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Using the Protocols Additional to the Geneva Conventions of 12
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Using the Protocols Additional to the Geneva Conventions of 12 August 1949 to Combat Acts of Terrorism

I. INTRODUCTION.

The United States, along with other concerned States, is seeking ways to effectively deter and deal with acts of terrorism. While the United States unequivocally condemns all terrorist acts, this sentiment is not universally shared. The unconscionableness of a particular act is often overlooked by observers sympathetic to the political motivations of the perpetrator. The maxim, "one man's terrorist is another's freedom fighter," continues to drown out calls for worldwide condemnation of all terrorist acts as crimes subject to universal jurisdiction. The failure to reach a consensus on the appropriate way to combat terrorism has allowed some perpetrators to go unpunished.

The United States recognizes that terrorism is essentially a tactic--a form of political warfare designed to achieve political ends. The Secretary of Defense further characterized terrorism as falling under the rubric of low-intensity conflict, which may be described as warfare at the lower end of the spectrum of violence, in which political, economic, and psychosocial considerations play a more important role than does conventional military power.¹ When defined in these terms, it appears that the laws of armed conflict would readily apply to some situations where terrorist acts occur.

The United States has, however, rejected the 1977 Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)² as a means for using the laws of armed conflict to combat terrorist acts in appropriate cases.³ Both Protocol I and the 1977 Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)⁴ contain rules that, "make a decisive contribution to the outlawing of terrorist acts and thus to the fight against terrorism."⁵

Rather than using the laws of armed conflict to combat terrorist acts, the United States has focused its efforts in the area of law enforcement, relying on cooperation with friendly nations to "identify, track, apprehend, prosecute, and punish terrorists."⁶ The underlying basis of these efforts is that terrorism is a crime and terrorists must be treated as criminals. The difficulty in executing this policy on the international level is that not all nations agreed with the basic premise.

This study will present arguments in favor of using the laws of armed conflict, in particular, Protocols I and II, to combat terrorist acts in situations where those rules would normally apply. These situations include international armed conflicts between Contracting Parties, wars of national liberation which have been designated as international armed conflicts under Protocol I, and certain non-international armed conflicts under Protocol II. The analysis will cover the scope of application of the Protocols, prohibited acts including sanctions

for violations, qualifications of belligerents, and U.S. objections to the ratification of Protocol I. The study will then compare the laws of armed conflict approach with the law enforcement approach by reviewing the U.S. policies regarding acts of terrorism and agreements entered into by the United States to implement those policies. The comparison will encompass scope of application, methods of dealing with terrorist acts, and an assessment of probable effectiveness. The study will conclude with an evaluation of the better method to deter terrorist acts in the future.

II. SCOPE OF APPLICATION.

One of the first issues requiring inquiry is whether the Protocols can ever apply to terrorist acts. So-called terrorists often claim to be fighting a war against oppressors. The target State's usual response is that the attacks are not justified and that an armed conflict between the parties does not exist. It is the level of conflict, however, and not the arguments of the parties that determines whether the laws of armed conflict apply to a particular act or acts. Both Protocol I and Protocol II contain provisions regarding the circumstances under which their rules come into force.

A. Protocol I.

Article I of Protocol I states that the Protocol supplements the Geneva Conventions of 12 August 1949 for the protection of war victims and applies to situations referred to in Article 2 common to those Conventions.⁷ These situations include all international armed conflicts between Parties to the Conventions,

even when one of them does not recognize a state of war. They also include:

(A) 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 Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁸

These are the so-called "wars of national liberation," or "CAR" conflicts.⁹

Despite its somewhat broad terms, the scope of application of Article 1 is limited. The International Committee of the Red Cross in its commentary on the Protocols concluded that the list contained in Article 1 is exhaustive and complete:

(I)t certainly covers all cases in which a people, in order to exercise its right to self-determination, must resort to the use of armed force against a racist regime. On the other hand, it does not include cases in which, without one of these elements, a people takes up arms against authorities which it contests, as such a situation is not considered to be international.¹⁰

It has been further argued that the national liberation provisions of Article 1 only apply to the peoples of South Africa and Palestine.¹¹

The inclusion of wars of national liberation within the scope of international conflicts covered by Protocol I created a problem regarding the eligibility of peoples engaged in such conflicts to become a Party to the Protocol. National liberation movements

are not usually represented by a State that is a Party to the Geneva Conventions. This would have prevented them from becoming a Party to the Protocol because only States which are Parties to the Geneva Conventions may become Parties to the Protocols. The problem is addressed in Article 96 of Protocol I, which provides:

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon receipt by the depositary, have in relation to that conflict the following effects:

(a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.¹²

This provision still requires a national liberation movement to either have or obtain the sponsorship of representative authority with sufficient control to fulfill the requirements of the provision. This places a further limiting factor on eligibility to operate under the Protocols rules. The key factor in the provision is the quid pro quo offered to national liberation movements which gives them the benefits of the laws of armed conflict in exchange for their compliance with those laws. On this point, the U.S. Delegation at the adoption of Article 96(3) stated:

In view of the fact that Article 1 established that wars of national liberation are to be considered international armed conflicts, it was important to add this provision on declarations to make clear that there would be no discrimination in favor of liberation movements, that they could not have rights without the corresponding obligations, and that the laws of armed conflict would have to be fully applied by those movements.¹³

It is regrettable that future U.S. policy declarations overlook these observations.

Armed conflicts which are not international in nature are not covered by Protocol I. These types of armed conflicts may fall within the scope of Protocol II.

B. Protocol II.

Protocol II develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949.¹⁴ In accordance with its first article, Protocol II applies to:

All armed conflicts not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party to between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹⁵

Protocol II does not apply to, "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."¹⁶ These three examples were defined in

preliminary comments by the International Committee of the Red Cross Commentary on the Draft Additional Protocols to the Geneva Conventions as follows:

The notion of internal disturbances which from the start has been made more explicit by an enumeration, albeit not exhaustive, of situations considered to be consistent with that notion irrespective of whether constitutional guarantees have or have not been suspended:

--riots, that is to say, all disturbances which from the start are not directed by a leader and have no concerted intent;

--isolated and sporadic acts of violence, as distinct from military operations carried out by armed forces or organized armed groups;

--other acts of a similar nature which cover, in particular, mass arrests of persons because of their behavior or political opinion.¹⁷

The criteria regarding command and control of territory make the field of application of Protocol II narrower than that of Article 3 common to the Geneva Conventions.¹⁸ According to the detailed U.S. analysis of Article I:

This Article technically excludes four types of situations from the scope of the Protocol: (1) international armed conflicts as defined in the traditional sense in Article 2 common to the four 1949 Geneva Conventions, that is, conflicts between two or more states (whether or not a state of war is recognized between them) or cases of occupation by one state of the territory of another state (whether or not the occupation meets with armed resistance); (2) the so-called wars of "national liberation" defined as international armed conflicts by Article I(4) of Protocol I Additional to the 1949 Geneva Conventions; (3) non-international conflicts covered by common

Article 3 to the 1949 Conventions but falling below the threshold in Article 1 of Protocol II, such as guerrilla conflicts in which insurgent groups do not control substantial territory on a permanent basis or conduct sustained and concerted regular military operations; and (4) situations of internal violence that have not been traditionally considered as armed conflicts and are not covered by the 1949 Conventions, such as riots and sporadic terrorist acts.¹⁹

While the scope of application of the two Protocols covers a wide range, the specific situations to which they apply have very definite qualifying factors. For the purposes of this study, the most important of these factors are the ability, in terms of command and control of forces, and the willingness to comply with the laws of armed conflict. As will be shown, the rules provided in the two Protocols leave no room for terrorist actions. Rather than restricting the situations in which the Protocols apply through strict interpretation, the better course would be an expansive interpretation that brings as many belligerents under their regulation as possible.

III. PROHIBITED ACTS.

If the Protocols do apply to the act or conflict, the next question is how is a terrorist act treated by the Protocols. To determine the extent to which terrorist acts are proscribed, a definition of terrorism is needed. Experts have used a wide variety of definitions, but no single one has gained universal acceptance. Borrowing from the Vice President's study on terrorism, the following definitions will be used as a basis for discussion:

Terrorism is premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually to influence an audience.

International terrorism is terrorism involving citizens or territory of more than one country.²⁰

Using this definition, the Protocols deal with terrorism in the following manner:

A. Protocol I.

Article 35 of Protocol I reaffirms two basic principles of customary international law developed since the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.²¹ These principles state that (1) the right to choose methods or means is not unlimited and (2) the use of weapons, projectiles, and materials and methods of a nature to cause superfluous injury or unnecessary suffering is prohibited.²² Focusing on the attack of noncombatant targets, the following prohibitions in Protocol I are germane:

1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* must not be made the object of an attack.²³

2. Persons parachuting from an aircraft in distress may not be attacked during descent and must be given an opportunity to surrender upon reaching the ground.²⁴

3. Parties to the conflict must, at all times, distinguish between the civilian population (noncombatants) and combatants and between civilian objects and military objectives. They are required to direct their operations only against military objectives.²⁵ Neither the civilian population nor individual civilians may be made the object of attack. Acts or threats of

violence primarily for the purpose of spreading terror among the civilian population are prohibited. Indiscriminate attacks are prohibited. Attacks by way of reprisals against the civilian population or civilians are also prohibited. Civilians enjoy the protections listed above unless and for such time as they take a direct part in the hostilities. In addition, civilians cannot be used to shield military objectives or operations from attack.²⁶

Like the civilians themselves, civilian objects are also protected. Such objects may not be made the object of attack or reprisals. They are comprised of all objects that are not military objectives. Military objectives are limited to those objects which, by their nature, location, purpose, or use, make 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.²⁷ In addition, protection is also extended to cultural objects and places of worship²⁸, objects indispensable to the survival of the civilian population²⁹, the natural environment³⁰, and works and installations containing dangerous forces³¹. Protocol I further requires that in the conduct of military operations, constant care must be taken to spare the civilian population, civilians, and civilian objects.³² Furthermore, precautions must be taken to protect them against the dangers resulting from military operations while they are under control, to the maximum extent feasible³³.

B. Protocol II.

Protocol II also contains many rules that are antithetical to terrorist actions. These rules are contained in humane treatment

guarantees³⁴ and rules regarding the treatment of the civilian population³⁵.

Persons who do not take a direct part or who have ceased to take part in hostilities must be treated humanely in all circumstances.³⁶ According to the text of Article 4 among other things, they cannot be subjected to:

- (a) violence to their life, health, and physical or mental well-being, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment;
- (b) collective punishments;
- (c) taking of hostages;
- (d) acts of terrorism;
- (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) slavery and the slave trade in all their forms;
- (g) pillage;
- (h) threats to commit any of the foregoing acts.³⁷

The civilian population and individual civilians are also afforded many protections similar to Protocol I. They may not be made the object of attack and acts or threats of violence primarily aimed at spreading terror among the civilian population are prohibited. These rules must be observed in all circumstances and civilians enjoy these and other protections unless and for such time as they take a direct part in the hostilities.³⁸ Other relevant protections provided by Protocol II include protection of objects indispensable to the survival of the civilian population such as foodstuffs, agricultural areas for the

production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works³⁹; works and installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations⁴⁰; and forced movement of civilians⁴¹.

C. Sanctions for Violations.

Having determined that the Protocols apply, this study will now review the consequences under the Protocols for engaging in acts of terrorism. Failure to comply with the rules set out in Protocols I and II could lead to trial for violations of the laws of armed conflict. In addition, Protocol I contains further requirements and sanctions for the repression of breaches of its provisions.

Acts described as grave breaches in the Geneva Conventions are designated as grave breaches of Protocol I if committed against certain persons in the power of an adverse Party.⁴² The following acts, among others not relevant to this discussion, are regarded as grave breaches of Protocol I when committed willfully, in violation of the relevant provisions of Protocol I, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, ... ;

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian

objects, ... ;

...

(e) making a person the object of attack in the knowledge that he is *hors de combat*;

...⁴³

Grave breaches are regarded as war crimes.⁴⁴ Parties to the conflict are required to repress grave breaches and to take measures necessary to suppress all other breaches which result from a failure to act when under a duty to do so. Superiors are responsible for the acts of their subordinates if they know or had information which should enable them to conclude in the circumstances prevailing at the time, that the subordinate is committing or is going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁴⁵ Military commanders are required to prevent and, where necessary, to suppress and to report to competent authority, breaches by members of the armed forces under their command and other persons under their control. They are also responsible for ensuring that members of the armed forces under their command are aware of their responsibilities under the Protocol and for initiating steps to prevent violations or initiating disciplinary or penal action against violators.⁴⁶ A significant provision in terms of the suppression of terrorist acts is a requirement that Parties to the Protocol afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect to grave breaches of the Protocol.⁴⁷ Of similar significance is a provision that makes a Party to the conflict which violates the provisions of the Geneva Conventions or Protocol I liable to pay compensation if the case demands. This provision also makes the Party responsible for all

acts committed by persons forming part of its armed forces.⁴⁸

These sanctions encompass several important factors. First, they are specific and uniform. Belligerents can easily determine what conduct is acceptable and what conduct is prohibited. Commanders are charged with making sure the provisions in the Protocols are complied with. Second, the sanctions have worldwide application. It is therefore extremely difficult for violators to escape prosecution. It is also difficult for States to ignore their obligation to either prosecute or assist other concerned States with prosecuting violators. All in all, the Protocols provide a very efficient mechanism for combatting terrorist acts.

IV. QUALIFICATIONS OF BELLIGERENTS.

Traditionally, under the Brussels Declaration of 1874, Hague Convention IV of 1907, and the Geneva Prisoners of War Convention of 1949, to qualify as a "privileged combatant," a belligerent had to meet four criteria: (1) operate under military command, (2) wear a fixed distinctive sign (or uniform in the case of members of regular military forces), (3) carry arms openly, and (4) conduct military operations consistent with the laws and customs of war.⁴⁹ The status of privileged combatant provides, "immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflict."⁵⁰ If captured, a privileged combatant has the legal right to prisoner

of war status with its accompanying substantive and procedural benefits.⁵¹ Since World War II, there has been increasing dissatisfaction with the four traditional criteria, by the United States in World War II and Vietnam, and especially on the part of Third World States and organized resistance movements, because of the view that the requirements impose, "unworkable obligations upon irregulars operating in conflicts where guerrilla tactics are employed, including enemy-occupied territory."⁵² The problem was stated by Ambassador Aldrich, the head of the U.S. Delegation to the Conference that adopted the Protocols:

In most circumstances the guerrilla fighter will only be a part-time soldier who must live an apparently normal civilian life except when he and his unit are actually engaged in military operations. A rule that requires him to distinguish himself at all times from the civilian population will simply make him an outlaw; he cannot respect it and hope to survive.⁵³

The rules in Protocol I are designed to deal with this problem by allowing such part-time soldiers to distinguish themselves from the civilian population only during those times when they are actually fulfilling their role as combatants. This innovation is significant because it is foreseeable that guerrilla warfare by irregular combatants will continue to dominate those conflicts where dissident groups are battling relatively superior military powers. Branding these groups criminal merely encourages them to operate outside of the humanitarian constraints of the laws of armed conflict. Including them within the scope of those constraints is beneficial to the groups themselves and to all those who might be affected by their armed conflict. These groups are not granted the authority to engage in

acts of terrorism without facing dire consequences.

A. Protocol I.

First of all, Protocol I defines the armed forces of a Party to a conflict as consisting of all organized armed forces, groups, and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.⁵⁴ This definition comports with the first traditional criterion. Such armed forces must be subject to an internal disciplinary system which enforces compliance with the rules of international law applicable in armed conflict.⁵⁵ This requirement implements the fourth traditional criterion. By definition, members of armed forces are considered to be combatants.⁵⁶

Any combatant, as defined above, who falls into the power of an adverse Party is a prisoner of war.⁵⁷ Again, this status is one incentive for complying with the laws of armed conflict. The question of distinguishing between irregulars using guerrilla tactics as combatants and civilians as noncombatants still remains however. Protocol I provides the following solution:

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.⁵⁸

The rules set out above on when arms must be carried openly have been the subject of some debate.⁵⁹ Ambassador Aldrich provided the U.S. understanding that, "as regards the phrase 'military deployment preceding the launching of an attack', ... his delegation understood it to mean any movement towards a place from which an attack was to be launched."⁶⁰ Professor Al Ghunaim, of the Egyptian Delegation, expressed a different view that, "the expression 'military deployment' meant the last step when the combatants were taking their firing positions just before the commencement of hostilities; a guerrilla should carry his arms openly only when within range of the natural vision of his adversary."⁶¹ However interpreted, the rules regarding the carrying of arms openly must be consistent with the prohibition against perfidy, which includes feigning civilian noncombatant status to kill, injure, or capture an adversary.⁶² As stated in the 1977 Report of Committee III:

With one narrow exception, the article (44(4) of Protocol I) makes the sanction for failure by a guerrilla to distinguish himself when required to do so to be merely trial and punishment for violation of the laws of war, not loss of combatant or prisoner-of-war status. The exception, which was the most difficult part of the article to negotiate, related to the guerrilla fighter who relied on his civilian attire and lack of distinction to take advantage of his adversary in preparing and launching an attack. ... 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 crime 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.⁶³

Other than this one exception, compliance with the stated rules for carrying arms openly is not considered perfidious.⁶⁴ As stated, violations of these rules will result in forfeiture of prisoner of war status, but the prisoner must still be given protections equivalent to a prisoner of war.⁶⁵ He may, however, be tried and punished for a violation of the laws of war.⁶⁶

The requirement to carry arms openly, as a means of distinguishing combatants from the civilian population comports with the second traditional criterion for privileged combatancy. The stated rules are more evolutionary than revolutionary. They represent a consistent progression in the adaptation of the laws of armed conflict to the realities of contemporary warfare. They are a logical step from the inclusion of "organized resistance movements" in the 1949 Geneva Prisoner of War Convention which was an addition to the "militia and volunteer corps" specified in the 1874 Brussels Declaration and the 1899 and 1907 Hague Conventions. This was done because of the participation of these groups in armed conflicts. Their inclusion as Parties to the laws of armed conflict furthered the humanitarian goals of those laws by offering them the protections of those laws in exchange for their compliance with those laws.

B. Protocol II.

The qualifications of privileged combatants under Protocol II

were previously set out in the discussion on the scope of application of Protocol II. Restated briefly, they are: membership in the armed forces of a High Contracting Party or in opposing dissident armed forces or other organized armed groups which are: (a) under responsible command and (b) exercising sufficient control over a part of the territory of a High Contracting Party as to enable them to carry out sustained and concerted military operations and to implement Protocol II.⁶⁷

The meaning of "other armed groups" was discussed during negotiations in Working Group B of Committee I. The following statement was made regarding this term:

The expression does not mean any armed band acting under a leader. Such armed groups must be structured and possess organs, and must therefore have a system for allocating authority and responsibility; they must also be subject to rules of internal discipline. Consequently the expression "organized armed groups" does not imply any appreciable difference in degree of organization from that of regular armed forces.⁶⁸

Protocol II does not contain any specific statements regarding whether arms must be carried openly as a requirement for status as a privileged combatant. In fact, unlike Protocol I, it does not directly address methods and means of warfare, or combatant and prisoner of war status. As its title implies, its focus is primarily on protecting victims of non-international armed conflicts.

The absence of a rule for distinguishing combatants from the noncombatant civilian population is problematic. As previously stated, civilians lose their protections under Protocol II

when they take a direct part in the hostilities. Since no distinctive sign or act, other than taking a direct part, is required, whether a civilian has crossed the magic line by thought, word, or deed, is left to the judgment of the opposing forces. This lack of definition potentially places the civilian population at greater risk than Protocol I's rules regarding the carrying of arms openly.

Article 5 of Protocol II affords certain minimum protections to persons deprived of their liberty for reasons related to the armed conflict.⁶⁹ The rules of Article 5 apply to both military and civilian persons; therefore, a combatant captured by the adverse party is protected by its provisions as well as a civilian interned for supporting the other side.⁷⁰

V. U.S. OBJECTIONS TO PROTOCOL I.

President Reagan has strongly recommended that the United States ratify Protocol II and urge all other States to do likewise.⁷¹ Protocol I did not receive a similar endorsement. Even the signing of Protocol I has been called a "grave lapse in judgment" on the part of the United States.⁷² The U.S. view of the effects of Protocol I regarding terrorist acts was one of the primary reasons for its rejection.

Much of the criticism focuses on the granting of international status to wars of national liberation. The consensus of the critics appears to be that national liberation movements make a practice of terrorism and are incapable of complying with the laws of armed conflict.⁷³ As expressed by

G.J.A.D. Draper, the critics view Protocol I in these terms:

The damage to Humanitarian Law, the benefit of which (national liberation movements) have claimed, is apparent because discrimination has been imported into it. It does violence to the facts, including the political and military facts of the situation. Even with the palliatives in Protocol I, Article 96(3), the declaration of intent made during the conflict, and the interpretative statements made by certain states before the signing of the Final Act of the Conference as to the minimum level of intensity of the conflict being determined by reference to the scope of provisions (Article 1) of Protocol II, the international community is likely to be confronted with entities bound by a body of humanitarian law that they are unable to apply, even if they had the will to do so. The net effect of the "political coup" obtained by the adoption of the (national liberation movement) insertion ... is to weaken the delicate network of humanitarian rules established for the conduct of international armed conflicts and at the same time diminish confidence in Protocol II governing internal disputes.⁷⁴

Protocol I is viewed by its critics as merely a political tool for terrorist groups to gain recognition and legitimacy. As stated by Judge Abraham D. Sofaer, Legal Advisor to the United States Department of State:

The terrorist groups that attended the conference had no intention of modifying their conduct to satisfy these traditional rules of engagement. Terrorists are not soldiers. They don't wear uniforms. They hide among civilians and, after striking, they try to escape once again into civilian groups. Instead of modifying their conduct, therefore, the terrorist groups succeeded in modifying the law.⁷⁵

Consistent with this view, the provisions of Protocol I

regarding the carrying of arms openly are interpreted in a manner that facilitates acts of terrorism. According to the critics, the essence of terrorist criminality is the obliteration of the distinction between combatants and noncombatants. In their view, the effect of the Protocol I rules, therefore, is to:

(G)ive the terrorists dressed as civilians, who kill indiscriminately with concealed weapons, the same status as uniformed soldiers openly engaged against opposing military forces. The new protocol would legitimate the terrorist's practice of concealing themselves among civilian populations. By removing the visible distinctions between noncombatants and soldiers, the Protocols would make every citizen suspect and subject to reprisals. The protected status of civilians, at the heart of the Geneva Conventions, was tragically weakened.⁷⁶

In response to these arguments, the advocates of Protocol I assert that the Protocol neither recognizes terrorist groups nor legitimizes terrorist acts.⁷⁷ First of all, the rule designating wars of national liberation as international conflicts was not aimed at legitimizing any specific groups. It merely transferred into humanitarian law the principle of self-determination of peoples as enshrined in the Charter of the United Nations.⁷⁸ The scope of the rule is very limited. Hans-Peter Gasser, Legal Advisor to the Directorate, International Committee of the Red Cross, Geneva, described it thus:

It only deals with specific types of armed conflict and not the legal status of particular groups. The Friendly Relations Declaration furthermore makes clear that the territorial integrity of existing states shall not be impaired, which means that a secessionist movement cannot expect its struggle against the

central government to be recognized as a war of national liberation. Neither minorities dissatisfied with the majority nor political opponents of the government may therefore rely on the right of self-determination to voice their grievances. This limited concept of self-determination is unlikely to be broadened to any significant degree, since no government has any interest in undermining the territorial integrity of the state or, implicitly, its own position. The scope of application of the new rule is consequently very limited and it will probably remain so.⁷⁹

The whole idea that terrorist groups were able to modify the laws of armed conflict is somewhat absurd. The Diplomatic Conference that adopted the Protocols was attended by 135 States and only ten recognized liberation movements who attended as observers without a vote. No "terrorists" were invited to the Conference.

Colonel Waldemar A. Solf, U.S. Army Retired, who was a member of the U.S. Delegation to the 1974-1977 Diplomatic Conference on Humanitarian International Law Applicable in Armed Conflicts and a former Chief, International Affairs Division, Office of the Judge Advocate General of the Army, reviewed the historical developments that led to the adoption of the new rules regarding the carrying of arms openly.⁸⁰ He notes that national attitudes regarding whether guerrillas, partisans, and members of resistance movements should be regarded as patriots and privileged combatants have changed based on roles and circumstances. Taking the United States as an example: During the American Revolution, the American colonies relied heavily on irregular part-time combatants such as the "minute men" in their struggle for freedom. Later, during the American Civil War, when Union soldiers operated in the South among an unfriendly

population, the attitude of the Union towards such belligerents was one of harsh repression.⁸¹ Prior to the Conference, States had come to recognize that requiring irregulars using guerrilla tactics to distinguish themselves at all times, even in territories controlled by their adversaries, was suicidal. As stated by Colonel Solf:

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 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 the most difficult and prolonged negotiations of the Conference.⁸²

Bearing in mind that the liberation movements had a voice but no vote, they had little or no control over the outcome of the negotiations. What they were offered in the end by the adopted rules was a reasonable opportunity to comply with rules of armed conflict.

Second, the rules regarding distinguishing combatants from civilians do not permit terrorist acts. As has been discussed, terrorist acts are prohibited by the Protocols. Pretending to be a civilian and shooting at the last moment is not allowed. Even the granting of combatant protections equivalent to prisoner of war status, when such status is forfeited because of a violation, is not without precedent. According to Mr. Gasser:

The new law on the status of combatants bears all the signs of a compromise. And indeed it was: the final text was negotiated by the American and

Vietnamese delegations, both of whom knew what they were talking about, the experience of the Vietnam War still being fresh in their minds. During the war in Vietnam, members of Vietcong guerrilla units who were captured while actually engaged in combat ("carrying arms openly") were treated by the U.S. Military Assistance Command as prisoners of war (but not granted POW status), whereas a Vietcong who had committed an act of terrorism did not receive that treatment. In a nutshell, that practice is identical with what is required by Protocol I, and the new rules thus go no further than American practice in Vietnam.⁸³

Weighing the arguments for and against Protocol I's provisions on wars of national liberation and rules on distinguishing combatants from noncombatants, in light of the ultimate goal of protecting victims armed conflicts, the scales tip in favor of the Protocol's provisions. The arguments that Protocol I helps terrorists commit heinous acts are without substance. Perhaps the most destructive allegation is that the rules were influenced by terrorist groups that had no intention of complying with the laws of armed conflict. This argument smacks of a political attempt to make wars the province of the rich and powerful (or surrogates of the rich and powerful). It also fails to recognize the reality of the types of wars being fought and the types of belligerents who are fighting them.

Some objections have also been raised as to the practicalities of using the rules in Protocol I in real situations. The Joint Chiefs of Staff of the United States found the rules too ambiguous and complicated to use as a practical guide for military operations.⁸⁴ A study conducted by the Joint Chiefs reached the following conclusions:

Protocol I is militarily unacceptable for many reasons. Among these are that the Protocol unreasonably restricts attacks against certain objects that traditionally have been considered legitimate targets. It fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those conventions (reprisal attacks against the civilian population).⁸⁵

These are valid considerations but not beyond solution. They may call for unilateral understandings on the part of the United States consistent with the objects of the Protocol. As Colonel Solf has suggested:

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.⁸⁶

The important thing to keep in mind is that in order to gain any benefits from the laws of armed conflict, belligerents must comply with those laws. This, in turn, will lead to their inclusion among the community of combatants waging humane warfare. And this will benefit everyone.

VI. THE PROTOCOLS AS CUSTOMARY LAW.

Even if the United States does not ratify the Protocols, they may still be binding, in part, as customary law. Michael J. Matheson, the Deputy Legal Advisor for the United States Department of State has stated that, "the United States will consider itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law, either now or as it may develop in the future."⁸⁷ In this regard, the Joint Chiefs of Staff of the United States have promulgated a list of those provisions of Additional Protocol I that are either part of customary international law or which, in their opinion, should be developed into customary international law, as applicable in conventional armed conflicts.⁸⁸ The list includes provisions addressing means and methods of warfare and prisoner of war status which are pertinent to this discussion.

The basic rules contained in Article 35(1) and (2), regarding means and methods of warfare, are included on the list. The United States supports the principle that permissible means of injuring the enemy are not unlimited and that parties to a conflict not use weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. The United States feels, however, that the prohibition of methods and means of warfare intended or expected to cause widespread, long-term and severe damage to the natural environment, contained in Article 35(3), is too broad and ambiguous and is not a part of customary law.⁸⁹

Article 44 of Protocol I, regarding combatants and prisoners of war, was not included in the Joint Chiefs' list. The United

States does support the principle that persons entitled to combatant status be treated as prisoners of war in accordance with the 1949 Geneva Conventions, as well as the principle that combatant personnel distinguish themselves from the civilian populations while engaged in military operations.⁹⁰ According to Mr. Matheson, this support does not amount to an endorsement of the Protocol I provisions:

These statements are, of course, related to but different from the content of Articles 44 and 45 (of Protocol I), which relax the requirements of the Fourth [sic] Geneva Convention concerning prisoner of war treatment for irregulars, and, in particular, include a special dispensation allowing individuals who are said to be unable to observe this rule in some circumstances to retain combatant status, if they carry their arms openly during engagements and deployments preceding the launching of attacks. ... (T)he executive branch regards this provision as highly undesirable and potentially dangerous to the civilian population and of course does not recognize it as customary law or deserving of such status. It probably goes without saying that we likewise do not favor the provision of Article 1(4) of Protocol I concerning wars of national liberation and do not support it as customary law.⁹¹

The United States does, however, support the principles contained in Article 45 of Protocol I that, (1) should any doubt arise as to whether a person is entitled to combatant status, such person given that status until his status has been determined by a competent tribunal and (2) if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, such person should have the right to assert

entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated.⁹²

The Joint Chiefs' list also includes Article 45 dealing with protection of persons who have taken part in the hostilities; Article 51(2), dealing with protection of the civilian population; Article 52(1) and (2), dealing with general protection of civilian objects, except for the reference to "reprisals"; Article 57(1), (2(c)), (4), and (5), dealing with precautions in attack; Articles 59 and 60, dealing with undefended localities and demilitarized zones; and the fundamental guarantees contained in Article 75. In addition, although not contained in the Joint Chiefs' list, the United States supports the principles that combatants not kill, injure, or capture enemy personnel by resort to perfidy.⁹³

To become a part of customary international law, a conventional rule must be supported by State practice combined with *opinio juris*, which is the requirement that governments consistently behave in a certain way with the belief that this practice is rendered obligatory by the existence of the rule of law. While advocating adherence to many of the rules in Protocol I that are useful in the fight against terrorist acts, at present, it appears unlikely that the United States will publicly adopt the new rules regarding the carrying of arms openly. Actual practice regarding these rules however, may provide sufficient evidence of acquiescence to bring these rules within the ambit of customary international law. The United States may find it necessary, as it did during the Vietnam conflict, to treat captured irregulars as privileged combatants based upon the nature of their conduct prior to capture, in order to ensure reciprocal treatment for captured U.S. combatants.

VII. USING THE PROTOCOLS TO COMBAT TERRORISM.

The question has been asked whether the laws of armed conflict should apply to terrorists. In response to this question Professor Alfred P. Rubin has stated:

Although those condemning terrorism normally say they are condemning deeds, not mere thoughts, when asked to specify which deeds constitute terrorism, the deeds either look very much like a short list of some war crimes, i.e., targeting the civilian population as such or use of indiscriminate weapons, or deeds that would be consistent with the laws of war but performed by a person or group to which the legal category of combatant is denied, ... as soon as the activities of any armed group reach the level at which the laws of war should apply, those laws must apply even if the enemy army is called "terrorist" or engages in acts which violate the laws of war.⁹⁴

The point is that the circumstances of the conflict should determine whether the laws of armed conflict should apply and not the labels placed on the participants. By defining belligerents as either combatants or criminals, and having a regime that will do that, the definitional crack that tends to swallow terrorist acts would disappear since terrorist acts will be condemned by both the laws of armed conflict and by local criminal laws. No "freedom fighter" could commit an act of terrorism without violating some law. As stated by Professor Mallison, "(i)t is very important that all combatants who exist *de facto* be brought with the legal system."⁹⁵ This comment is significant considering modern methods of warfare. Guerrilla war is a tactic that is not likely to be abandoned. Even the United States

has trained "special forces" proficient in the conduct of unconventional operations, including guerrilla tactics. Some resistance forces are composed entirely of irregular fighters. Since they are involved in armed conflict why not bring them into the legal system that regulates armed conflicts. Of course, it will be necessary to offer them some type of inducements to encourage their compliance with the laws of armed conflict. Affording them the benefits of the laws of armed conflict, including status as a privileged combatant and prisoner of war status if captured, would provide such inducements. Protocol I, by its terms, accomplishes this task and should be allowed to work always bearing in mind that its benefits are contingent on compliance with its rules.

As previously stated, the United States has rejected the law of armed conflict approach of combatting terrorism in favor of a law enforcement approach. As described by Lieutenant Colonel (Lt Col) Richard J. Erickson, an Air Force officer who spent a year as a Research Fellow at the Airpower Research Institute studying terrorism:

The law enforcement approach considers international terrorism as primarily a civil police responsibility. The objective is to deter and, failing that, to successfully manage terrorist incidents through arrest, prosecution, and imprisonment. Consequently, this approach seeks to improve law enforcement by promoting international agreement and cooperation among nations. Outlawing terrorism--making it a universal international crime like piracy or slave trading--is the ideal. For the present, states have emphasized negotiating new treaties to define specific terrorist acts as crimes. Conventions on aerial hijacking, letter bombs, and attacks on protected

persons such as diplomats are examples. Information exchange and judicial cooperation are essential ingredients of this approach. Nations have focused their attention on extradition agreements and on redefining narrowly the political offense escape clause. Terrorists are viewed as ordinary criminals not engaging in warlike or combatant activity. In exceptional circumstances when the use of military force abroad is required, it occurs in the context of a response to a peacetime crisis.⁹⁶

The key to the law enforcement approach is jurisdiction. The injured State wants to prosecute the alleged offender or make sure he or she is prosecuted by some other State having the power to do so. Often the offense is committed beyond the borders of the injured State and the alleged offender is located or in the custody of another State. The cooperation of the other State is required for a prosecution to take place. But this State may have its own ideas about whether the alleged offender should be prosecuted. The success of the injured State in obtaining such cooperation will determine the success of the law enforcement approach. The discussion will now focus on U.S. counterterrorism policy and the law enforcement approach to combatting terrorist acts.

VIII. U.S. COUNTERTERRORISM POLICY.

A. General Policy.

According to the Bureau of Public Affairs, Department of State, U.S. counterterrorism policy has three main elements:

First, we make no concessions to terrorists holding official or private American citizens hostage. Specifically, we will not pay ransom, release prisoners,

or change our policies in response to terrorist demands. At the same time, without making concessions, the U.S. Government will make every effort, including contact with the captors or their representatives, to obtain the release of hostages.

Second, we work with other countries to put pressure on the countries that support terrorism to persuade them that such support is not cost free. Among such countries are Iran, Libya, Syria, Cuba, South Yemen, and North Korea. These countries help terrorists by providing training, money, weapons, travel and identification documents, diplomatic pouch privileges, safe houses, and refuge. The U.S., working with friendly countries, seeks to isolate the terrorist countries by imposing economic, political, diplomatic, and--if all else fails--military pressures.

Third, we cooperate with friendly countries in developing practical measures to counter terrorism. These measures include:

- Identifying the terrorists by name and learning their goals, ideologies, sponsors, and areas of operation;
- Tracking them, particularly when they cross borders, and searching them for forged documents, weapons, and dangerous materials;
- Apprehending, prosecuting, and punishing terrorists. Although more needs to be done in these areas, we are beginning to see results. More terrorists are being caught before they can carry out their attacks, and more terrorists are being convicted and sentenced to stiff prison terms. Laws covering prosecution, exchange of evidence, and extradition are being improved and used more frequently to punish terrorists.⁹⁷

This study will consider the third policy element which incorporates the law enforcement approach to combatting terrorist acts. It is interesting to note that the second policy element includes the use of military pressures as part of the

United States' counterterrorism policy. Using the military outside of U.S. territory will bring international rules on the use of force and the laws of armed conflict into play. An example is the U.S. attack on Libya in response to its alleged support of terrorists.

In furtherance of the third policy element and as part of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (PL 99-399), the United States implemented a "long arm" statute that extends extraterritorial jurisdiction over terrorist acts abroad against United States Nationals.⁹⁸ The law makes it a federal crime to kill, attempt or conspire to kill, or to cause serious bodily injury, to a national of the United States outside the territory of the United States. No prosecution by the United States may take place unless the Attorney General, or his or her delegate, certifies that in the judgment of the certifying official, the offense committed was intended to coerce, intimidate, or retaliate against a government or a civilian population.⁹⁹ While it appears that the United States is using the passive personality principle¹⁰⁰ as a basis for jurisdiction over extraterritorial crimes, the certification criteria arguably would justify the exercise of jurisdiction based on the protective principle¹⁰¹ of jurisdiction. Whatever the basis, since the crimes are taking place in foreign jurisdictions, some agreement with those foreign jurisdictions must be worked out in order for the United States to bring the perpetrators to trial. The next portion of this study will review and comment on arrangements reached with foreign governments to attain this goal. Subject areas of discussion will include aviation security, extradition treaties, and other multilateral treaties dealing with acts of terrorism to which the

United States is a party.

B. Aviation Security.

As a consequence of the threat posed by the hijacking of airplanes, the United States has enjoyed some success in reaching agreements on aviation security both at the multilateral and bilateral levels. The international character of aviation made it necessary to determine which State is competent to exercise jurisdiction in cases of criminal offenses committed on board aircraft¹⁰², the exact nature of such offenses, and procedures for extradition from one State to another. Three multilateral conventions were promulgated that addressed these concerns:

Convention on Offenses and Certain Other Acts
Committed on Board Aircraft (Tokyo Convention) of
September 14, 1963;¹⁰³

Convention For the Suppression of Unlawful
Seizure of Aircraft (Hague Convention) of December 16,
1970;¹⁰⁴ and

Convention for the Suppression of Unlawful Acts
Against the Safety of Civil Aviation (Montreal
Convention) of September 23, 1971.¹⁰⁵

The scope of the Tokyo Convention includes offenses against penal law and acts which, whether or not they are offenses, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board the aircraft.¹⁰⁶ In terms of jurisdiction, the State of registration of the aircraft is designated as competent to exercise jurisdiction over offenses and acts committed on board the aircraft, not excluding any criminal jurisdiction exercised in accordance with national law.¹⁰⁷ Another Contracting State,

which is not the State of registration, is prohibited from interfering with an aircraft in flight in order to exercise its criminal jurisdiction on board the aircraft except when: the offense has effect on the territory of such State; the offense has been committed by or against a national or permanent resident of such State; the offense is against the security of such State; the offense consists of a breach of any rules or regulations relating to the flight or maneuver of aircraft in force in such State; or the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.¹⁰⁸ No provision of the Tokyo Convention may be interpreted as authorizing or requiring any action in respect of offenses against penal laws of a political nature or those based on racial or religious discrimination.¹⁰⁹

In order to control an alleged offender and facilitate future prosecution, the Tokyo Convention grants broad powers to the aircraft commander. If the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offense or act within the scope of the Convention, the commander may restrain, disembark, or deliver the alleged offender to competent authorities.¹¹⁰ If, in the aircraft commander's opinion, the act believed to have been committed on board the aircraft is a serious offense according to the penal law of the State of registration of the aircraft, the aircraft commander may deliver the alleged offender to the competent authorities of any Contracting State in the territory of which the aircraft lands.¹¹¹

Contracting States are required to allow the commander of an aircraft registered in another Contracting State to disembark an alleged offender¹¹² and must take delivery of any alleged offender from the aircraft commander in accordance with the Tokyo Convention.¹¹³ In addition, upon being satisfied that the circumstances so warrant, any Contracting State must take custody or other measures to ensure the presence of any person on board suspected of unlawfully committing by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight.¹¹⁴

The Contracting State to which a person is delivered or in which the aircraft lands following an unlawful seizure must immediately make a preliminary inquiry into the facts. If the alleged offender has been taken into custody, the State must notify the State of registration of the aircraft, the State of nationality of the detained person, and any other interested State it deems advisable, of the custody and the circumstances warranting detention. After completing its inquiry, the State promptly reports its findings to the States notified and indicates whether it intends to exercise jurisdiction.¹¹⁵ For extradition purposes, offenses committed on aircraft registered in a Contracting State are treated as if they had been committed not only in the place in which they occurred but also in the territory of the State of registration of the aircraft. Nothing in the Tokyo Convention, however, creates an obligation to grant extradition.¹¹⁶

While the Tokyo Convention provides a framework for combatting acts of terrorism aboard aircraft, it also leaves several cracks in the foundation. First of all, except for crimes

relating to the unlawful seizure of aircraft, it fails to define what specific offenses are proscribed. It further excludes from proscription "offenses against the penal laws of a political nature or those based on racial or religious discrimination." Second, although the Convention addresses the issue of extradition, it neither provides procedures for accomplishing same nor makes extradition mandatory. These cracks provide an ample lacuna for States to justify whatever action or inaction they choose to pursue. The goal of universal criminality of terrorist acts is therefore not reached through the Tokyo Convention.

The Hague Convention represents significant progress towards the goal of universal criminality although it too falls short. The Convention specifically addresses the problem of aerial hijacking. It makes it an offense for any person on board an aircraft in flight to unlawfully, by force or threat thereof, or by any other form of intimidation, seize, or exercise control of, that aircraft, or attempt to perform any such act, or to be an accomplice of a person who performs or attempts to perform any such act.¹¹⁷ Each Contracting State also "undertakes to make the offense punishable by severe penalties."¹¹⁸

Recognizing that jurisdiction is a prerequisite to prosecution, each Contracting State is required to take such measures as may be necessary to establish its jurisdiction over the offense and any other act of violence against passengers or crew committed by the alleged offender in connection with the offense, in the following cases: (1) when the offense is committed on board an aircraft registered in that State; (2) when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board; and (3) when the offense is

committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.¹¹⁹

In addition, each Contracting State is obliged to establish jurisdiction over the offense in cases where the alleged offender is present in its territory it does not extradite him or her to another Contracting State, as mentioned above, having jurisdiction over the offense.¹²⁰ The Convention does not exclude any criminal jurisdiction exercised in accordance with national law so a State remains free to exercise jurisdiction on that basis.¹²¹

These rules create a situation where many States with different attitudes and interests may have jurisdiction over a particular act of hijacking. While this makes the possibility of prosecution more likely because there are fewer places for an alleged offender to avoid jurisdiction, it also makes it easier for the alleged offender to find refuge in a State with jurisdiction that is sympathetic to his or her cause and will grant asylum.

Any Contracting State in the territory of which an alleged offender is present must take him or her into custody or take other measures to ensure his or her presence, and immediately make a preliminary inquiry into the facts. Persons in custody may communicate immediately with the nearest appropriate representative of the State of their nationality. The State of registration of the aircraft, the State of the lessee's principal place of business or permanent residence, the State of nationality of the detained person, and, if considered advisable, any other interested States, must be immediately notified of the fact that such person is in custody and of the circumstances which

warrant his or her detention. These States must also be promptly informed of the findings of the preliminary inquiry and whether the State making the inquiry intends to exercise jurisdiction.¹²²

The area of extradition is given particular attention in the Hague Convention. The Convention seeks to establish a prosecute or extradite formula. To that end, Article 7 of the Convention provides:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State.¹²³

The following rules regarding extradition are also set out in the Convention:

1. The offense shall be deemed to be included as an extraditable offense in any extradition treaty existing between Contracting States. Contracting States undertake to include the offense as an extraditable offense in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offense. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make

extradition conditional on the existence of a treaty shall recognize the offense as an extraditable offense between themselves subject to the conditions provided by the law of the requested State.

4. The offense shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4, paragraph 1.¹²⁴

Whether the Hague Convention does establish a prosecute or extradite option has been questioned. As pointed out by Professor Diederiks-Verschoor:

In Article 8, paras. 2 & 3, it is explicitly stated that extradition shall be 'subject to the other conditions provided by the law of the requested State'. The Convention, by this token, still contains no general rule making extradition obligatory. Extradition can only be effected in accordance with the law of the requested state which, in turn, will reflect the rules of any extradition treaty that state may have concluded.¹²⁵

As will be discussed later, most extradition treaties contain a political offense exception to the requirement to extradite.

Professor Diederiks-Verschoor further points out:

As regards offenders claiming political asylum it should be noted that the Convention is silent on that point, although a ban on it had been contemplated during preliminary discussions. Such a move would of course have meant an encroachment on the right of asylum. The result now is that when it comes to applying Article 7 much, if not all, will depend on the impartiality and integrity of the prosecuting authorities. Should they wish ignore their obligation to either extradite or prosecute, then there is nothing to stop them. Herein lies the main weakness of the

Convention: it cannot prevent states from granting political asylum to hijackers, if they so choose.¹²⁶

Therefore, although the Hague Convention has gone far towards making aerial hijacking a universal crime, extradition remains a problem area, especially in the context of "political crimes". Again, this problem will be discussed in more detail later in this study.

The Montreal Convention deals with offenses that occur both on board and outside of an aircraft. These offenses include: performing an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; destroying an aircraft in service or causing damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; placing or causing to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; destroying or damaging air navigation facilities or interfering with their operation, if any such act is likely to endanger the safety of aircraft in flight; or communicating information which a person knows to be false, thereby endangering the safety of an aircraft in flight.¹²⁷

Attempts to commit any of these offenses and being an accomplice of a person who commits or attempts to commit any of them are also offenses under the Montreal Convention.¹²⁸

Just as in the Hague Convention, each Contracting State to the Montreal Convention undertakes to make the offenses mentioned above punishable by severe penalties.¹²⁹ Each

Contracting State is required to establish jurisdiction when the offense is committed in the territory of that state; when the offense is committed against or on board an aircraft registered in that state; when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board; and when the offense is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that state.¹³⁰

The Montreal Convention contains provisions regarding custody of alleged offenders¹³¹, preliminary inquiry into the facts¹³², notification of appropriate States¹³³, extradition or prosecution¹³⁴, and extradition procedures¹³⁵ identical to the Hague Convention. The same criticisms regarding these provisions are applicable to both conventions.

The United States has supplemented these three multilateral conventions with numerous bilateral agreements which also address issue of aviation security. Most of these bilateral agreements stipulate that the parties, in their mutual relations, will act in conformity with the three multilateral conventions. One would suppose that these bilateral agreements would be the ideal place to try to address some of the deficiencies noted in the multilateral agreements. This, however, does not appear to be the case.

Many of the bilateral agreements follow a model aviation security article.¹³⁶ The following paragraphs of the model agreement are pertinent to this discussion:

(B) The parties shall provide upon request all

necessary assistance to each other to prevent acts of unlawful seizure of aircraft and other unlawful acts against the safety of passengers, crew, aircraft, airports and air navigation facilities and any other threat to aviation security.

(F) When an incident or threat of an incident or unlawful seizure of aircraft or other unlawful acts against the safety of passengers, crew, aircraft, airports and air navigation facilities occurs, the parties shall assist each other by facilitating communications and other appropriate measures intended to terminate rapidly and safely such incident or threat thereof.

These clauses do little to facilitate bringing the alleged offenders to court. Again, if the State having jurisdiction and custody fails to prosecute, the extradition process becomes the key factor. Agreements concerning this process will now be discussed.

C. Extradition.

Terrorist acts have not been made crimes of universal jurisdiction. Since such acts are often committed in territory outside of the State seeking to prosecute their perpetrators, the extradition process must be used to bring the alleged offenders before the courts in the offended State. Although the extradition process deals with crimes, it is not a criminal procedure. It is an exercise of sovereign discretion. In the United States, this discretion is exercised by the Executive with a recommendation from the courts. Since the extradition process is not a criminal procedure, constitutional protections do not apply.¹³⁷

There is no rule of international law requiring extradition. The extradition process is normally accomplished through bilateral treaties between the effected States. The United States has

many such treaties and, under current legal practice, will not honor a request for extradition from a foreign government unless there is a treaty or convention for extradition between the United States and the foreign government making the request.¹³⁸

Extradition treaties or conventions typically contain a list of offenses for which extradition will be granted. The crimes listed often include acts (such as murder or assault) which are committed by so-called terrorists. Such treaties or conventions also contain an exception from extradition for crimes of a political character. Since so-called terrorists often claim their acts were committed for political reasons, interpretations of this exception have caused major problems in extraditing such individuals.

The United States has tended to interpret the political offense exception in a rather restrictive manner. As stated in Matter of Doherty by Gov. of United Kingdom:

The Court must assess the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose behalf it is committed, and the particularized circumstances of the place where the act takes place.¹³⁹

This formulation allows the reviewing authority to make an objective assessment of the organization to which the alleged offender claims allegiance. As stated by the court:

(I)t would be most unwise as a matter of policy to extend the benefit of the political offense exception to every fanatic group or individual with loosely defined political objectives who commit acts of violence in the name of those so called political

objectives.¹⁴⁰

This objective view of the political offense exception is not shared by all States. Some States have adopted a subjective interpretation of the political offense exception. An Italian court defined the exception in these terms:

A subjectively political offense is therefore characterized by the nature of motive, appearing from the offender's purpose in committing the crime, which must go beyond the personal interests of the offender and be concerned wholly or in part with wider interests connected with the purpose carrying into effect of different political ideals or theories.¹⁴¹

Under the subjective test, the motives of the actor will determine whether the alleged crime was a political offense. The State reviewing the extradition request need not agree with the motives of the actor or of the organization for which the act was committed in order to apply the exception to the case.

The language in the particular treaty or convention may be critical because it may define the parameters in which the political offense exception may operate. Some modern agreements have limited the scope of the exception to exclude what are believed to be terrorist acts. A primary example is the Supplementary Extradition Treaty with The United Kingdom¹⁴² which excludes numerous offenses from classification as political offenses including: offenses within the scope of selected multilateral conventions (Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Montreal Convention for the Suppression of Unlawful Acts against the Safety of Aviation, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and

International Convention against the Taking of Hostages); murder; manslaughter; maliciously wounding or inflicting grievous bodily harm; kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage; causing or conspiring to cause an explosion likely to endanger life or cause serious damage to property; making or possessing of an explosive with the intent, personally or through another person, to endanger life or cause serious damage to property; possessing a firearm or ammunition with the intent, personally or through another person, to endanger life; using a firearm with the intent to resist or prevent the arrest or detention of yourself or another person; damaging property with the intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered; or attempting to commit any of the foregoing offenses.¹⁴³

Few current extradition treaties have such extensive exceptions to the political offense exception, although the Supplementary Treaty to the Treaty Between the United States of America and the Federal Republic of Germany Concerning Extradition¹⁴⁴ is similar. Future extradition treaties will probably at least attempt to follow these examples. Perhaps the ultimate example of this trend is the supplemental treaty on extradition signed by the United States and the Kingdom of Belgium to specifically promote the repression of terrorism.¹⁴⁵ Among other things, this treaty provides:

Article 2

For purposes of extradition and in spite of the political nature of the act, any of the following offenses may, in the discretion of the executive authority of the

Requested State, be considered not to be a political offense, an offense connected to a political offense, or an offense inspired by political motives:

a) an offense for which the Contracting States have the obligation pursuant to a multilateral agreement to extradite the person sought or to submit his case to the competent authorities for the purpose of prosecution;

b) murder, voluntary manslaughter and voluntary assault and battery inflicting serious bodily harm;

c) an offense involving kidnapping, abduction, the taking of a hostage, or any other form of illegal detention;

d) an offense involving the placement or use of an explosive, incendiary or destructive device or substance, as well as the use of automatic weapons to the extent that they cause or are capable of causing serious bodily harm or substantial property damage;

e) an attempt to commit one of the above-mentioned offenses or the participation as co-author or accomplice of a person who commits or attempts to commit such an offense;

f) an "association of wrongdoers" formed to commit any of the foregoing offenses under the laws of Belgium, or a conspiracy to commit any such offenses as provided by the laws of the United States.

Article 3

None of the offenses mentioned in Article 2 shall be considered to be a political offense, an offense connected to a political offense, or an offense inspired by political motives when:

a) it created a collective danger to the life, physical integrity, or liberty of any persons; or

b) it affected a person foreign to the motives behind it; or

c) cruel or vicious means were used; or

d) it involved the taking of a hostage.

Other current extradition treaties include exceptions to the

political offense exception for crimes against Heads of State and other persons protected under international law¹⁴⁶ and acts in violation of multilateral treaties such as aircraft hijacking¹⁴⁷, but most have no stated exceptions to the political offense exception.

It is clear that even when great detail is added to the rules regarding extradition, the State considering an extradition request retains a great deal of discretion in deciding whether the request for extradition should be granted. Primarily because of this reason, the goal of mandatory prosecution or extradition has not been achieved. A wedge, forged from political justifications has made certain that a crack in the framework constructed to outlaw terrorist acts remains open.

D. Other Multilateral Treaties to Combat Terrorist Acts.

Before concluding the discussion on law enforcement efforts to combat terrorist acts, four other multilateral conventions to which the United States is a party or prospective party merit review:

Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, February 2, 1971.¹⁴⁸

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, December 14, 1973.¹⁴⁹

Convention on the Physical Protection of Nuclear Material, October 26, 1979.¹⁵⁰

International Convention Against the Taking of Hostages, December 17, 1979.¹⁵¹

The Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance was adopted by the Member States of the Organization of American States to progressively develop international law as regards cooperation in the prevention and punishment of criminal acts against persons entitled to special protection under international law.¹⁵² The acts proscribed include kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the State has the duty to give special protection according to international law, and extortion in connection with these crimes, which are considered common crimes of international significance regardless of motive.¹⁵³ When a requested extradition is declined because the person sought is a national of the requested State, or because of some other legal or constitutional impediment, the requested State is obliged to submit the case to its competent authorities for prosecution, as if the case had been committed in its territory, and communicate the decision of those authorities to the requesting State.¹⁵⁴ However, nothing in the Convention can be interpreted so as to impair the right of asylum.¹⁵⁵

The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, was adopted by the United Nations General Assembly. The Convention defines "internationally protected person" as:

(a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a

Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;

(b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.¹⁵⁶

Each State Party to the Convention is required to make the intentional commission of the following acts a crime under its internal law and make them punishable by appropriate penalties which take into account their grave nature:

(a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

(b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;

(c) a threat to commit any such attack;

(d) an attempt to commit any such attack; and

(e) an act constituting participation as an accomplice in any such attack.¹⁵⁷

As in the aviation security agreements, the State Parties are required to take such measures as may be necessary to establish its jurisdiction over the crimes set forth above when: the crime is committed in the territory of that State or on board a ship or aircraft registered in that State; and when the alleged offender is a national of that State the crime is committed against an internationally protected person as defined in (this

Convention) who enjoys his status as such by virtue of functions which he exercises on behalf of that State.¹⁵⁸ Each State is likewise required to establish its jurisdiction over those crimes in cases where the alleged offender is present in its territory and it does not extradite him or her to another State having jurisdiction as outlined above.¹⁵⁹

The Convention contains notification, prosecution, and extradition provisions nearly identical to those contained in the multilateral aviation security agreements discussed earlier in this study. If the State Party in whose territory the alleged offender is present does not extradite him or her, it must submit the case to its competent authorities for the purpose of prosecution.¹⁶⁰ Again, extradition is not mandatory and the Convention does not affect the application of Treaties on Asylum in force at the date of its adoption.¹⁶¹

These apparently standard provisions also appear in the Convention on the Physical Protection of Nuclear Material and the International Convention Against the Taking of Hostages. The former convention makes punishable the intentional commission of the following offenses:

- (a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property;
- (b) a theft or robbery of nuclear material;
- (c) an embezzlement or fraudulent obtaining of nuclear material;
- (d) an act constituting a demand for nuclear material by threat or use of force or by any other

form of intimidation;

(e) a threat:

(i) to use nuclear material to cause death or serious injury to any person or substantial property damage, or

(ii) to commit an offense described in subparagraph (b) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;

(f) an attempt to commit any offense described in paragraphs (a), (b), or (c); and

(g) an act which constitutes participation in any offense described in paragraphs (a) to (f).¹⁶²

The latter convention outlaws the taking of hostages. It provides that any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offense of taking hostages ("hostage-taking") within the meaning of this Convention. It further provides that any person who attempts to commit an act of hostage-taking, or participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offense for the purposes of this Convention.¹⁶³

It is interesting to note that the International Convention Against the Taking of Hostages specifically references the Geneva Conventions and the Protocols Additional to those Conventions. It provides:

In so far as the Geneva Conventions of 1949 for

the protection of war victims or the Protocols Additional to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, Additional Protocol I of 1977, 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 Charter of the United Nations 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.¹⁶⁴

This provision evidences the interrelationship between the law of armed conflict approach to terrorist acts and the law enforcement approach to terrorist acts, and illustrates that the two approaches can work together.

In summary, the law enforcement approach uses agreements, both bilateral and multilateral to define specific offenses and provide for their prosecution by an appropriate party. Since the alleged offender is often located in a territory outside of the State seeking to prosecute, the ability to extradite the alleged offender becomes a key factor. Despite attempts to create a rule of prosecute or extradite, the political offense exception to extradition proceedings has prevented this goal from coming to fruition. The law enforcement approach has failed therefore to make terrorist acts crimes of universal condemnation.

IX. LAW OF ARMED CONFLICT VS. LAW ENFORCEMENT: A COMPARISON.

The law of armed conflict approach and the law enforcement approach to combatting terrorism can be compared in terms of scope of application, method of dealing with terrorist acts, and probable effectiveness of that method. Lt Col Erickson developed a chart (see Appendix E) as a means of summarizing the differences between the law enforcement approach and the law of armed conflict approach to combatting terrorism.¹⁶⁵ The findings in this chart will be used as a basis for analysis.

In terms of scope of application, the laws of armed conflict provide a much more effective means for combatting terrorist acts. The law enforcement approach is civil in nature, with offenses defined under domestic laws. It is carried out by the State's police forces and domestic courts. These bodies exercise limited jurisdiction under international law and must rely on the extradition process to bring alleged offenders within their control. For the reasons previously discussed, the extradition process is not a very reliable means accomplishing this task. Successful extradition is dependent on application of specific treaties to the parties involved in the particular incident. Although there are many such treaties they have not established a system of mandatory universal extradition mainly due to the political offense exception and the discretion afforded the State from which extradition is requested. Therefore the likelihood of an alleged offender being brought to trial is diminished.

On the other hand, the law of armed conflict approach is military in nature and is carried out on the domestic and international level. The offenses are defined under international

law and their jurisdiction is universal. The scope of the law of armed conflict approach is determined by the nature of conflict. The rules regarding the laws of armed conflict are so ubiquitously binding on States, either through participation as a Contracting Party or through application of customary international law, that they can truly be said to be universal. In terms of the Protocols, as of December 31, 1988, 78 States were parties to Protocol I and 69 to Protocol II.¹⁶⁶ Once the nature of the armed conflict reaches the appropriate level, the rules apply. Participants in the conflict who violate the rules are subject to sanction. States having custody of alleged offenders are required to take action or turn them over to another State seeking to take action. Prosecution under the laws of armed conflict for acts of terrorism is virtually assured.

The author of this study disagrees with Lt Col Erickson's characterization regarding combatant status. Lt Col Erickson views the combatant status of "terrorists" as unlawful and unprivileged. In the author's opinion the conduct and not the status of the actor is the crucial factor. The actor may be a privileged combatant who violates the Conventions and is therefore subject to prosecution for that violation. No one is a "terrorist" but anyone could commit "terrorist acts" which are illegal under the laws of armed conflict.

Both the law of armed conflict approach and the law enforcement approach deal with acts of terrorism in the same manner; under both approaches such acts are criminal and subject to sanction. The law of armed conflict approach provides for a mandatory prosecute or extradite for prosecution action on the part of the Contracting Parties. The law enforcement

approach suggests a similar procedure but contains within it a significant loophole, the political offense exception. Efforts to circumvent this exception have met limited success. Prosecution or extradition is not mandatory under the law enforcement approach and political asylum or simply inaction remain viable alternatives for States wishing to shelter "freedom fighters".

In terms of probable effectiveness, the law of armed conflict approach is more effective but is limited to the circumstances when it applies. It appears, therefore, that both approaches are needed in order to cover the whole scope of activity that may involve terrorist acts. In those situations where the laws of armed conflict do not apply, application of the law enforcement approach should be mandatory. The political offense exception should be tied to the laws of armed conflict so that no violation of the laws of armed conflict can fall into the political exception to extradition. In this way, terrorist acts can be made universal crimes. Also, States can use the laws of armed conflict to combat terrorism on the international level, especially State sponsored terrorism. This is already being done under other justifications. Perhaps the clearest example is the U.S. attack on Libya, when the use of military force was deemed necessary to "defend" against future terrorist attacks.¹⁶⁷ Assuming the accuracy of the facts claimed by the U.S., this attack could be justified as a reprisal against military targets under the laws of armed conflict. By using both approaches to combat terrorism any gaps where offenders can find shelter from any recourse against their illegal actions can be closed.

X. CONCLUSION.

The United States has concluded that 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts legitimizes terrorist acts and should not be ratified. This study reaches the opposite conclusion regarding the Protocol's treatment of terrorist acts and finds, as in the previous law of armed conflict conventions, such acts are illegal under the provisions of Protocol I. This study further finds that the law enforcement approach to combatting terrorism, an approach favored by the United States, is an insufficient vehicle for reaching the goal of universal condemnation of all terrorist acts. Under the circumstances, it seems absurd to forgo a valuable weapon in the fight against terrorism, the law of armed conflict as developed through Protocol I, based on a politically biased interpretation of those rules. However, using the law of armed conflict approach alone will not provide the means for combatting terrorist acts in all circumstances. The law enforcement approach, tied to the law of armed conflict approach, will provide a legal blanket that covers all situations. Using the two approaches together is the best way to combat terrorist acts and to bring such acts into the realm of customary international law that will one day convert them into crimes of universal condemnation. The United States should reconsider its decision not to ratify Protocol I based on the its characterization as a "pro-terrorist" treaty, and consider ratifying it with the necessary reservations that will help clarify its terms as a weapon in the fight against terrorism.

Notes

1. Vice President's Task Force on Combatting Terrorism, Terrorist Group Profiles (1988) [hereinafter V.P. Study].
2. International Committee of the Red Cross, "Protocols Additional to the Geneva Conventions of 12 August 1949," Geneva, 1977, 3-73 [hereinafter either Protocols, Protocol I, or Protocol II]. The Protocols are reprinted in A. Roberts & R. Guelff, Documents on the Laws of War 387-466 (1982).
3. Letter of Transmittal from President Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, S. Treaty Doc. No. 2, 100th Congress, 1st Sess., at III (1987) [hereinafter Letter of Transmittal].
4. Protocol II, *supra* note 2.
5. Statement by Hans-Peter Gasser, "Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims," 81 A.J.I.L. 910, 913 (1987).
6. V.P. Study, *supra* note 1, letter from the Vice President.
7. Protocol I, *supra* note 2, at Art. 1. Article 2 common to the Geneva Conventions provides as follows:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be

a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

8. *Id.*, at Art. 1(4).

9. *See* W. Mallison & S. Mallison, "The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts," 42 *Law & Comp. Probs.* 4, 15-17 (1978).

10. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 54-55 Geneva:ICRC, 1987 [hereinafter ICRC Commentary].

11. M. Bothe, K. Partsch, & W. Solf, New Rules for Victims of Armed Conflicts, at 52, (1982) [hereinafter Bothe Commentary].

12. Protocol I, *supra* note 2, at Art. 96(3).

13. Report of the United States Delegation [to the Geneva Conference on International Humanitarian Law] submitted by Ambassador George H. Aldrich, Chairman of the U.S. Delegation, to the Secretary of State at 7 (1977) [hereinafter Delegation Report, with year added], *quoted and discussed in* Mallison & Mallison, *supra* note 9, at 14.

14. Protocol II, *supra* note 2, at Art. 1. Article 3 common to the 1949 Geneva Conventions states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de*

combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

15. *Id.*

16. *Id.*

17. Bothe Commentary, *supra* note 11, n. 9 at 628, citing the 1973 I.C.R.C. Commentary to the Draft Protocols to the Geneva Conventions.

18. *Id.*, at 628.

19. Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at 1 (1987) [hereinafter S. Treaty Doc. No. 2].

20. V.P. Study, *supra* note 1, at viii.

21. Bothe Commentary, *supra* note 11, at 193.

22. *Id.*, at 219.

23. Protocol I, *supra* note 2, at Art. 41. A person is *hors de combat* if:

- (a) he is in the power of an adverse Party;
- (b) he clearly expresses an intention to surrender; or
- (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

24. *Id.*, at Art. 42.

25. *Id.*, at Art. 48.

26. *Id.*, at Art. 51. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each case, are of a nature to

strike military objectives and civilians or civilian objects without discrimination.

27. *Id.*, at Art. 52.

28. *Id.*, at Art. 53.

29. *Id.*, at Art. 54.

30. *Id.*, at Art. 55. Art. 35 also prohibits employment of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment.

31. *Id.*, at Art. 56. This prohibition includes attack on nuclear plants, one of the big fears of terrorist attacks.

32. *Id.*, at Art. 57.

33. *Id.*, at Art. 58.

34. Protocol II, *supra* note 2, at Part II.

35. *Id.*, at Part IV.

36. *Id.*, at Art. 4(1).

37. *Id.*, at Art. 4(2).

38. *Id.*, at Art. 13.

39. *Id.*, at Art. 14.

40. *Id.*, at Art. 15. Even where these objects are military objectives, they may not be attacked if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

41. *Id.*, at Art. 16.

42. Protocol I, *supra* note 2, at Art. 85(2). These persons include those protected by Articles 44, 45, and 73 of Protocol I; the wounded, sick, and shipwrecked of the adverse Party who are protected by Protocol I; and those medical or religious personnel, medical units, or medical transports, protected by Protocol I, which are under the control of the adverse Party.
43. *Id.*, at Part V, Sec. II.
44. *Id.*, at Art. 85.
45. *Id.*, at Art. 86.
46. *Id.*, at Art. 87.
47. *Id.*, at Art. 88.
48. *Id.*, at Art. 91.
49. *See* Mallison & Mallison, *supra* note 9, at 5. These are the so-called Brussels-Hague-Geneva requirements derived from those Conventions which are cited in note 1 of the article.
50. Bothe Commentary, *supra* note 11, at 243.
51. Mallison & Mallison, *supra* note 9, at 5.
52. *Id.*, at 6.
53. George H. Aldrich, "New Life for the Law of War," 75 *American Journal of Int'l Law* 764, at 769 (1981).
54. Protocol I, *supra* note 2, at Art. 43.
55. *Id.*
56. *Id.*
57. *Id.*, at Art. 44.

58. *Id.*, at Art. 44(3).
59. Mallison & Mallison, *supra* note 9, 22-24.
60. *Id.*, at 24.
61. *Id.*, at 23.
62. Protocol I, *supra* note 2, at Art. 37.
63. Mallison & Mallison, *supra* note 9, at 25.
64. Protocol I, *supra* note 2, at Art. 44.
65. *Id.*, at Art. 44(4).
66. Mallison & Mallison, *supra* note 9, at 25.
67. Protocol II, *supra* note 2, at Art. 1.
68. Bothe Commentary, *supra* note 11, at 626.
69. Protocol II, *supra* note 2, at Art. 5. The protections provided include the following:

(a) the wounded and the sick shall be treated in accordance with Art. 8 (protection against pillage and ill-treatment and ensurance of adequate care);

(b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of armed conflict;

(c) they shall be allowed to receive individual or collective relief;

(d) they shall be allowed to practice their religion and, if requested and appropriate, to receive spiritual assistance from persons such as chaplains, performing religious functions;

(e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

70. Bothe Commentary, *supra* note 11, at 645.
71. Letter of Transmittal, *supra* note 3.
72. American Foreign Policy, 1986, Doc. 99, at 214.
73. Letter of Transmittal, *supra* note 3.
74. G.I.A.D. Draper, Wars of National Liberation and War Criminality, in *Restraints on War* 135, 158-159 (M. Howard ed. 1979) *cited as an expert in* G. Roberts, "The New Rules for Waging War: The Case Against Ratification of Additional Protocol I," 26 *Vir. J. Int'l L.* 123, at 126 (1985).
75. A. Sofaer, "Terrorism and the Law," 64 *Foreign Affairs* 901, at 914 (1986).
76. American Foreign Policy, *supra* note 72.
77. Gasser, *supra* note 5, at 913.
78. *Id.*
79. *Id.*, at 917.
80. W. Solf, "A Response to Douglas J. Feith's Law in the Service of Terror--The Strange Case of the Additional Protocol," 20 *Akron L. Rev.* 261, 269-273 (1986). The article gives some good examples. Col Solf had combat experience in WW II and therefore has a perspective through the "fog of battle" as to how the rules actually work on the battlefield.
81. *Id.*, at 269.
82. *Id.*, at 273-274.

83. Gasser, *supra* note 5, 921-922.
84. Letter of Submittal from Secretary of State Shultz, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, S. Treaty Doc, No. 2, 100th Cong., 1st Sess., at IX (1987).
85. "The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, January 22, 1987," Humanitarian Law Conference, 2 Am. U.J. Int'l L. & Pol'y 415, at 468 (1987) [hereinafter H. Law Conf.].
86. Solf, *supra* note 80, at 289.
87. Remarks of Michael J. Matheson, H. Law Conf., *supra* note 82, at 420 [hereinafter Matheson Remarks].
88. The Joint Chiefs of Staff, Memorandum for the Deputy Assistant Secretary of Defense (Negotiations Policy), Subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, 18 March 1986. A copy of the Memorandum is attached at Appendix A.
89. Matheson Remarks, *supra* note 84, at 424.
90. *Id.*, at 425.
91. *Id.* Reference to the Fourth Geneva Convention in original text should be to the Third Geneva Convention which deals with prisoners of war.
92. *Id.*
93. *Id.*
94. Remarks by Alfred P. Rubin, "Should the Laws of War Apply to Terrorists?," 79 Am. Soc'y Int'l L. Proc. 109 (1985).
95. Remarks of Professor W.T. Mallison, H. Law Conf., *supra*

note 82, at 531.

96. R. Erickson, Terrorism, Volume II 113-114 (1988).

97. Bureau of Public Affairs, Department of State, Gist, "International Terrorism," April 1989.

98. 18 U.S.C. Sec. 2331.

99. *Id.*, Sec. 2331(e).

100. See Restatement (Third) of the Foreign Relations of the United States, Sec. 402, Comment g. & Reporters' Note 3 [hereinafter Restatement]. Comment g states:

The passive personality principle asserts that a State may apply law--particularly criminal law--to an act committed outside its territory by a person not its national. The principle has not been generally accepted for ordinary crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a State's nationals by reasons of their nationality, or to assassination of a State's diplomatic representatives or other officials.

101. Restatement, *supra* note 97, at Comment f. The protective principle gives a State jurisdiction to prescribe law with respect to certain conduct outside its territory by persons not its nationals that is directed against the security of the State or against a limited class of other State interests.

102. I.H.Ph. Diederiks-Verschoor, An Introduction to Air Law 161 (3rd rev. ed. 1988).

103. 704 U.N.T.S. 219, 20 U.S.T. 2941.

104. 22 U.S.T. 1641.

105. 24 U.S.T. 564.

106. Toyko Convention, *supra* note 100, at Art. 1.
107. *Id.*, at Art. 3.
108. *Id.*, at Art. 4.
109. *Id.*, at Art. 2.
110. *Id.*, at Art. 6.
111. *Id.*, at Art. 9.
112. *Id.*, at Art. 12.
113. *Id.*, at Art. 13.
114. *Id.*
115. *Id.*
116. *Id.*, at Art. 15.
117. Hague Convention, *supra* note 101, at Art. 1.
118. *Id.*, at Art. 2.
119. *Id.*, at Art. 4.
120. *Id.*
121. *Id.*
122. *Id.*, at Art. 5.
123. *Id.*, at Art. 7.
124. *Id.*, at Art. 8.
125. Diederiks-Verschoor, *supra* note 99, at 171.

126. *Id.*, at 171-172.
127. Montreal Convention, *supra* note 102, at Art. 1.
128. *Id.*
129. *Id.*, at Art. 3.
130. *Id.*, at Art. 5.
131. *Id.*, at Art. 6.
132. *Id.*
133. *Id.*
134. *Id.*, at Art. 7.
135. *Id.*, at Art. 8.
136. Agreements using the model article are in force with Belgium, Canada, Grenada, Israel, the Netherlands, Peru, and China (Taiwan). Agreements using the model article have also been signed with Aruba, the Dominican Republic, Ecuador, Luxemborg, and the United Kingdom. Copies of these agreements are maintained in the files of the Assistant Legal Advisor for Treaty Affairs, U.S. Department of State. *See also*, "International Terrorism: A Compilation of Major Laws, Treaties, Agreements, and Executive Documents," Committee Print, Committee on Foreign Affairs, U.S. House of Representatives, August 1987. A copy of the model article is attached at Appendix B.
137. For a good review of practical aspects of U.S. extradition law *see* John G. Kester, "Some Myths of United States Extradition Law," 76 Geo. L.J. 1441 (1988).
138. *See*, 18 U.S.C. Sec. 3184.
139. 599 F.Supp. 270, 275 (1984).

140. *Id.*, at 276.
141. Public Prosecutor v. Zind, 40 Int'l L. Rep. 214 (1961).
142. Sen. Treaty Doc. No. 99-8, 99th Cong., 1st Sess. Copy attached at Appendix C.
143. *Id.*, at Art. 1.
144. Signed October 21, 1986. Copies maintained in the files of the Assistant Legal Advisor for Treaty Affairs, U.S. Department of State. Copy attached at Appendix D.
145. Signed March 17, 1987. Copies maintained in the files of the Assistant Legal Advisor for Treaty Affairs, U.S. Department of State.
146. For example treaties with Canada, Finland, Ireland, Italy, Mexico, the Netherlands, Paraguay, Spain, and Turkey.
147. For example treaties with Canada, Finland, Mexico, Paraguay, Spain, and Turkey.
148. 27 U.S.T. 3949 [hereinafter Terrorism & Extortion Treaty].
149. 28 U.S.T. 1975 [hereinafter Diplomatic Protection Treaty].
150. 96th Cong., 2d Sess., Senate, Executive H. The Convention was adopted at a Vienna Meeting of Government Representatives on October 26, 1979, and was signed by the United States on March 3, 1980 [hereinafter Nuclear Protection Treaty].
151. 96th Cong., 2d Sess., Senate, Executive N. The Convention was adopted by the United Nations General Assembly on December 17, 1979, and signed on behalf of the United States on December 21, 1979 [hereinafter Hostage Treaty].
152. Terrorism & Extortion Treaty, *supra* note 144, at Preamble.

153. *Id.*, at Art. 2.
154. *Id.*, at Art. 5.
155. *Id.*, at Art. 6.
156. Diplomatic Protection Treaty, *supra* note 145, at Art. 1.
157. *Id.*, at Art. 2.
158. *Id.*, at Art. 3.
159. *Id.*
160. *Id.*, at Art. 7.
161. *Id.*, at Art. 12.
162. Nuclear Protection Treaty, *supra* note 146, at Art. 7.
163. Hostage Treaty, *supra* note 147, at Art. 1.
164. *Id.*, at Art. 12.
165. Erickson, *supra* note 96, at 130-131. A copy of the chart is attached at Appendix E.
166. 268 International Review of the Red Cross 76-79 (January-February 1989). The list of States is attached at Appendix F.
167. *See*, The President's Address to the Nation (April 14, 1986), reprinted in Department of State Bull. 1 (June 1986).

Appendix A
Joint Chiefs of Staff Memorandum



THE JOINT CHIEFS OF STAFF
WASHINGTON D.C. 20301

MAR 13 12 0 24 1986

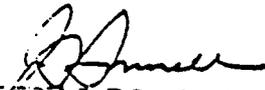
MJCS-49-86
18 MAR 1986

MEMORANDUM FOR THE DEPUTY ASSISTANT SECRETARY OF DEFENSE
(NEGOTIATIONS POLICY)

Subject: 1977 Protocols Additional to the Geneva Conventions:
Customary International Law Implications

1. Reference your request* for a definitive list of those provisions of Additional Protocol I that are either part of customary international law or should be developed into customary international law; as applicable in conventional armed conflict. The attached list is provided in response to your request.
2. The attachment does not differentiate between those parts of the Protocol that may already be customary international law, and those that could be supported for future incorporation into that law through practice. If legal guidance is needed on whether a particular rule is legally binding on the United States, the issue should be referred to the DOD General Counsel and the legal advisors of the Services.

For the Joint Chiefs of Staff:


JOSEPH S. DONNELL, III
Vice Admiral, USN
Vice Director for
Plans and Policy

Attachment
a/s

Reference:

*DASD memorandum, 18 February 1986, subject as above.

§ On file in Joint Secretariat

JCS 2497/32

ATTACHMENT

Provisions in Additional Protocol I
to be Recognized or Supported as
Customary International Law

1. Civilian sick, wounded and medical activities: Articles 10, 12-15, and 18-20.
2. Medical aircraft: Articles 24-31, except that the duties and rights of medical aircraft should depend on control of the airspace through which they fly (rather than control of the surface over which they fly), and that US medical aircraft need not respect a summons to land unless there is a reasonable basis to assume that the party ordering the landing will respect the Geneva Conventions and Articles 30 and 31 of Protocol I.
3. Missing personnel: Articles 32-34.
4. Basic Principles: Article 35, paragraphs 1 and 2.
5. Parachutists: Article 42.
6. Persons who have taken part in hostilities: Article 45.
7. Civilians: Article 51, paragraph 2; Article 52, paragraphs 1 and 2 (except for the reference to "reprisals"); and Article 57, paragraphs 1, 2(c), 4, and 5. Also, the principle embodied in Article 28 of the Fourth Geneva Convention of 1949 may be extended to civilians other than those who are "protected persons" under

ATTACHMENT

that Convention.

8. Undefended localities and demilitarized zones: Articles 59 and 60.

9. Refugees: Article 73.

10. Family reunification: Article 74.

11. Fundamental guarantees: Article 75.

12. Women and children: Articles 76 and 77.

13. Evacuation of children: Article 78, subject to the sovereign right to grant political asylum, and the need to comply with the United Nations Protocol on the Status of Refugees.

14. Journalists: Article 79.

Appendix B
Model Aviation Security Article

MODEL AVIATION SECURITY ARTICLE*

Aviation Security

(A) In accordance with their rights and obligations under international law, the parties reaffirm that their obligation to protect, in their mutual relationship, the security of civil aviation against acts of unlawful interference forms an integral part of this agreement.

(B) The parties shall provide upon request all necessary assistance to each other to prevent acts of unlawful seizure of aircraft and other unlawful acts against the safety of passengers, crew, aircraft, airports and air navigation facilities and any other threat to aviation security.

(C) The parties shall act in full conformity with the provisions of the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970 and the Convention for the Suppression of Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.

(D) The parties shall, in their mutual relations, act in conformity with the aviation security provisions established by the International Civil Aviation Organization and designated as annexes to the Convention on International Civil Aviation; they shall require that operators of aircraft of their registry or operators who have their principal place of business or permanent residence in their territory and the operators of airports in their territory act in conformity with such aviation security provisions.

*Source: Air Transport Agreement Between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg (Not yet in force; Copies maintained in the files of the Assistant Legal Adviser for Treaty Affairs, U.S. Department of State)

(E) Each party agrees to observe the security provisions required by the other contracting party for entry into the territory of that other contracting party and to take adequate measures to protect aircraft and to inspect passengers, crew, their carry-on items as well as cargo and aircraft stores prior to and during boarding or loading. Each part shall also give positive consideration to any request from the other party for special security measures to meet a particular threat.

(F) When an incident or threat of an incident or unlawful seizure of aircraft or other unlawful acts against the safety of passengers, crew, aircraft, airports and air navigation facilities occurs, the parties shall assist each other by facilitating communications and other appropriate measures intended to terminate rapidly and safely such incident or threat thereof.

(G) When a party has reasonable grounds to believe that the other party has departed from the aviation security provisions of this article, the aeronautical authorities of that party may request immediate consultations with the aeronautical authorities of the other party. Failure to reach a satisfactory agreement within 15 days from the date of such request will constitute grounds to withhold, revoke, limit or impose conditions on the operating authorization or technical permission of an airline or airlines of the other party. When required by an emergency, a party may take interim action prior to the expiry of 15 days.

Appendix C
Supplementary Extradition Treaty with the United Kingdom

United Kingdom, Supplementary Extradition Treaty,
June 25, 1985*

SUPPLEMENTARY EXTRADITION TREATY WITH THE
UNITED KINGDOM

THE SUPPLEMENTARY EXTRADITION TREATY BETWEEN THE
UNITED STATES OF AMERICA AND THE UNITED KINGDOM OF
GREAT BRITAIN AND NORTHERN IRELAND, WITH ANNEX,
SIGNED AT WASHINGTON ON JUNE 25, 1985

*Source: 99th Congress, 1st Session, Senate, Treaty Document No. 99--

SUPPLEMENTARY TREATY CONCERNING THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, SIGNED AT LONDON ON 8 JUNE 1972

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at London on 8 June 1972 (hereinafter referred to as "the Extradition Treaty");

Have resolved to conclude a Supplementary Treaty and have agreed as follows:

ARTICLE 1

For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character:

(a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;

(b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;

(c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;

(d) an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;

(e) murder;

(f) manslaughter;

(g) maliciously wounding or inflicting grievous bodily harm;

(h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;

(i) the following offenses relating to explosives:

(1) the causing of an explosion likely to endanger life or cause serious damage to property; or

(2) conspiracy to cause such an explosion; or

(3) the making of possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;

(j) the following offenses relating to firearms or ammunition:

(1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or

- (2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;
- (k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;
- (l) an attempt to commit any of the foregoing offenses.

ARTICLE 2

Article V, paragraph (1)(b) of the Extradition Treaty is amended to read as follows:

"(b) the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requesting Party; or"

ARTICLE 3

Article VIII, paragraph (2) of the Extradition Treaty is amended to read as follows:

"(2) A person arrested upon such an application shall be set at liberty upon the expiration of sixty days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of the person sought if a request for extradition is subsequently received."

ARTICLE 4

This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

ARTICLE 5

This Supplementary Treaty shall form an integral part of the Extradition Treaty and shall apply:

(a) in relation to the United Kingdom: to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man and the territories for whose international relations the United Kingdom is responsible which are listed in the Annex to this Supplementary Treaty;

(b) to the United States of America;

and references to the territory of a Contracting Party shall be construed accordingly.

ARTICLE 6

This Supplementary Treaty shall be subject to ratification and the instruments of ratification shall be exchanged at London as soon as possible. It shall enter into force upon the exchange of instruments of ratification. It shall be subject to termination in the same manner as the Extradition Treaty.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Supplementary Treaty.

DONE in duplicate at Washington this twenty-fifth day of June, 1985.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:



FOR THE GOVERNMENT OF THE
UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN
IRELAND:



ANNEX

Anguilla
Bermuda
British Indian Ocean Territory
British Virgin Islands
Cayman Islands
Falkland Islands
Falkland Islands Dependencies
Gibraltar
Hong Kong
Montserrat
Pitcairn, Henderson, Ducie and Oeno Islands
St. Helena
St. Helena Dependencies
The Sovereign Base Areas of Akrotiri and Dhekelia in the Island of
Cyprus
Turks and Caicos Islands

○

Appendix D
Supplementary Treaty on Extradition between the United States of
America and the Kingdom of Belgium to Promote the Repression of
Terrorism

Belgium--Supplementary Treaty on Extradition between
the United States of America and the Kingdom of
Belgium to Promote the Repression of Terrorism,
March 17, 1987*

SUPPLEMENTARY TREATY ON EXTRADITION
BETWEEN
THE UNITED STATES OF AMERICA
AND
THE KINGDOM OF BELGIUM
TO PROMOTE THE REPRESSION OF TERRORISM

The United States of America and the Kingdom of Belgium,

Concerned about the growing danger caused by the increase of
terrorist acts,

Convinced that extradition is an effective means to combat these
acts,

Agree to the following:

*Not yet in force

Copies maintained in the files of the Assistant Legal Adviser for Treaty
Affairs, U.S. Department of State

Article 1

This Treaty shall only apply when extradition could otherwise be denied pursuant to the domestic laws or other international obligations of the Contracting States because:

(a) the offense is a political offense, an offense connected to a political offense, or an offense inspired by political motives; or

(b) the offense is not a listed extraditable offense under the terms of the extradition treaties presently in force between the Contracting States.

Article 2

For the purposes of extradition and in spite of the political nature of the act, any of the following offenses may, in the discretion of the executive authority of the Requested State, be considered not to be a political offense, an offense connected to a political offense, or an offense inspired by political motives:

- a) an offense for which the Contracting States have the obligation pursuant to a multilateral agreement to extradite the person sought or to submit his case to the competent authorities for the purpose of prosecution;
- b) murder, voluntary manslaughter and voluntary assault and battery inflicting serious bodily harm;

- c) an offense involving kidnapping, abduction, the taking of a hostage, or any other form of illegal detention;
- d) an offense involving the placement or use of an explosive, incendiary or destructive device or substance, as well as the use of automatic weapons to the extent that they cause or are capable of causing serious bodily harm or substantial property damage;
- e) an attempt to commit one of the above-mentioned offenses or the participation as co-author or accomplice of a person who commits or attempts to commit such an offense;
- f) an "association of wrongdoers" formed to commit any of the foregoing offenses under the laws of Belgium, or a conspiracy to commit any such offenses as provided by the laws in the United States.

Article 3

None of the offenses mentioned in Article 2 shall be considered to be a political offense, an offense connected to a political offense, or an offense inspired by political motives when:

- a) it created a collective danger to the life, physical integrity, or liberty of any persons; or
- b) it affected a person foreign to the motives behind it; or

c) cruel or vicious means were used; or

d) it involved the taking of a hostage.

Article 4

If the offense for which extradition is requested is punishable by death in the Requesting State, and if in respect of such offense the death penalty is not provided for by the Requested State or is not normally carried out by it, extradition may be refused, unless the Requesting State gives such assurances as the Requested State considers sufficient that the death penalty will not be carried out.

Article 5

Notwithstanding the provisions of the present Treaty, the executive authority of the Requested State may refuse extradition for humanitarian reasons pursuant to its domestic law.

Article 6

To the extent necessary, all offenses listed in Article 2 are hereby added to the listed extraditable offenses in the extradition treaties presently in force between the Contracting States.

Article 7

1. This treaty shall be subject to ratification. The instruments of ratification shall be exchanged at Brussels as soon as possible.

2. This Treaty shall enter into force on the first day of the second month after the exchange of instruments of ratification.

Article 8

Either Contracting State may terminate this Treaty by giving written notice to the other Contracting State. This termination shall be effective six months after the date of such notice.

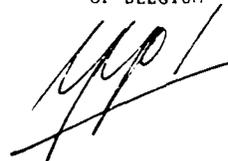
IN WITNESS WHEREOF, the undersigned, being duly authorized for this purpose, have signed this Treaty.

DONE at Washington, in duplicate, this 17th day of March, 1987 in the English, French and Dutch languages, all three texts being equally authentic.

FOR THE UNITED STATES
OF AMERICA:

Edwin Meese III

FOR THE KINGDOM
OF BELGIUM



J

Appendix E
Lt Col Erickson's Chart Comparing the Law Enforcement Approach
to the Law of Armed Conflict Approach

<u>Trait</u>	<u>Law Enforcement Approach</u>	<u>Law of Armed Conflict Approach</u>
Basic thrust of approach:	Civil	Military
Whose primary responsibility:	Police	Armed forces
View of terrorism as what kind of activity:	Outlaw	Unlawful combat
Combatant status of terrorist:	(none)	Unlawful and unprivileged
Treatment of terrorist:	Criminal	Criminal
Objective of authorities:	Arrest, prosecute and, imprison	Defeat, prosecute, and imprison
Offenses, where defined:	Primarily domestic law	Primarily international law
Applicability of treaty law defining offenses:	Limited	Universal
Applicability of extradition law:	Limited	Universal
Who tries:	Domestic courts	Almost always domestic courts (international courts could)
Context of armed force response:	Peacetime crisis	Armed conflict
Initial decision to use force (go/no go rules):	(Rules contained in chapters 4-6 are the same for both approaches. May be easier for LOAC approach to meet the conditions of the rules.)	
Subsequent decisions on use of force (rules governing conduct of military operation):	Some law of armed conflict rules apply. Geneva Conventions do not apply.	All law of armed conflict rules apply including Geneva Conventions.

Appendix F
States Party to the Protocols of 8 June 1977
as of 31 December 1988

States party to the Protocols of 8 June 1977

as at 31 December 1988

Below we give the lists, drawn up in chronological order as at 31 December 1988, of all the States party to Protocols I and II additional to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977.

The names of the States are shown in abbreviated form; the numbering of States party to the Protocols has been divided into two columns, the first for States party to Protocol I, the second for those party to Protocol II.

The third column indicates the form of official act received by the depositary, the Swiss Federal Council: R = ratification; A = accession.

The fourth column indicates whether the ratification or accession was accompanied by any reservations or declarations (using the State's own designation thereof). It also indicates by the abbreviation "Int. Commission" whether the State concerned has accepted the competence of the International Fact-Finding Commission by making the declaration provided for in Art. 90, para. 2 of Protocol I.

PROTOCOL			OFFICIAL DATE	TYPE OF ACT		
I	II		OF REGISTRATION	RECEIVED		REMARKS
1978						
1	1	Ghana	28 February	R		
2	2	Libya	7 June	A		
<i>Date of entry into force of the Protocols: 7 December 1978</i>						
3	3	El Salvador	23 November	R		
1979						
4	4	Ecuador	10 April	R		
5	5	Jordan	1 May	R		
6	6	Botswana	23 May	A		
7		Cyprus	1 June	R		Protocol I only
8	7	Niger	8 June	R		

9	8	Yugoslavia	11 June	R	Declaration
10	9	Tunisia	9 August	R	
11	10	Sweden	31 August	R	Reservation: Int. Commission
1980					
12	11	Mauritania	14 March	A	
13	12	Gabon	8 April	A	
14	13	Bahamas	10 April	A	
15	14	Finland	7 August	R	Declarations: Int. Commission
16	15	Bangladesh	8 September	A	
17	16	Laos	18 November	R	
1981					
18		Viet Nam	19 October	R	Protocol I only
19	17	Norway	14 December	R	Int. Commission
1982					
20	18	Rep. of Korea	15 January	R	Declaration
21	19	Switzerland	17 February	R	Reservations: Int. Commission
22	20	Mauritius	22 March	A	
23		Zaire	3 June	A	Protocol I only
24	21	Denmark	17 June	R	Reservation: Int. Commission
25	22	Austria	13 August	R	Reservations: Int. Commission
26	23	Saint Lucia	7 October	A	
27		Cuba	25 November	A	Protocol I only
1983					
28	24	Tanzania	15 February	A	
29	25	United Arab Emirates	9 March	A	Declaration
30		Mexico	10 March	A	Protocol I only
31		Mozambique	14 March	A	Protocol I only
32	26	Saint Vincent and the Grenadines	8 April	A	
33	27	China	14 September	A	Reservation
34	28	Namibia*	18 October	A	
35	29	Congo	10 November	A	
36		Syria	14 November	A	Protocol I only; Declaration

* Instruments of accession deposited by the United Nations Council for Namibia.

37	30	Bolivia	8 December	A	
38	31	Costa Rica	15 December	A	
1984					
	32	France**	24 February	A	Protocol II only
39	33	Cameroon	16 March	A	
40	34	Oman	29 March	A	Declaration
41	35	Togo	21 June	R	
42	36	Belize	29 June	A	
43	37	Guinea	11 July	A	
44	38	Central African Rep.	17 July	A	
45	39	Western Samoa	23 August	A	
46		Angola	20 September	A	Protocol I only; Declaration
47	40	Seychelles	8 November	A	
48	41	Rwanda	19 November	A	
1985					
49	42	Kuwait	17 January	A	
50	43	Vanuatu	28 February	A	
51	44	Senegal	7 May	R	
52	45	Comoros	21 November	A	
53	46	Holy See	21 November	R	Declaration
54	47	Uruguay	13 December	A	
55	48	Suriname	16 December	A	
1986					
56	49	Saint Christo- pher and Nevis	14 February	A	
57	50	Italy	27 February	R	Declarations; Int. Commission
58	51	Belgium	20 May	R	Declarations; Int. Commission***
59	52	Benin	28 May	A	
60	53	Equatorial Guinea	24 July	A	
61	54	Jamaica	29 July	A	
62	55	Antigua and Barbuda	6 October	A	
63	56	Sierra Leone	21 October	A	
64	57	Guinea-Bissau	21 October	A	
65	58	Bahrain	30 October	A	
66	59	Argentina	26 November	A	Declarations
	60	Philippines	11 December	A	Protocol II only

** When acceding to Protocol II, France sent a communication concerning Protocol I.

*** On 27 March 1987.

1987					
67	61	Iceland	10 April	R	Reservation: Int. Commission Declarations: Int. Commission Reservation
68	62	The Netherlands	26 June	R	
69		Saudi Arabia	21 August	A	
70	63	Guatemala	19 October	R	
71	64	Burkina Faso	20 October	R	
1988					
72	65	Guyana	18 January	A	Declarations Int. Commission
73	66	New Zealand	8 February	R	
74		Dem. People's Rep. of Korea	9 March	A	Protocol I only Protocol I only: Declaration
75		Qatar	5 April	A	
76	67	Liberia	30 June	A	
77	68	Solomon Islands	19 September	A	
78	69	Nigeria	10 October	A	

**On 31 December 1988, 78 States were parties to Protocol I and 69 to Protocol II.
Eleven States had accepted the competence of the International Fact-Finding
Commission.**