra note 1, at 499, 500, 2 PROTECTION, supra note 2, at 420-21.
4. The sole difference between these two categories would be as follows: The first category would have to fulfill the condition of "visibility," that is to say "to distinguish themselves from the civilian population in military operations" according to the terms of paragraph 1(b) of Article 42 of the ICRC draft, while the second category would be exempt from that requirement.\(^\text{21}\)

Under this proposal paragraph 3(a) and (b) of Article 44 of the 1977 Protocol I, as ultimately adopted, would have been applicable to members of resistance movements, but not to members of national liberation movements.

To summarize, paragraph 3 of Article 44 of the 1977 Protocol I requires combatants (as defined in Article 43) to distinguish themselves from the civilian population "while they are engaged in an attack or in a military operation preparatory to an attack." They will fulfill that requirement if they carry their arms openly (a) during an actual military engagement and (b) when visible to the enemy while in the course of a military deployment preliminary to an attack. This appears to mean that these combatants may merge with the crowd, weapons concealed, until they are about to attack, at which time they move out of the crowd, disclose their weapons, and begin their attack.

There seems little doubt but that the provisions of paragraph 3 of Article 44 will increase the dangers to the civilian population. This position would, of course, be disputed by those delegations at the Diplomatic Conference which sought (successfully) to increase the protection given to members of national liberation movements, denying that this was at the expense of the civilian population. In the 1976 Report of Committee III the Rapporteur (Ambassador Aldrich of the United States) included this personal note:

94. In summary, the Rapporteur stated his conviction that Article 42 [now 44] was a compromise — the greatest possible increase in protection of guerrilla combatants at the cost of some, but hopefully not unacceptable, loss of protection to the civilian population. Some representatives agreed that one could not have one without the other. Other representatives disagreed and felt that adequate protection could be assured to the civilian population.\(^\text{22}\)

\(^\text{21}\) XIV OFFICIAL RECORDS, supra note 1, at 464, 2 PROTECTION, supra note 2, at 397.

\(^\text{22}\) XV OFFICIAL RECORDS, supra note 1, at 373, 404, 2 PROTECTION, supra note 2, at 482, 485.
Under paragraph 4 of Article 44 a failure to comply with the provisions of paragraph 3(a) and (b) results in a forfeiture of the right to prisoner-of-war status upon capture — but, even so, the captured individual remains entitled to protections equivalent to those afforded by the 1949 Third Geneva Convention. In other words, at his trial as an unlawful combatant he will be entitled to the judicial safeguards of the Convention. With this there can be no quarrel. Presumably, as he is not a prisoner of war, these protections will cease upon conviction and sentence.

Paragraph 5 of Article 44 of the 1977 Protocol I provides:

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

Like a number of other paragraphs of Article 44, this one originated in the Working Group, its subject matter not having been included in any proposed amendment, nor having been raised during the discussions in Committee III. At first glance it might appear that the intent was to draft a provision similar to the one concerning spies contained in Article 31 of the 1907 Hague Regulations (and in Article 46(4) of the 1977 Protocol I). (A spy who rejoins his army after committing his act of espionage is "home free" and cannot be punished for the act if he is thereafter captured by the Party against whom the act of espionage was conducted.) It might also mean that a combatant who fails to comply with the provisions of paragraph 3 of Article 44, but who is not captured until a time subsequent to the illegal act, cannot be punished for his prior violation of the provisions of paragraph 3 (a) and (b). Further, it could mean simply that he is entitled to the status of a prisoner of war — in which case he could be tried and punished for the violation of paragraph 3 just as persons entitled to the status of prisoner of war can be tried for other violations of the law of war committed prior to capture. The only available legislative history consists of a statement in Committee III's 1976 Report which reads:

91. Paragraph 5 is an important innovation developed within the Working Group. It would ensure that any combatant who is captured while not engaged in an attack or a military operation preparatory to an attack retains his rights as a combatant and a prisoner of war whether or

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not he may have violated in the past the rule of the second sentence of paragraph 3. This rule should, in many cases, cover the great majority of prisoners and will protect them from any efforts to find or fabricate past histories to deprive them of their protection.\(^{24}\)

In other words, the individual who violates the provisions of paragraph 3, but is only captured at some subsequent point in time, not involving the conditions of that paragraph, is entitled to prisoner-of-war status; but he may be tried for the prior violation of the paragraph, or, for that matter, for any other prior violation of the law of war. This is an attempt to prevent the Capturing Power from administratively determining that an individual is not entitled to be a prisoner of war because of an alleged prior violation of paragraph 3 of Article 44. It will be noted that the rule only applies if the capture does not involve the provisions of paragraph 3. Does this mean that if an individual is captured during the course of a subsequent attack, where the provisions of paragraph 3 have been complied with, he does not come within the saving provisions of paragraph 5 and he may be denied prisoner-of-war status on the basis of an alleged prior violation of the provisions of paragraph 3? This probably was not the intention of the drafters, but it is a logical interpretation of the provision.

Paragraph 7 of Article 44 states:

7. 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.

It might be thought that this provision was included in order to provide some protection for the regular armed forces of a Government in a conflict with a national liberation movement. Not so! As has surely become obvious the entire tenor of the discussions at the Diplomatic Conference was directed towards creating an imbalance in favor of the members of national liberation movements. This provision was included to ensure that regular troops would not be ordered by their commanders to remove their uniforms and, wearing civilian clothes, lose themselves in the civilian population in their search for members of a national liberation movement.\(^{25}\)

\(^{24}\) XV Official Records, supra note 1, at 373, 404. 2 Protection, supra note 2, at 482, 484.

\(^{25}\) Paragraph 84 of Committee III's 1976 Report (XV Official Records, supra note 1, at 373, 401, 2 Protection, supra note 2, at 482, 483) includes a statement to the effect that "this concept of a single standard gave rise to certain problems, particularly concern that we should not develop a rule that would encourage uniformed regular soldiers to dress in civilian clothes."
Finally, paragraph 8 of Article 44 provides:

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

The 1976 Report of Committee II correctly describes this provision as a "technical addition which seemed desirable to ensure that persons whose entitlement to PW status comes only from Article 42" [now Article 44] are entitled to the protection of the provisions of the first two 1949 Geneva Conventions.²⁶

A number of the provisions of the 1977 Protocol I, including particularly those of Article 1(4) and Article 44, have caused much soul-searching in the Executive Department of the United States Government. In depth studies of these provisions have probably been made by each of the armed services. A lengthy, classified study was made by the Joint Chiefs of Staff,²⁷ while similar studies have been made by the Departments of State, Defense, and Justice, etc. The final result of these studies has been that the Executive Department has concluded that the United States should not become a Party to the 1977 Protocol I. Article 44 is one of the major causes of the problem.

In transmitting the 1977 Protocol II²⁸ to the President with the recommendation that it be sent to the Senate for the latter's advice and consent to ratification, but that this not be done with respect to the 1977 Protocol I, the Secretary of State said:

Our extensive interagency [State, Defense and Justice] review of the Protocol has, however, led us to conclude that Protocol I suffers from fundamental shortcomings that cannot be remedied through reservations or

²⁶ XV Official Records, supra note 1, at 373, 404, 2 Protection, supra note 2, at 482, 484-85.
²⁷ Reference is made to this study in the Secretary of State's letter to the President, transmitting the 1977 Protocol II with the recommendation that it be forwarded to the Senate for the latter's advice and consent to ratification. See notes 28 and 29, infra. Rumor has it that the report of the Joint Chiefs recommended that, if the United States were to ratify the 1977 Protocol I, it should only do so with more than 20 reservations and more than 20 understandings!
understandings. We therefore must recommend that Protocol I not be forwarded to the Senate. The following is a brief summary of the reasons for our conclusion.

In key respects Protocol I would undermine humanitarian law and endanger civilians in war. . . .

Equally troubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to 'national liberation' movements in general, but in particular to the inhumane tactics of many of them. Article 44(3), in a single subordinate clause, sweeps away years of law by 'recognizing' that an armed irregular 'cannot' always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States' announced policy of combatting terrorism.29

In submitting the 1977 Protocol II and the Secretary of State's letter to the Senate for its advice and consent to ratification, President Reagan made the following statement with respect to Article 44 of the 1977 Protocol I:

Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations and I therefore have decided not to submit the Protocol to the Senate.30

It is believed that the emphasis placed on terrorists and terrorism in connection with Article 44 of the 1977 Protocol I is a mistake, both legally and philosophically. Article 44 can only be considered as pro-

30 Id. at iv, reprinted in 81 A.J.I.L. 910, 911 (1987).
ecting terrorists if it is assumed that all members of national liberation movements are *ipso facto* terrorists. When terrorists operate, they do not "deploy," under any definition of that term; and they do everything possible to avoid confrontation with armed forces (or police) while engaged in their acts of terrorism. When members of national liberation movements merge with the civilian population, they do not do so in order to take members of the civilian population hostages as is the case with the several pro-Iranian terrorist groups based in Lebanon, nor to commit hit-and-run acts of violence against members of the civilian population as is the case with the PLO in Israel, with the IRA in Ireland, and with other terrorist groups operating around the world. These groups merge with the civilian population solely in order to avoid being identified so that they may live to fight another day. The present author does not condone that practice which, inevitably, increases the danger that members of the civilian population will be engulfed in the hostilities despite their noncombatant status. However, that does not make terrorists out of members of national liberation movements. While courts have, on occasion, held that when terrorist groups engage in acts of terrorism they are engaged in a political activity, no court has ever held that they were engaged in a legal military activity. It is also extremely doubtful that such terrorist groups are ever "subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict," as required by Article 43(1) of the 1977 Protocol I. Raising the issue of protection of terrorists in connection with Article 44, and arguing that on that basis ratification of the 1977 Protocol I would be contrary to the U.S. program of combating terrorism, gives the impression that there is a need to buttress other reasons for not ratifying the Protocol. There may well be good reasons for such a decision based on other provisions of the Protocol but the public image of

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31 One of the Reagan Administration's chief opponents of the ratification by the United States of the 1977 Protocol I asserts, in effect, that the sole object of this document is to protect terrorists. Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 AKRON L. REV. 531 (1986). Contrary to his oft-repeated statements, the word "terrorism" does not appear anywhere in the Protocol. The only two references to terrorism found in the legislative history occur in the 1976 Report of Committee III which states, with respect to paragraph 4: "Several representatives made the point that this paragraph is not, in any event, intended to protect terrorists who act clandestinely to attack the civilian population." XV OFFICIAL RECORDS, *supra* note 1, at 373, 403, 2 PROTECTION, *supra* note 2, at 482, 484, and when, in explaining the U.S. vote, the head of the U.S. delegation, Ambassador Aldrich, said: "The article conferred no protection on terrorists." VI OFFICIAL RECORDS, *supra* note 1, at 149, 2 PROTECTION, *supra* note 2, at 535, 536.
the United States is not helped by presenting poor ones — and the terrorist argument falls in the latter category.\textsuperscript{32}

**CONCLUSION**

During the course of the debate in Committee III of the Diplomatic Conference on the article that eventually became Article 44 of the 1988 Protocol I, the representative of Norway made a statement worthy of repetition. He said:

10. Before concluding my statement I would like to recall three essential conditions which must be fulfilled in order that the system of international humanitarian law applicable in armed conflicts may function in practice. First, the legal rules in question must place the Parties to the conflict on an equal footing; second, the legal rules must represent a well-balanced compromise between humanitarian considerations and military necessity and, third, the rules must be drafted in such a manner as to ensure that all Parties to the conflict have an equal interest in their application.\textsuperscript{33}

The analysis just completed of the provisions of Article 44 of the 1977 Protocol I indicates that several of those provisions fail to meet some or all of the three conditions enumerated. However, it is not believed that this fact alone should make that article a basis for a refusal by the United States to ratify the 1977 Protocol I. That difficulty could be overcome by a simple reservation to the effect that the United States will not recognize as a legal combatant, entitled to prisoner-of-war status, any individual who fails to comply with the provisions of Article 4A(2) of the 1949 Geneva Prisoner-of-War Convention. (That article sets forth the four historical requirements for an individual to be a legal combatant and to be entitled to prisoner-of-war status upon capture.) Any country which believes that such a reservation is contrary to the object and purpose of the Protocol


\textsuperscript{33} XIV OFFICIAL RECORDS, supra note 1, at 480, 482, 2 PROTECTION, supra note 2, at 408, 409.
need only state that it does not consider itself bound as regards the United States — thereby clearly indicating its position that the real object and purpose of the 1977 Protocol I was to establish protection for members of national liberation movements by eliminating century-old requirements for legal combatants. Some of the African countries might do so because the support of national liberation movements is the core of their foreign policy. A few of the Asian countries might likewise do so as an indication of support for the African countries. It is doubtful that, should they decide to ratify the 1977 Protocol I, the Soviet Union or any of the other Communist countries would feel that the disadvantages of not supporting countries which they are courting would outweigh the advantages of participation by the United States.

This paper should not be considered as a recommendation that the United States ratify the 1977 Protocol I. It is merely a recommendation that if the United States continues to decline to ratify the Protocol, it should reach that decision on some basis other than the argument that Article 44 protects terrorists.

Appendix

*Article 44 — Combatants and prisoners of war*

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant, or if he falls into the power of the adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
(a) during each military engagement, and

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

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offenses he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. 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.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Convention, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.