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ENCLOSURE
THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20330-5000

JCSM-152-85
3 May 1985

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BY JS (01-F-1766)
DATE 2 MAR 03

MEMORANDUM FOR THE SECRETARY OF DEFENSE

Subject: Review of the 1977 First Additional Protocol to
the Geneva Conventions of 1949

1. The Joint Chiefs of Staff have, as requested,* reviewed the First Additional Protocol to the Geneva Conventions, and recommend against ratification by the United States. The military problems created by the Protocol cannot be remedied except by taking an unusually large number of reservations and understandings, as reflected in the Annex. These problems outweigh any probable military benefit from ratification.

2. Among the more serious problems created by the Protocol are the following:

- a. Some nations probably would reject the critical US nuclear understanding.
- b. In many situations, it would grant guerrillas a superior legal status to members of regular armed forces.
- c. It would virtually eliminate reprisals as a deterrent against violations of the law of armed conflict.
- d. Its presumption that, in case of doubt, objects and persons be considered civilian would be unworkable in practice.
- e. It would unreasonably restrict attacks against certain dams, dikes, and nuclear power stations.
- f. It would inject political criteria into the administration and application of humanitarian law by Article 1, paragraph 4; Article 47; and Article 85, subparagraph 4(c).

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g. It contains ambiguous restraints against the use of cities and towns for military activities, such as logistics and C2 sites, and against attacks on enemy forces conducting military operations from cities and towns.

h. Soviet bloc countries probably will reject the Western understanding of the fundamental guarantees in Article 75.

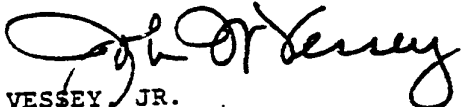
Aside from the many reservations required, including those applicable to the above provisions, the large number of clarifying understandings required also indicate that the Protocol is too complex to be a reliable codification of the law of armed conflict. The reasoning in support of these conclusions appears in the Appendix.

3. The Joint Chiefs of Staff also recommend that their objections to the Protocol be communicated through the US Delegation to the NATO Military Committee and other appropriate channels to US allies. This action would help develop a cooperative approach in framing mutually acceptable understandings and reservations for those allies who decide to ratify. In an effort to prevent misinterpretation of the US position on the Protocol, the Joint Chiefs of Staff further recommend development of a public affairs program for use upon announcement of the Government's decision.

4. The position of the Joint Chiefs of Staff on the Second Additional Protocol will be forwarded in a separate memorandum.

5. Without attachments, this memorandum is UNCLASSIFIED.

For the Joint Chiefs of Staff:


JOHN W. VESSEY, JR.
Chairman
Joint Chiefs of Staff

Attachments

Reference:

- * Memorandum by the Under Secretary of Defense for Policy, 20 December 1984, "Review of the 1977 Additional Protocols to the Geneva Conventions of 1949"

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APPENDIX AND ANNEX

(FOR REFERENCE)

Appendix
and Annex

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JCS REVIEW OF THE FIRST PROTOCOL
ADDITIONAL TO THE GENEVA CONTRIBUTIONS (PROTOCOL I) (U)

A. PART I: GENERAL PROVISIONS (ARTICLES 1-7) (U)

APPENDIX

1. (U) Article 1--Scope of Application of Protocol I. Protocol I is intended to apply only to international armed conflicts. Such conflicts include two types.

a. (U) Wars Between States Party to the Protocol. Like the 1949 Geneva Conventions, the Protocol would apply to international armed conflicts between two or more countries that are parties to it, even if there were no formal declaration of war by either side. It would not apply to a conflict between a state party and a non-party, unless the non-party government undertook on an ad hoc basis to "accept and apply" the Protocol for the duration of the conflict.

b. (U) Wars of "National Liberation." Article 1, paragraph 4, of the Protocol extends its application, and the application of the 1949 Geneva Conventions, to certain conflicts commonly referred to as "wars of national liberation." In particular, the Protocol refers to wars of

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Appendix

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"peoples" against "colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." This language was adopted, over the protest of the United States, in order to legitimize, as international armed conflicts, certain guerrilla wars in the Middle East and Africa. It injects the political concerns of particular blocs of states into the administration of the Geneva Conventions, which should be applied on the basis of neutral, apolitical criteria. Under Article 1, paragraph 4, a rebel organization would gain a degree of international status, prestige, and legitimacy if it were fighting for one of the "just" causes listed in that paragraph, but not if it were fighting for some other objective; e.g., to overthrow a local totalitarian (but non-racist) dictatorship. Further, the United Nations General Assembly has supported outside intervention on behalf of peoples exercising their right of self-determination, a right interpreted by many in the international community as only applicable against Western countries and not against "socialist" countries. The combatant members of a rebel organization would, in theory, similarly be entitled to prisoner of war status only if they fought for one of the "just" causes listed. By linking the

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legal rights of individual combatants to the justice of the
cause for which they fight Article 1, paragraph 4, creates
a very bad precedent and politicizes what should be an
objective determination and reverses several hundred years
of practice. In the Korean and Southeast Asian conflicts,
Communist governments claimed that everyone fighting against
them was an "aggressor," and, therefore, a war criminal not
entitled to prisoner of war status or treatment. The
adoption of Article 1, paragraph 4, by the United States
would lend support to such arguments by admitting that the
status of individual combatants can be affected by the cause
for which he is fighting.

c. ~~(U)~~ As a practical matter, the inclusion of Article 1,
paragraph 4, in the Protocol will probably make it more
difficult to apply the Geneva Conventions in doubtful or
ambiguous situations. In such situations, the international
Red Cross often urges the parties to the conflict to apply
the Conventions anyway, as a humanitarian matter. In 1965,
for example, the United States decided, as a matter of
policy, that its forces in South Vietnam would apply the
Geneva Conventions during combat operations there. In the
future, governments may be much more reluctant to take such

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a step, out of concern that the application of the Conventions might be construed as an admission that their adversaries were fighting a "just" war against a colonial, alien, or racist regime.

d. ~~(U)~~ Conclusion. Because it injects political factors into the administration of the Geneva Conventions, and because it establishes that the rights of combatants can legitimately be linked to the justice of the cause for which they fight, the United States should not become bound by this paragraph. If the United States ratifies the Protocol, this paragraph should be reserved.

2. ~~(U)~~ Substantive Obligations. The substantive obligations of the Protocol are contained in its Parts II, III, and IV (Articles 8-79). The acceptability of these provisions is examined in the following sections.

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B. PART II: WOUNDED, SICK, AND SHIPWRECKED (ARTICLES 8-34) (U) 1

1. (U) Part II of Protocol I contains three sections. The 2
first covers general protection of the wounded, sick, and 3
shipwrecked; medical and religious personnel; and medical units 4
and establishments. The second section deals with the 5
protection of medical transports. The third section deals with 6
the search for the missing and the decent disposition of the 7
dead. 8

Section I--General Protection (Articles 8-20) (U) 9

2. (U) Articles 8, 10, 12, 13, 15, and 20--General Protection 10
Extended to Civilians 11

a. (U) Protocol I, Article 8, expands the definition of 12
sick, wounded, and shipwrecked to include civilian war 13
victims and expands the definition of medical personnel, 14
units, and transport to include civilian persons and 15
activities. 16

b. (U) Articles 10, 12, and 15 then extend the provisions of 17
the First and Second Geneva Conventions of 1949 to civilian 18
sick, wounded, and shipwrecked and to civilian medical 19
personnel and units and associated civilian religious 20
personnel, all of whom would be "respected and protected" by 21
the parties to the conflict, the sick and wounded to receive 22

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required care "to the fullest extent practicable." (As used in the Protocol, the term "respected and protected" means that an activity should not be knowingly attacked, fired upon, or unnecessarily interfered with; it does not cover accidental damage or casualties due to proximity to military objectives or to a justifiable mistake in identifying the activity.)

c. ~~(U)~~ End of Protection. Under Article 13, protection of civilian medical units would cease if they were used "to commit, outside their humanitarian function, acts harmful to the enemy." This is the same standard the 1949 Geneva Conventions prescribe for discontinuing protection of military medical units. Article 12 prohibits the use of medical units "in an attempt to shield military objectives from attack," a provision also taken from the 1949 Conventions.

d. ~~(U)~~ Reprisals. Article 20 prohibits reprisals against civilian sick, wounded, or shipwrecked, or civilian medical activities, just as the 1949 Conventions prohibited reprisals against military sick, wounded, or shipwrecked, or military medical activities.

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- e. ~~(U)~~ Conclusion. These articles are militarily acceptable. 2
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3. ~~(U)~~ Article 11--Protection of Persons 3
- a. ~~(U)~~ Biological Experiments. The 1949 Geneva Conventions 4
declare "biological experiments" on prisoners of war, 5
interned enemy civilians, and others in the hands of an 6
adverse party to be a "grave breach" of the Conventions. 7
The states party to the Conventions are required to seek out 8
and prosecute (or extradite) anyone in their territory 9
guilty of such experiments. Article 11 of the Protocol 10
expands and reinforces this rule. It applies not only to 11
"persons who are in the power of an adverse party" but also 12
to any persons "who are interned, detained or otherwise 13
deprived of liberty" as a result of an armed conflict. As 14
to such persons, Article 11 prohibits "any medical procedure 15
which is not indicated by the state of health of the person 16
concerned." In particular, "physical mutilations," "medical 17
or scientific experiments," and the "removal of tissue or 18
organs for transplantation" are prohibited. Voluntary 19
donations of blood for transfusion or skin for grafting are 20
permitted so long as they are given "without any coercion or 21
inducement and are only for therapeutic purposes." 22

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- b. ~~(b)~~ Right To Refuse Treatment. Persons protected by this article also "have the right to refuse any surgical operation." Any willful violation of Article 11 is declared to be a "grave breach," of the Protocol, which would require prosecution or extradition. As Article 11 would provide additional protection to American prisoners of war, it is militarily acceptable, and even advantageous. The provision specifying an absolute right to refuse any surgery could, however, operate in an inhumane manner in some circumstances. A detainee might, for example, refuse surgery necessary to save his own life in order to make a political point or because of ignorance or mental incompetence. Aside from the humanitarian considerations, the death of a prisoner or detainee under such circumstances could be very embarrassing to the United States. A reservation to paragraph 5 is therefore proposed to deal with surgery required to save life (see Annex).
- c. ~~(c)~~ Conclusion. Except for the one reservation noted above, Article 11 is militarily acceptable.
4. ~~(d)~~ Article 14--Requisition of Civilian Medical Units. Article 14 of the Protocol prohibits an occupying power from requisitioning civilian hospitals or other civilian medical
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units, or their supplies, equipment, or personnel, if these are 1
necessary for the health of the civilian population. 2
Requisitions for the medical needs of the occupying power's 3
armed forces are permitted only if that power makes alternative 4
arrangements to ensure the health of the population of the 5
occupied territory. 6

a. ~~(U)~~ The Hague Regulations of 1907 and the Fourth Geneva 7
Convention of 1949 already make the occupying power 8
responsible for health services in occupied territory and 9
limit requisitions to the needs of the occupation 10
administration. Primary responsibility for the health needs 11
of the civilian population will remain in the hands of the 12
civilian medical institutions of an occupied territory. The 13
military medical authorities of the occupying power, within 14
existing capabilities, will assist in coordinating with and 15
supporting those institutions as needed. 16

b. Conclusion. The substance of Article 14 is already 17
implicit in existing international law, and the article is 18
therefore militarily acceptable. 19

5. ~~(U)~~ Article 16--General Protection of Medical Duties. 20
Article 16 of the Protocol applies to anyone, military or 21
civilian, of any nationality, who performs medical activities. 22

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It provides, in paragraph 1, that none shall be punished for 1
carrying out such activities, "compatible with medical ethics, 2
regardless of the person benefiting therefrom." Paragraph 3 3
provides that no person engaged in medical activities shall be 4
forced to give to an adverse party "information concerning the 5
wounded and sick who are, or who have been, under his care, if 6
such information would, in his opinion, prove harmful to the 7
patients concerned or to their families." 8

a. ~~(b)~~ Impact on Unconventional Warfare. These provisions 9
would protect those who give medical care to resistance 10
fighters in occupied territory, even if those fighters were 11
not considered lawful combatants. These provisions of 12
Article 16 are further reinforced by the first paragraph of 13
Protocol Article 17, which provides that the civilian 14
population and civilian aid societies shall be permitted "to 15
collect and care for the wounded, sick and shipwrecked, even 16
in invaded or occupied territory" and that no one "shall be 17
harmed, prosecuted, convicted or punished for such 18
humanitarian acts." Under the Protocol, the concept of 19
"sick and wounded" includes illegal combatants. Taken 20
together, Articles 16 and 17 would protect, for example, 21
persons, including military personnel, who create and/or 22

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operate clandestine medical activities for unlawful
combatants, even in occupied territory. If Articles 16 and
17 were accepted as written, persons who aid illegal
combatants in enemy territory occupied by Armed Forces would
not be subject to punishment under Article 104 of the
Uniform Code of Military Justice. 1

b. ~~(U)~~ Conclusion. Articles 16 and 17 of the Protocol are, 2
therefore, militarily unacceptable to the extent that they 3
seek to add new limitations on the right of governments and 4
regular forces to stipulate the conditions under which 5
medical care is to be provided to enemy combatants. A draft 6
reservation designed to remedy this deficiency is contained 7
in the Annex. This reservation reaffirms that existing 8
international law limitations on the right to specify such 9
conditions do apply, including the obligation to comply with 10
the 1949 Geneva Conventions and the right of all victims of 11
a conflict to receive humane treatment and adequate care 12
regardless of their status. In other words, stipulation of 13
the conditions under which care can be provided to the sick 14
and wounded cannot be used to deny the opportunity for 15
adequate medical care to anyone. In certain circumstances, 16
such a reservation might, of course, result in adverse 17
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consequences for insurgents or other irregular forces 1
friendly to the United States. If, for example, irregulars 2
who were nationals of a state party to the Protocol were 3
fighting against a government also bound by the Protocol in 4
a conflict for which both parties and the United States 5
recognized the applicability of the Protocol, the United 6
States might, as a result of this reservation, lose its 7
legal (and perhaps moral) standing to object to the 8
recognized government concerned establishing, within the 9
existing framework of applicable international law, certain 10
controls over the administration of medical care to 11
insurgent personnel. 12

c. ~~(d)~~ Impact on Military Justice. Article 16, paragraph 2, 13
also states that "persons engaged in medical activities 14
shall not be compelled to perform acts or carry out work 15
contrary to the rules of medical ethics or to other medical 16
rules designed for the benefit of the wounded and sick." 17
This could have a direct impact on the discipline of armed 18
forces medical officers and medical service personnel, since 19
orders given them would have to be in accord with "medical 20
ethics," a nonlegal body of rules created and subject to 21
revision by the organized medical profession. "Medical 22

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ethics" and "medical rules designed for the benefit of the wounded and sick" could be used as a defense to court-martial charges for disobedience by anyone failing to carry out military medical duties. 1
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d. ~~(U)~~ Conclusion. As it would impact on the administration of military justice, Article 16 is militarily unacceptable. A draft reservation designed to remedy this deficiency is contained in the Annex. 5
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Section II--Medical Transportation (Articles 21-31) ~~(U)~~ 9

6. ~~(U)~~ Article 21--Medical Vehicles 10

a. ~~(U)~~ Article 21 of the Protocol states that medical vehicles shall be respected and protected in the same manner as "mobile medical units." This clarifies an ambiguity in the First Geneva Convention of 1949, Article 19 of which protects fixed military hospitals and "mobile medical units" but does not specifically protect ambulances. Protocol Article 21 would extend this protection to both military and civilian ambulances. 11
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b. ~~(U)~~ Conclusion. Article 21 is acceptable. 19

7. ~~(U)~~ Articles 22 and 23--Hospital Ships and Similar Craft. 20

Articles 22 and 23 of Protocol I revise the Second Geneva 21

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Convention's provisions concerning hospital ships and coastal
rescue craft. 1
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a. ~~(S)~~ Article 22--Hospital Ships and Coastal Rescue Craft. 3

The first paragraph of Article 22 would extend the same 4

protection to hospital ships carrying civilians that the 5

Second Convention grants to hospital ships carrying military 6

sick and wounded. The Second Convention also protects 7

hospital ships used by national Red Cross societies and 8

relief organizations; Article 22 of the Protocol extends 9

similar status to hospital ships of neutral states and 10

international humanitarian organizations. The Second 11

Convention requires that the names and descriptions of 12

hospital ships be notified to the enemy at least 10 days 13

before their use. Protocol Article 22 exempts coastal 14

rescue craft from this requirement. 15

b. ~~(S)~~ Article 23--Other Medical Ships and Craft. 16

Article 23 of the Protocol extends protection to other 17

medical ships and craft that do not meet the requirements 18

laid down in the Second Geneva Convention of 1949, that is, 19

that may be used for purposes other than medical or for 20

which the required notification has not been given to the 21

enemy. While engaged in medical duties, such vessels would 22

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be authorized and encouraged to display the Red Cross or Red 1
Crescent and would be given the same protection as military 2
ambulances on land; i.e., they would not be subject to 3
deliberate attack while engaged in medical duties and so 4
long as they are not used for purposes outside their 5
humanitarian functions and harmful to the enemy. Unlike 6
hospital ships protected under the Second Convention of 7
1949, vessels protected only by this article would be 8
subject to capture by the enemy. 9

c. ~~(U)~~ Conclusion. Articles 22 and 23 of Protocol I are 10
militarily acceptable. 11

8. ~~(U)~~ Articles 24-31--Medical Aircraft. The Geneva 12
Conventions of 1949 provide almost no protection for medical 13
aircraft. This is of concern to the United States since the US 14
Armed Forces use medical evacuation by air extensively, both in 15
combat and intertheater. Under the 1949 Conventions, a medical 16
aircraft is protected from attack only if its flight plan is 17
agreed to in advance by the enemy. Articles 24-31 of the 18
Protocol represent an effort to provide better protection for 19
medical aircraft. 20

a. ~~(U)~~ Articles 25, 26, and 27--Areas Where Protected. When 21
flying over land areas controlled by friendly forces or 22

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over sea areas not under the actual control of the enemy, 1
medical aircraft are to be respected and protected (Protocol 2
Article 25). When flying over the "contact zone," that is, 3
over "any area on land where the forward elements of 4
opposing forces are in contact with each other," in the 5
absence of agreement, medical aircraft operate "at their own 6
risk" but are still entitled to respect "after they have 7
been recognized as such" (Protocol Article 26). In 8
practice, however, recognition under these circumstances may 9
be impossible. Prior agreement is required for flights over 10
enemy-controlled territory. However, if a recognized 11
medical aircraft flies over enemy territory by mistake or 12
through necessity, it shall be given reasonable opportunity 13
to comply with orders to land before an attack is resorted 14
to (Protocol Article 27). 15

b. ~~(U)~~ Article 28--Restrictions on Operations of Medical 16
Aircraft. Article 28 states the conditions a medical 17
aircraft must comply with to warrant protection under the 18
Protocol. In general, these parallel the conditions 19
established by the 1949 Geneva Conventions for the 20
protection of other medical activities, such as not carrying 21
arms (except for small arms under specified conditions) and 22

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not being used to acquire military advantage over the enemy. 1
One condition may be of some concern. Paragraph 2 prohibits 2
the use of medical aircraft for gathering intelligence or 3
carrying "any equipment intended for such purposes," but 4
equipment "intended solely to facilitate navigation, 5
communication or identification" is not prohibited. The 6
United States has interpreted this language as not 7
prohibiting secure voice communications equipment. However, 8
at least one delegation to the 1974-1977 Diplomatic 9
Conference expressed the opposite interpretation, that by 10
analogy to the Second Geneva Convention of 1949, which 11
forbids hospital ships from carrying cryptographic gear or 12
secret codes, such equipment would be prohibited. 13
Therefore, if the United States ratifies the Protocol, it 14
should do so only subject to an understanding reaffirming 15
that the use of secure voice communications equipment on 16
medical aircraft is not prohibited. Draft language for such 17
an understanding is contained in the Annex. 18
c. ~~(b)~~ Article 30--Landing and Inspection of Medical 19
Aircraft. Article 30 of the Protocol provides that medical 20
aircraft may be required by the enemy to land for inspection 21
whenever they are flying over areas controlled by the enemy 22

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or where control by either side is not clearly established. 1
This is an improvement over the 1949 Geneva Convention 2
requirement that medical aircraft land for enemy inspection 3
on demand, even if they are flying over areas controlled by 4
friendly forces. Protocol Article 29 contains procedures to 5
facilitate agreements, when required. 6
d. ~~(U)~~ Article 31--Neutral States. Article 31 provides that 7
medical aircraft should enter the airspace of neutral states 8
only by prior agreement. If such an entry occurs without 9
prior agreement, through error or because of an emergency, 10
the medical aircraft should not be attacked except as a last 11
resort. Access to neutral airspace and facilities will 12
usually be obtained for medical aircraft either through 13
diplomatic clearance or in accordance with existing base 14
rights and access agreements. Under the last paragraph of 15
Article 31, neutral states are required to be impartial in 16
granting access to medical aircraft of parties to the 17
conflict, which would require a neutral state to grant 18
access to enemy medical aircraft to the same extent that it 19
grants such access to the United States. Historically, 20
however, the United States has used intertheater medical 21
flights far more than its adversaries have. 22

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e. ~~(S)~~ Conclusions and Recommendations. In general, the 1
Protocol articles on medical transportation are militarily 2
acceptable. Those dealing with medical aircraft improve on 3
the 1949 Conventions and are, in principle, advantageous to 4
the US Armed Forces. As a practical matter, however, 5
medical aircraft may rarely be able to claim the new 6
protection provided by the Protocol. Because of the diverse 7
nature of aeromedical airlift requirements, and the fact 8
that aeromedical airlift would be only one of several varied 9
requirements levied on intratheater and intertheater airlift 10
assets, the United States would be unable to permanently 11
dedicate--and, thus, identify with appropriate markings--all 12
of those aircraft likely to be used in an aeromedical 13
airlift role. Additionally, ambient conditions and the 14
austere environment of forward locations would preclude use 15
of temporary markings, such as decals. A more serious 16
difficulty concerns the requirement that protected aircraft 17
comply with enemy requests to land for inspection while 18
flying over areas not clearly under the control of either 19
party. As a matter of operational policy, medical aircraft 20
would not normally fly over either enemy-controlled or 21
disputed territory. The immediate decision as to whether or 22

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not to obey an enemy order to land would be based on 1
determination of the authenticity of that order, 2
establishment of the aircraft's true position, and an 3
assessment of the enemy threat. If any combination of the 4
foregoing was in doubt, the aircraft probably would land as 5
ordered. However, numerous situations could arise under 6
which a landing for inspection would be deemed inadvisable, 7
or unwarranted. The combination of US inability to mark all 8
aircraft flying medical missions and the scenario-dependent 9
nature of US adherence to the inspection criteria of the 10
Protocol mitigate against the United States being able to 11
claim protection for medical aircraft except in very limited 12
circumstances. 13
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Section III--Missing and Dead Persons (Articles 32-34) (U)	<u>1</u>
9. (U) The Geneva Conventions require only that wounded, sick, and dead members of armed forces be searched for on the battlefield. Section III of Part II of the 1977 Protocol I states a general obligation to search for persons missing as a result of armed conflict and to respect the dead resulting from armed conflict.	<u>2</u> <u>3</u> <u>4</u> <u>5</u> <u>6</u> <u>7</u>
a. (U) <u>Article 32--General Principle</u> . Article 32 of the Protocol recognizes a broad right of "families to know the fate of their relatives."	<u>8</u> <u>9</u> <u>10</u>
b. (U) <u>Article 33--Missing Persons</u> . Article 33 obligates parties to the conflict to search for anyone reported missing by an adverse party, as soon as circumstances permit and no later than the end of active hostilities. It requires the parties to record identifying information concerning anyone detained or held captive for more than 2 weeks as a result of the conflict, or anyone who has died during captivity. It encourages use of the Red Cross Central Tracing Agency and the formation of teams to search for the missing.	<u>11</u> <u>12</u> <u>13</u> <u>14</u> <u>15</u> <u>16</u> <u>17</u> <u>18</u> <u>19</u> <u>20</u>
c. (U) <u>Article 34--Remains of Deceased</u> . Article 34 establishes an obligation to respect the graves of persons	<u>21</u> <u>22</u>

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who die for reasons relating to a conflict or enemy 1
occupation and requires that such graves be disturbed only 2
to return remains to a deceased's home country or for 3
reasons of "overriding public necessity," in which case the 4
deceased's home country must be notified. It encourages 5
agreements for the repatriation of remains or the 6
maintenance of foreign graves. 7

d. ~~(U)~~ Conclusion. These articles were negotiated largely 8
to make it politically more difficult for nations to refuse 9
to account for persons missing in action after future armed 10
conflicts. They are militarily acceptable. 11
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C. PART III: METHODS AND MEANS OF WARFARE; COMBATANT AND PRISONER OF WAR STATUS (Articles 35-47) (U)

1. (U) Part III of the Protocol consists of two sections. The first section revises Articles 22, 23, and 25 of the 1907 Hague Regulations on Land Warfare; the second section amends Articles 4 and 5 of the 1949 Geneva Convention (III) on Prisoners of War. It also revises Articles 29-31 of the 1907 Hague Regulations.

Section I--Methods and Means of Warfare (Articles 35-42) (U)

2. (U) Article 35--Basic Rules

a. (U) Paragraphs 1 and 2 of Additional Protocol Article 35 state that the right to choose means of warfare is not unlimited and that it is prohibited to use weapons that would cause unnecessary suffering or superfluous injury.

These provisions merely restate the rules in Articles 22 and 23(e) of the 1907 Hague Regulations, which have been binding on the United States for more than 70 years.

b. (U) Paragraph 3 of Article 35 introduces a new principle. It prohibits the use 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." This language is quite close to that of the Environmental

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Modification (ENMOD) Convention, which entered into force 1
for the United States in 1980. The ENMOD Convention 2
prohibits "the military or hostile use of environmental 3
modification techniques having widespread, longlasting or 4
severe effects, as the means of destruction, damage or 5
injury." While the Convention was directed at the use of 6
environmental modification techniques as weapons, the 7
Protocol is directed against the employment of weapons that 8
have environmental consequences. The Protocol goes further 9
than does the Convention in that it prohibits the employment 10
of both means and methods of warfare which, although not 11
primarily intended to, may be expected to damage the 12
environment. The Protocol's standard of prohibited conduct 13
is different from the Convention's standard in that the 14
means or methods employed in the Protocol must be widespread 15
and long term and severe to be a violation--(The 16
Convention's need only be widespread or longlasting or 17
severe). 18
c. ~~It~~ It is not clear what type of weapons or methods of 19
warfare would be prohibited by paragraph 3, Article 35. The 20
report of the committee that drafted this Article (and 21
Article 55) stated that the term "long-term" was considered 22

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by some delegations "to be measured in decades.... However,
it is impossible to say with certainty what period of time
might be involved. It appeared to be a widely shared
assumption that battlefield damage incidental to
conventional warfare would not normally be proscribed by
this provision." This Article could have considerable
impact on naval warfare. Attacks against oil tankers and
ships carrying hazardous chemical cargoes might be expected
to have long-term, widespread, and severe effects on the sea
environment.

d. ~~(c)~~ Conclusion. In light of the uncertainty surrounding
the meaning of paragraph 3, Article 35, the United States
should, if it ratifies the Protocol, reserve the words "or
may be expected." This would eliminate the problem of
collateral ecological damage from conventional weapons and
methods of warfare, including herbicides and riot control
agents, and would limit the obligations imposed to
essentially those already established by the ENMOD
Convention. A draft reservation and understanding for this
purpose appears in the Annex.

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3. ~~(U)~~ Article 36--New Weapons 1
- a. ~~(U)~~ Article 36 of the Protocol requires states party to 2
it to conduct a legal review of new weapons, means or 3
methods of warfare. 4
- b. ~~(U)~~ Conclusion. The United States already conducts such 5
reviews, and this article would cause no problems for this 6
country. 7
4. ~~(U)~~ Article 37--Prohibition of Perfidy 8
- a. ~~(U)~~ Article 37 of the Protocol expands and explains 9
Article 23(b) of the 1907 Hague Regulations on Land Warfare, 10
which makes it forbidden "to kill or wound treacherously 11
individuals belonging to the hostile nation or army." 12
- b. Rather than "treachery," paragraph 1 of Article 37 uses 13
the modern term "perfidy," and defines it as "acts inviting 14
the confidence of an adversary to lead him to believe that 15
he is entitled to, or is obliged to accord, protection under 16
the rules of international law applicable in armed conflict, 17
with the intent to betray that confidence." This 18
definition, and the examples provided, are an accurate and 19
helpful clarification of existing law. 20
- c. ~~(U)~~ Paragraph 2 of Article 37 provides that "ruses of war 21
are not prohibited," and goes on to distinguish permitted 22

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deception, or ruses, from forbidden perfidy. This paragraph 1
explains and clarifies Article 24 of the 1907 Hague 2
Regulations, which similarly refers to ruses of war as 3
permissible. 4

d. (X) Conclusion. The clarification of existing law in 5
Article 37 is both accurate and helpful from a military 6
standpoint. 7

5. (X) Article 38--Recognized Emblems 8

a. (X) Article 38 of the Protocol expands and explains 9
Article 23(f) of the 1907 Hague Regulations, which states 10
that it is forbidden "to make improper use of a flag of 11
truce of the national flag or of the military insignia and 12
uniform of the enemy, as well as the distinctive badges of 13
the Geneva Convention." In addition, the First and Second 14
Geneva Conventions of 1949 also prohibit unauthorized use of 15
the Red Cross or Red Crescent symbol (see Article 44 in each 16
Convention). Article 38 of the Protocol reaffirms the rule 17
against the misuse of the flag of truce and the Geneva 18
Convention symbols, prohibits misuse of symbols established 19
by the Protocol (Articles 56 and 66) as well as the United 20
Nations symbol and the cultural property emblem of the 1954 21
Hague Convention. 22

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- b. ~~(S)~~ Conclusion. There is no military problem with Article 38. 1
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6. ~~(S)~~ Article 39--Emblems of Nationality 3
- a. ~~(S)~~ Article 39, paragraph 1, of the Protocol prohibits use of neutral flags, uniforms or emblems in armed conflict. 4
This is already a rule of customary international law, to 5
which recognized exceptions exist governing espionage and 6
warfare at sea. The exceptions are preserved by paragraph 3 7
of the Article. 8
9
- b. ~~(S)~~ Paragraph 2 of Article 39, however, presents certain 10
problems. Existing international law prohibits "improper" 11
use of the enemy uniform or insignia. The United States 12
interprets this rule to prohibit their use in combat, but 13
not in situations preceding or following combat. The 14
Protocol would prohibit use of enemy uniforms and insignia 15
"in order to shield, favor, protect or impede military 16
operations." If adopted, this rule could impact on the 17
infiltration and exfiltration of special operations 18
personnel, and possibly the escape and evasion of other 19
military personnel. Under the command responsibility 20
provisions of Articles 86 and 87, the superiors of special 21
operations personnel might also be liable for "war crimes" 22

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prosecution. SHAPE has advised the NATO Military Committee
that in the event of war in Europe, "important Allied ground
operations conducted behind Warsaw Pact lines would be
inhibited, impeded or precluded by the provisions of
Articles 39," paragraph 2.* It is therefore
proposed that the United States not become bound by this
paragraph.

c. (X) Conclusion. Subject to a reservation to paragraph 2,
Article 39 is acceptable. An appropriate draft reservation
for this purpose is included in the Annex.

7. (X) Article 40--Quarter

a. (X) Article 23(d) of the 1907 Hague Regulations on Land
Warfare prohibit declaring that no quarter will be given.
Article 40 of the Protocol merely reaffirms this long-
standing rule.

b. (X) Conclusion. Article 40 is acceptable.

8. (X) Article 41--Safeguard of an Enemy Hors de Combat

a. (X) Article 23(c) of the 1907 Hague Regulations forbids
killing enemy personnel who are surrendering, and the First
Geneva Convention of 1949 forbids attacks on the sick and
wounded. Article 41 of the Protocol refines and expands
this body of law by formally forbidding attacks against

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personnel who have clearly expressed an intent to surrender, 1
in addition to those already captured, and those who are 2
unconscious or otherwise incapacitated due to wounds or 3
sickness. Immunity is lost if they continue to take part in 4
combat or try to escape. 5

b. ~~(b)~~ Paragraph 3 of Article 41 provides that if, due to 6
"unusual conditions of combat," prisoners of war cannot be 7
evacuated to a safe internment camp as required by the Third 8
Geneva Convention of 1949, then they should be released as 9
soon as practicable and all "feasible" precautions taken to 10
ensure their safety. While the term "unusual conditions of 11
combat" has considerable ambiguity, this rule would, for 12
example, cover prisoners taken by patrols behind enemy 13
lines, or during unconventional warfare operations. This 14
paragraph may, however, be misinterpreted as requiring 15
release of prisoners whenever they could not immediately be 16
evacuated from the dangers of combat. A draft understanding 17
intended to preclude such an interpretation is included in 18
Appendix A, along with a draft declaration expressing the 19
United States understanding of the term "feasible," as it is 20
used throughout the Protocol. 21

c. ~~(c)~~ Conclusion. The provisions of Article 41 are already 22
implicit in existing international law; the article simply 23

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makes these rules explicit. Subject to the understanding discussed above, Article 41 is acceptable.

9. (X) Article 42--Occupants of Aircraft

a. (X) Article 42 of the Protocol prohibits attacks on aircrew members descending by parachute from disabled aircraft. The United States regards such attacks as prohibited under customary international law, and the US delegation argued for explicit recognition of such a rule at the diplomatic conference which negotiated the Protocol. The adoption of Article 42 represents the success of those efforts.

b. (X) Conclusion. Article 42 is acceptable.

Section II--Combatant and Prisoner of War Status
(Articles 43-47) (X)

10. (X) Section II of the Protocol radically changes the formal rules pertaining to combatant and prisoner of war status, especially as they apply to guerrillas and other irregulars. Under the 1949 Geneva Conventions, members of a nation's regular armed forces are entitled to prisoner of war status on capture. Guerrillas, resistance movements and other irregulars, however, are only entitled to be prisoners of war if they meet four strict criteria:

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- a. Being commanded by a person responsible for his or her subordinates; 1
- b. Wearing a fixed distinctive insignia recognizable at a distance; 2
- c. Carrying arms openly; and 3
- d. Conducting their operations in accordance with the laws and customs of war. 4

To be entitled to prisoner of war status under the 1949 Convention, a guerrilla unit must meet these criteria at all times. Articles 43 and 44 of the Protocol eliminate the second and fourth of these criteria, and circumscribe the operation of the third criterion. 5

11. ~~(c)~~ Articles 43 and 44--Armed Forces, Combatants, and Prisoners of War. Article 43 declares that all members of the "armed forces," with the exception of medical personnel and chaplains, are "combatants," and Article 44, paragraph 1, provides that all "combatants" are entitled to prisoner of war status on capture. Article 43 defines "armed forces" as including "all organized armed forces, groups and units which are under a command responsible...for the conduct of its subordinates." The intent is to include both regular armed forces and guerrilla units in this definition. The Protocol 6

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thus eliminates the requirement that guerrillas wear fixed 1
insignia, though Article 44, paragraph 7, provides that it is 2
not intended to change the practice of uniform wear by "the 3
regular, uniformed units" of a party to the conflict. It is 4
generally accepted that the term "uniform" includes camouflage 5
fatigues, CW protective clothing, wetsuits, and similar special 6
combat attire. Though such attire is often intended to conceal 7
combatants from enemy observation, in practice it also 8
distinguishes combatants from ordinary civilians. 9

a. ~~(C)~~ As to the current requirement that guerrilla units 10
conduct operations in accordance with the laws of war, 11
Article 43 retains a requirement that every "armed force" be 12
subject to a disciplinary system that will, among other 13
things, enforce compliance with the international law of war 14
among its members. Article 44, paragraph 2, however, makes 15
it clear that the failure of such a system to function does 16
not deprive a group of its right to claim combatant status 17
under the Protocol. Thus, under the Protocol, members of a 18
guerrilla group that routinely executes its own prisoners 19
would, upon capture, be entitled to prisoner of war status. 20
Individual members of the group could still be punished for 21
the war crime of killing prisoners, but only if sufficient 22

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evidence to prove individual guilt could be produced in 1
court. 2
b. ~~(c)~~ In place of the existing general requirements to 3
carry arms openly and wear fixed, visible insignia, Article 4
44, paragraph 3, substitutes a general rule that all 5
"combatants are obliged to distinguish themselves from the 6
civilian population while they are engaged in an attack or 7
in a military operation preparatory to an attack." However, 8
the paragraph then goes on to state that there are certain 9
"situations," not further defined, where combatants cannot 10
do this "owing to the nature of the hostilities." The 11
negotiating history, together with paragraph 7 of the same 12
Article, make it clear that these "situations" refer to 13
guerrilla warfare by irregular forces. In such 14
"situations," the guerrillas retain their right to prisoner 15
of war status if they carry their arms openly during 16
military engagements and while they are visible to the enemy 17
in military deployments preceding the launching of an 18
attack. If a guerrilla does not follow these rules, he 19
loses his right to prisoner of war status if he is captured 20
while violating them during a military engagement or a 21
deployment preceding an attack. 22

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c. (C) Under paragraph 4 of Article 44, he is still to be 1
given "protections equivalent in all respects to those 2
accorded to prisoners of war." It is not clear whether or 3
not this would preclude prosecution for taking part in 4
hostilities. The ordinary meaning of the text would suggest 5
that such prosecution is prohibited, since prisoners of war 6
cannot be punished simply for participating in combat, 7
though the negotiating history may suggest a contrary 8
conclusion. In many cases, however, guerrillas might still 9
be subject to prosecution for perfidy, in violation of 10
Article 37, discussed above. 11

d. (D) Critics of the treatment of guerrillas under the 1949 12
Geneva Convention argued that the Convention discriminates 13
against guerrillas and in favor of regular forces because 14
all members of a guerrilla unit lose their right to prisoner 15
of war status if the group in general failed to wear visible 16
insignia, or carry arms openly, or follow the law of war, 17
even if some individual guerrillas followed these rules. On 18
the other hand, individual members of regular forces only 19
lose their right to prisoner of war treatment if they 20
personally violate the rules of war. 21

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e. ~~(c)~~ The Protocol has, in a sense, reversed this 1
discrimination to favor guerrillas. As noted above, the 2
requirement that an armed force as a whole comply with the 3
law of war has been dropped as a condition for granting PW 4
status to individual members of the force. Under paragraphs 5
3 and 7 of Article 44, however, members of the regular armed 6
forces are expected to wear a uniform whenever they are 7
engaged in combat or in any military operation preparatory 8
to combat. Guerrillas, on the other hand, are only required 9
to carry arms openly in actual combat and in military 10
deployments preceding the launching of attacks, a much more 11
limited set of circumstances than that applicable to 12
regulars, at least in the "situations" to which the second 13
sentence of paragraph 3 applies. 14

f. ~~(c)~~ This improved status for guerrillas may be of 15
considerable military importance for countries that rely on 16
a territorial defense concept, including many of the United 17
States allies. Since it is very unlikely that the United 18
States would ever rely on guerrilla warfare in defense of 19
its own territory, there is little military advantage for 20
the United States armed forces in recognizing improved 21
status for guerrilla fighters. On the contrary, the United 22

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States armed forces are more likely to continue to meet 1
guerrillas as adversaries than as allies in power projection 2
situations. 3

12. ~~(S)~~ Article 46--Spies 4

a. ~~(C)~~ Article 46 of the Protocol, on espionage, also 5
accords guerrillas a more favorable position than regulars. 6
Under Articles 29-31 of the 1907 Hague Regulations, a member 7
of the armed forces sent into enemy-controlled territory in 8
disguise in order to gather information could be tried and 9
punished as a spy if captured before he returned to his own 10
forces. Paragraphs 1, 2, and 4 of Article 46, Protocol I, 11
preserve and restate these old rules. 12

b. ~~(C)~~ Paragraph 3, however, attempts to create parallel 13
rules for guerrillas in occupied territory. Under that 14
paragraph, such guerrillas can be convicted of espionage 15
only if, while gathering information, they engage in some 16
act of false pretense, beyond merely wearing civilian 17
attire, such as using a concealed camera. Also, the 18
guerrilla cannot be convicted of spying in occupied 19
territory unless captured while actually engaging in 20
espionage. Again, this improved status for guerrilla spies 21

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- may be quite important to nations planning to defend their national territory by such means. 1
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13. ~~(S)~~ Effects of Articles 43, 44, and 46 3
- a. ~~(S)~~ It is clear that Articles 43, 44, and 46 of the 4
Protocol make many far-reaching changes in the international 5
law of guerrilla warfare. They can be illustrated by the 6
following scenario: a regular force is sent into territory 7
occupied by the enemy, to carry out an operation jointly 8
with a friendly guerrilla force. The regulars make contact 9
with the guerrillas, and in the course of planning their 10
joint operation, a member of the regular force and a member 11
of the guerrilla force jointly spy on the enemy target while 12
dressed in civilian clothing. The target is successfully 13
attacked, but both forces are later captured by the 14
occupying power. 15
- b. ~~(S)~~ Under both existing law and the Protocol, the 16
regulars were required to be in uniform during the attack 17
and in all military operations preparatory to the attack; 18
i.e., from the time they penetrated enemy-controlled 19
territory until the completion of the attack. Failure to 20
abide by this rule could result in their trial and 21
punishment by the enemy. Under existing law, the same would 22

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be true of the guerrillas; under the Protocol, however, the
guerrillas would be entitled to prisoner of war status, and
could not be punished for their participation in the attack
so long as they had carried their arms openly during the
attack and their deployment prior to the attack. Also, the
guerrilla who spied on the target prior to the attack could
not be punished for espionage, but the regular who
accompanied him would be liable for punishment as a spy,
since he was captured before he left enemy-controlled
territory.

c. ~~(C)~~ Conclusion. As can be seen, guerrillas, especially
those in occupied territory, would have a better legal
position than regulars under the Protocol.

14. ~~(X)~~ Summary and Conclusions--Articles 43, 44, and 46

a. ~~(A)~~ To sum up, there appears to be little if any military
advantage to the United States in recognizing an improved
legal position for guerrillas. This improved position
lessens the protection of the civilian population, since the
guerilla will have no incentive or reasons, in fact just the
opposite, to mark himself off from the civilian population.

b. ~~(B)~~ Such an improved position would also make it more
difficult to suppress guerrilla movements in any future

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situation in which United States Armed Forces must occupy
territory and exercise military government powers over it.
Members of the local population, who would otherwise be
deterred from joining such a movement by the threat of
punishment from the occupying power, might join in guerrilla
activity if they knew that the United States would treat
them as lawful combatants in accordance with the Protocol.
c. ~~(C)~~ Conclusion. From a military standpoint, therefore,
the United States should reserve Articles 43, 44 and 46 if
it ratifies Protocol I.
15. ~~(S)~~ Article 45--Protection of Persons Who Have Taken Part
in Hostilities
a. ~~(S)~~ Article 45 of the Protocol expands and elaborates
Article 5 of the 1949 Geneva Convention on Prisoners of War,
which provides that if "any doubt" arises as to whether a
person committing a belligerent act is entitled to prisoner
of war status, that person will be treated as a prisoner of
war until his status has been determined by a "competent
tribunal."
b. ~~(S)~~ In United States practice, administrative boards of
officers are the competent tribunals used to settle doubtful
cases of PW entitlement. Article 45 of the Protocol

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clarifies this provision by declaring that upon capture, 1
anyone taking part in hostilities "shall be presumed to be a 2
prisoner of war" if (1) he claims that status, (2) "he 3
appears to be entitled" to it, or (3) the authorities of his 4
side claim it for him. Doubts as to whether this 5
presumption should continue will be resolved by a "competent 6
tribunal". 7

c. ~~(c)~~ The second paragraph of Article 45 provides that if 8
someone who has taken part in hostilities is to be tried for 9
an offense arising out of the conflict; e.g., a war crime, 10
the accused will be allowed to raise his entitlement to 11
prisoner of war status before a "judicial tribunal;" i.e., 12
not merely an administrative tribunal. If possible, this 13
issue is to be adjudicated before trial, but it is 14
sufficient if the trial court itself considers the issue of 15
PW status. American military courts would presumably follow 16
the latter practice, as they do now. 17

d. ~~(d)~~ The third paragraph requires that any person who has 18
taken part in hostilities be given at least a minimum level 19
of humane treatment even if he is not entitled to PW status. 20

e. ~~(e)~~ Conclusion. Article 45 is consistent with existing 21
United States law and policies. Its general adoption by the 22

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nations of the world would be militarily advantageous, since 1
it would make it politically more difficult for our 2
adversaries to deny humane treatment to captured Americans. 3
In both the Korean and Southeast Asian conflicts specious 4
"war crimes" charges were used as a pretext for denying 5
prisoner of war status and humane treatment to American PWs. 6
Article 45 reaffirms that prisoner of war status can be 7
denied only after a proper hearing, and that even then the 8
captured individual has a right to humane treatment. 9

16. (U) Article 47--Mercenaries 10

- a. ~~(S)~~ Article 47 of the Protocol provides that "a mercenary 11
shall not have the right to be a combatant or a prisoner of 12
war." Article 47 was included in the Protocol not for 13
humanitarian reasons, but purely to make the political point 14
that mercenary activity in the Third World is unwelcome. 15
- b. ~~(U)~~ Most of the practical impact of the Article is 16
eliminated by paragraph 2, which defines "mercenary" in 17
exceedingly narrow terms. To be a mercenary, a person must 18
(1) be specially recruited to fight, (2) actually take part 19
in combat, and (3) to be motivated essentially by a desire 20
for private gain and be paid more than members of the armed 21
forces performing similar duties. In addition anyone who is 22

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D. PART IV--CIVILIAN POPULATION (Articles 48-79) ~~(U)~~

1. ~~(U)~~ From a military standpoint, Articles 48 through 60 are probably the most important provisions in the Protocol, since they would directly regulate the conduct of combat operations. In assessing the acceptability of these articles, several factors should be kept in mind.

a. ~~(C)~~ First, the Protocol rules are stated as prohibitions; any method or means of combat not forbidden by these articles (or existing international law) would still be legally permitted.

b. ~~(C)~~ Second, many of the Protocol rules are stated in vague language that will be subject to considerable interpretation in practice; e.g., "severe" civilian losses (Article 56); "concrete and direct" military advantage (Articles 51 and 57). It is, then, impossible to say with any degree of accuracy exactly what methods and means of combat would, in the abstract, be forbidden by Protocol I. The most that can be said is that there would be strong pressure on the Government to give a broad construction to these rules during low-intensity or unpopular conflicts, to bring civilian losses to the lowest possible level. During high-intensity conflicts, especially those enjoying domestic

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and international political support, considerations of
military effectiveness will undoubtedly play a greater role
in determining the US Government position on what the
Protocol requires.

c. ~~(C)~~ Recommended Understanding. When applying rules that
are so ambiguous, it is important to ensure that commanders
and other decisionmakers are judged only on the basis of
knowledge actually available to them, and not on the basis
of hindsight. A draft understanding to this effect is
included in the Annex.

Section I--General Protection (Articles 48-67) ~~(U)~~ 11

2. ~~(U)~~ Article 48--Basic Rule 12

a. ~~(U)~~ Article 48 of the Protocol states a general
principle--that the parties to a conflict should always
distinguish civilians from combatants and direct their
operations only against military objectives. Subsequent
articles then apply this principle in particular contexts.

b. ~~(U)~~ Conclusion. Article 48 is acceptable. 18

3. ~~(U)~~ Article 49--Definition of Attacks and Scope of
Application 19
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a. ~~(U)~~ Article 49 defines the term "attack," as used in the
Protocol, to include any act of violence against the enemy, 21
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- whether in offense or defense. It also limits the scope of
this part of the Protocol to land combat, to include any air
or sea warfare that would affect the civilian population on
land.
- b. ~~(X)~~ Conclusion. Article 49 is acceptable.
4. ~~(X)~~ Article 50--Definition of Civilians
- a. ~~(X)~~ Article 50 defines "civilians" and "civilian
population" in terms of persons who are not members of an
armed force under either the Protocol or the 1949 Geneva
Convention on Prisoners of War.
- b. ~~(X)~~ The only controversial provision in these articles is
in the second sentence of paragraph 1, Article 50, which
states that "in case of doubt whether a person is a
civilian, that person shall be considered to be a civilian."
The acceptability of this provision will be discussed below
in conjunction with a parallel provision in Article 52 on
civilian objects.
5. ~~(C)~~ Article 51--Protection of Civilian Population. Article
51 of the Protocol covers the protection due to civilian
persons, both enemy and friendly, who are in enemy-controlled
territory.

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- a. (U) Paragraphs 1, 2, and 3 restate the generally accepted principle that civilian persons should not be made the object of attack, and that acts or threats of violence which have the primary purpose of terrorizing the civilian population are prohibited. (The latter provision represents an international rejection of the terrorist tactics often used by guerrilla groups.) It is also expressly provided that civilians lose legal immunity from attack if they take a direct part in hostilities. 1
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- b. (S) Paragraph 4 prohibits indiscriminate attacks and defines that term. Questions have been raised as to whether certain effective methods of warfare; e.g., harassing fires and interdiction fires, common in past armed conflict, would meet the test of this prohibition against indiscriminate attacks. Harassing fires are delivered on enemy locations for the purpose of disturbing the rest, curtailing the movement, or lowering the morale of troops. Interdiction fires are delivered, at random intervals, on selected terrain for the purpose of denying the enemy the unrestricted use of these areas. Neither of these types of attacks should be considered indiscriminate and an understanding to that effect is offered. 10
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c. (2) Paragraphs 4 and 5 of Article 51 prohibit 1
"indiscriminate" attacks; i.e., those which "are of a nature 2
to strike military objectives and civilians... without 3
distinction." Such attacks include those which may cause 4
collateral civilian losses which are "excessive" in relation 5
to "the concrete and direct military advantage anticipated." 6
This rule would require a weighing of expected civilian 7
losses against the expected military advantage of any 8
military operation. Many legal experts believe that this 9
rule is already binding on the United States as part of 10
customary international law. Even if this rule is not 11
already legally binding, considerations of proportionality 12
have always been a major factor underlying political and 13
practical restraints on military operations of the United 14
States. "Indiscriminate" attacks also include a 15
"bombardment... which treats as a single military objective 16
a number of clearly separated and distinct military 17
objectives located in a city, town, village or other area 18
containing a similar concentration of civilians." Whether a 19
group of military targets in a city are "clearly separated 20
and distinct" would be judged from the viewpoint of the 21
attacking force; if enemy camouflage makes it impossible to 22

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distinguish the military objectives from the surrounding 1
civilian population, then this rule would not prevent an 2
attack on the entire area where the target is believed to 3
be. 4

d. (C) Article 51, paragraph 7, would also prohibit the use 5
of the civilian population to "shield military objectives 6
from attacks or to shield, favor or impede military 7
operations." This rule should be militarily advantageous to 8
the United States, since it expressly outlaws a practice 9
used by US adversaries both during and since World War II. 10
Use of civilians as a screen has also been a common practice 11
among guerrilla and terrorist groups. 12

e. (L) There is, however, a problem with the last paragraph 13
of Article 51, which provides that any violation of Article 14
51 by one side will not release the other side from fully 15
complying with its provisions. This is reinforced by 16
paragraph 6 of the article, which forbids any reprisal 17
attacks against the civilian population; i.e., attacks that 18
would otherwise be forbidden but that are in response to the 19
enemy's own violations of the law and are intended to deter 20
future violations. 21

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f. (C) Historically, reciprocity has been the major sanction 1
underlying the law of war. If paragraphs 6 and 8 of Article 2
51 come into force, this sanction would be removed, at least 3
insofar as the civilian population is concerned. Thus the 4
enemy could deliberately carry out attacks against friendly 5
civilian populations, and the United States would be legally 6
forbidden to reply in kind. Similarly, if an adversary used 7
the civilian population as a shield for military objectives; 8
e.g., by hiding a guerrilla headquarters in the center of a 9
town or refugee camp, an attack on such objectives would be 10
forbidden if "excessive" civilian casualties might result. 11
As a practical matter, the United States might, for 12
political or humanitarian reasons, decide in a particular 13
case not to carry out retaliatory or reprisal attacks 14
involving unfriendly civilian populations. To formally 15
renounce even the option of such attacks, however, removes a 16
significant deterrent that presently protects civilians and 17
other war victims on all sides of a conflict. 18
g. (C) Conclusion. If it ratifies Protocol I, therefore, 19
the United States should reserve paragraphs 6 and 8 of 20
Article 51. A draft reservation that would preserve the 21
principle of reciprocity appears in the Annex. Since the 22
same reasoning would apply to the prohibitions against 23

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- reprisals on civilian objects in Articles 52-56, below, the 1
draft reservation is phrased to cover these articles as 2
well. Paragraphs 1-5 are acceptable, though a clarifying 3
understanding is required (see Annex). 4
6. ~~(X)~~ Article 52--General Protection of Civilian Objects 5
- a. ~~(S)~~ Article 52 prohibits attacks against civilian 6
objects, defined as anything which is not a military 7
objective. Military objectives are "those objects which by 8
their nature, location, purpose or use make an effective 9
contribution to military action and whose total or partial 10
destruction, capture or neutralization, in the circumstances 11
ruling at the time, offers a definite military advantage." 12
This definition, which is consistent with customary 13
international law, is broad enough to meet military 14
requirements. 15
- b. ~~(S)~~ Under this definition, an area of land could, for 16
example, be a military objective, as could political and 17
economic activities that support the enemy's war effort. 18
- c. ~~(S)~~ The problem with Article 52 is paragraph 3, which 19
provides that "in case of doubt" as to whether an object 20
"normally dedicated to civilian purposes" is a military 21
objective, "it shall be presumed not to be" a military 22

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objective. This rule would apply to almost any object 1
except for weapons and similar things that are military in 2
the narrowest sense. Railroads, telecommunications 3
facilities, and electrical power plants are all "normally 4
dedicated to civilian purposes." This rule, together with 5
the comparable rule in Article 50 that "in case of doubt" 6
whether a person is a civilian, he or she "shall be 7
considered to be a civilian," is unrealistic. Commanders 8
and other military personnel who make decisions in the fog 9
of war must do so in good faith and on the basis of whatever 10
information they have available at the time. Such decisions 11
will almost never be free of "doubt," either subjective or 12
objective. 13

d. ~~(C)~~ The presumption of civilian status established by 14
Articles 50 and 52 of the Protocol could adversely impact on 15
American military operations and personnel in many ways. 16
"War crimes" accusations have been a principal means used to 17
deny prisoner of war status to Americans in both Korea and 18
Southeast Asia; the existence of a rule that everyone and 19
everything is civilian in case of "doubt" could be used to 20
prove such charges in the future, or at least lend credence 21
to them for propaganda purposes. A requirement that there 22

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(Revised by Decision)

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be no "doubt" that the persons and objects attacked were
military could also be used to place American prisoners of
war on the psychological defensive during interrogation.
This presumption also provides an additional protection for
guerrillas and other irregulars who may find it advantageous
to be presumed a civilian rather than a combatant. Finally,
such a presumption would make it more difficult to defend
the legality of military operations in domestic and
international public opinion.

e. ~~(1)~~ Conclusion. If the United States ratifies Protocol
I, therefore, it should reserve the second sentence of
paragraph 1, Article 50, and paragraph 3 of Article 52. A
draft reservation is included in the Annex. The rest of
Article 52 is militarily acceptable.

7. ~~(1)~~ Article 53--Cultural Objects and Places of Worship

a. ~~(1)~~ Article 53 of the Protocol concerns protection of
cultural property. The United States recognizes a general
obligation in customary international law to respect and
protect important cultural property, such as historic
monuments. In addition, Articles 27 and 56 of the 1907
Hague Regulations on Land Warfare prohibit deliberate
bombardment of cultural property, or its willful destruction

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in occupied territory. Article 53, which prohibits "acts of hostility" toward cultural property or its use for military purposes, is in accord with these existing policies and obligation.

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b. ~~(b)~~ Two aspects of Article 53 raise problems, however.

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First, it should be made clear that if cultural property is used for military purposes, it loses its protection.

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Second, the protection of the article must be limited to a relatively few highly important cultural monuments and objects.

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This was the position of the United States and most of its allies at the diplomatic conference. However, a few states regarded Article 53 as protecting all temples, chapels, mosques, and other places of worship, an extension that would make the article impractical in operation. A draft understanding to reflect these views appears in the Annex.

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c. ~~(c)~~ Conclusion. Subject to the proposed understanding in the Annex, Article 53 is acceptable.

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8. ~~(d)~~ Article 54--Objects Indispensable to the Survival of the Civilian Population

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a. ~~(a)~~ Article 54 of the Protocol prohibits starvation of civilians as a method of warfare. This is a change from

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customary international law, which permits the starvation of 1
the enemy population, both civilian and military, in sieges 2
and blockades. The possible impact of this new rule on 3
naval blockades is discussed below, in conjunction with 4
Article 70 on relief supplies. As a general proposition, 5
however, there is little military need for a modern armed 6
force to retain the option of starving the enemy's civilian 7
population into submission. This prohibition on 8
deliberately starving the civilian population is therefore 9
militarily acceptable. 10

b. ~~(c)~~ Article 54 also specifically forbids the attack or 11
destruction of "objects indispensable to the survival of the 12
civilian population," including foodstuffs, crops, 13
livestock, drinking water and irrigation installations, "for 14
the specific purpose of denying them for their sustenance 15
value" to either the civilian population or to the enemy. 16
Destroying these items for some other purpose would still be 17
lawful; e.g., destroying standing crops to clear a field of 18
fire. The Article also provides that these objects lose 19
their protection if they are used solely as sustenance for 20
the enemy armed forces, or if they are used some other way 21
in direct support of military action. They can then be 22

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attacked not only to terminate that support, but also for
the purpose of denying sustenance to the enemy, provided
that the civilian population is not starved or forced to
move as a result. These restrictions do not apply to
attacks that are not for the specific purpose of denying
sustenance; an understanding to clarify this is included in
the Annex. The article also contains an exception allowing
a state to destroy such items in defense of its own
territory, as part of a "scorched earth" policy.

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c. ~~(C)~~ Conclusion. In light of the many exceptions that
Article 54 allows in the interests of military necessity,
this article is militarily acceptable, subject to the
proposed understanding.

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9. ~~(V)~~ Article 55--Protection of the National Environment

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a. ~~(S)~~ Article 55 deals with damage to the natural
environment, in language similar to the third paragraph of
Article 35. The first sentence requires that "care" be
taken to avoid widespread, long-term and severe damage to
the environment. This requires only that reasonable efforts
be taken to avoid such damage.

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b. ~~(S)~~ The second sentence is stronger, in that it prohibits
use of methods or means of warfare that "are intended or may

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be expected" to cause such damage. This prohibition is, 1
however, qualified by the phrase "and thereby to prejudice 2
the health or survival of the population," which makes it 3
clear that it only prohibits collateral environment damage 4
that threatens the civilian population as a whole. Any 5
conventional method or means of warfare having a foreseeable 6
result of that nature will be subject to severe political 7
restraint in any event. 8

c. ~~(C)~~ Conclusion. Article 55 is militarily acceptable, 9
subject to a reservation of the words "or may be expected," 10
for reasons stated above in the discussion of Article 35. 11

10. ~~(X)~~ Article 56--Works and Installations Containing 12
Dangerous Forces 13

a. ~~(C)~~ Article 56 of the Protocol gives rise to a number of 14
problems. It protects dams, dikes, and nuclear power plants 15
against attacks that could result in "severe" civilian 16
losses. In the first place, it is difficult to determine 17
exactly which dams, dikes, and nuclear plants will be 18
protected and which will not. The negotiating history 19
indicates that Article 56 is intended to protect objects 20
that would be considered legitimate military objectives 21
under Article 52 of the Protocol and under customary law. 22

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Attacks on such military objectives would be prohibited if 1
"severe" civilian casualties might result from flooding or 2
release of radiation. The negotiating history throws little 3
light on what level of civilian losses is "severe." It is 4
clear, however, that under this article, civilian losses are 5
not to be balanced against the military value of the target; 6
if severe losses would result then the attack is forbidden, 7
no matter how important the target. 8

b. ~~(2)~~ It also appears that Article 56 forbids any attack 9
that raises the possibility of severe civilian losses, even 10
though considerable care is taken to avoid them. At the 11
diplomatic conference which drafted the Protocol, the 12
wording of this article was changed from "likely to" result 13
in severe losses to "may" result in severe losses, precisely 14
to make it clear that the attacker must guarantee that no 15
such losses will result, rather than that such losses be 16
merely improbable. 17

c. ~~(C)~~ Paragraph 2 of Article 56 provides for termination of 18
protection, but only in limited circumstances. If it is 19
once conceded that a particular dam, dike, or nuclear power 20
station is entitled to protection under Article 56, that 21
protection can only end if it is used "in regular, 22

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significant and direct support of military operations." 1
This is intended to create a higher standard than the 2
criterion in Article 52's definition of a military 3
objective; i.e., "effective contribution to military 4
action." (As noted above, the negotiators assumed that 5
everything protected by Article 56 would already be a 6
militarily objective in the sense of Article 52.) In the 7
case of a nuclear power plant, this support must be in the 8
form of "electric power." The negotiating history refers to 9
electric power for "production of arms, ammunition and 10
military equipment" as removing a power plant's protection, 11
but not "production of civilian goods which may also be used 12
by the armed forces." The diplomatic conference thus 13
neglected the nature of modern integrated power grids, where 14
it is impossible to say that electricity from a particular 15
plant goes to a particular customer. Assuming that in an 16
individual case the power from a plant can be identified as 17
going to a particular military installation, this would, 18
under Article 56, remove the immunity from attack from a 19
nuclear power plant, but not from a hydroelectric dam. In 20
order for a dam or dike to lose its immunity, it must be 21
used for "other than its normal function" in support of 22

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military operations; e.g., to support a road used as a main supply route. This distinction between nuclear power plants and dam and dikes appears unreasonable. 1
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d. ~~(C)~~ It is also unreasonable for Article 56 to terminate the protection of nuclear power plants only on the basis of the use of their electric power. Under this provision, a nuclear power plant that is being used to produce plutonium for nuclear weapons purposes would not lose its protection. 4
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e. ~~(D)~~ Another problem with Article 56 is that it has the potential to create safe-havens for enemy military forces. 9
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Paragraph 5 of Article 56 prohibits attacks against 11

"installations erected for the sole purpose of defending the 12

protected works." Such installations would include both 13

antiaircraft and ground defenses. This provision is not 14

limited to installations intended to protect against 15

unlawful attacks. It would be perfectly lawful to try to 16

capture a dam, dike, or nuclear power station with infantry, 17

since this would create no danger of destroying the 18

installation. As paragraph 5 literally reads, however, it 19

would still be unlawful for the attacking infantry to fire 20

at pillboxes and other installations erected for the ground 21

defense of the dam, dike, or nuclear station. Another 22

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problem with this provision is that the presence of military 1
forces at a particular location may affect enemy military 2
operations even if they confine their activities to 3
defending the dam, dike, or nuclear station involved. Thus, 4
the presence of heavy antiaircraft defenses at a nuclear 5
power station will affect the route attacking aircraft will 6
take to other targets, and may make defense of those targets 7
easier. In the case of radar near a dam, dike, or nuclear 8
installation, it will probably be impossible to tell whether 9
it is confining its activities to defense of that 10
installation, or participating in the air defense of other 11
possible targets. 12

f. (2) Finally, Article 56 creates a new international 13
symbol for objects protected by it: three orange circles on 14
the same axis. The problem with this emblem is that it will 15
be practically impossible to tell whether it is being used 16
in good faith or not. The criterion for displaying the new 17
sign is whether an attack might cause "severe" civilian 18
losses. There is no internationally accepted criterion to 19
determine whether particular losses are "severe." In 20
practice, a party controlling a dam, dike, or nuclear 21
station will probably mark it as entitled to protection if 22

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there is any chance at all of civilian casualties; the party 1
attacking such a facility will probably regard such marking 2
as illegitimate unless it determines that hundreds or even 3
thousands of civilians might be endangered. Unlike existing 4
emblems for medical activities, prisoner of war and 5
internment camps, and cultural property, it will be almost 6
impossible to verify whether a party to the conflict is 7
using this new symbol in good faith or not; the criteria are 8
entirely subjective. Acceptance of this new sign would thus 9
have no military benefit to the United States. On the other 10
hand, its adoption could give rise to specious war crimes 11
accusations whenever a facility displaying the sign is 12
attacked, even if no civilian casualties actually result 13
from that attack. Its adoption could also erode respect for 14
existing, accepted symbols, such as the Red Cross. 15

g. ~~(f)~~ Conclusion. Article 56 has so many defects, both in 16
concept and in drafting, that it should not be considered 17
militarily acceptable. If the United States ratifies the 18
Protocol, it should reserve Article 56. An appropriate 19
draft reservation is included in the Annex. 20

11. ~~(h)~~ Article 57--Precautions in Attack 21

a. ~~(g)~~ Article 57 summarizes many of the general obligations 22
in Articles 48, 51, and 52, such as doing everything 23

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feasible to ensure that only military objectives are 1
attacked, and that collateral civilian losses are kept to a 2
minimum. As such it acts as a convenient summary or 3
checklist for persons responsible for planning or executing 4
military operations. It also contains a general obligation 5
to warn the civilian population of attacks, "unless 6
circumstances do not permit;" e.g., because surprise is 7
required. This warning requirement is a more modern 8
expression of the rule in Article 26 of the 1907 Hague 9
Regulations, which requires a warning before the bombardment 10
of inhabited places, "except in cases of assault." Article 11
57 generalizes this exception so that it applies to all 12
"circumstances" where military need prevent a warning. With 13
one exception, Article 57 is militarily acceptable. 14
b. ~~Y~~ The exception is subparagraph 2(b) of the article. 15
This paragraph requires that an attack be canceled or 16
suspended "if it becomes apparent" that the objective is not 17
a military one, "or that the attack may be expected to cause 18
incidental loss of civilian life, injury to civilians, 19
damage to civilian objects, or a combination thereof, which 20
would be excessive in relation to the concrete and direct 21
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military advantage anticipated." This provision might 1
provide a defense to military personnel accused of 2
disobedience or misbehavior before the enemy as a result of 3
refusal to participate in a particular combat operation. 4
Under military law, members of the armed forces may, and 5
should, refuse to obey an order to commit a crime, such as 6
the shooting of prisoners of war or unarmed civilians. 7
Article 57, however, goes considerably beyond this, in 8
allowing each individual combatant to call off an "attack" 9
(or at least his participation in it) if it appears to him 10
that collateral damage "may" be excessive to whatever 11
military advantage he is aware of. In order to overcome 12
this defense in a trial by court-martial, the prosecution 13
would have to prove, beyond a reasonable doubt, that the 14
possible collateral damage would not be excessive to the 15
military advantage gained. To do this would often require 16
the declassification of information known to the accused's 17
superiors and its discussion in a public trial. Finally, 18
the accused might be able to prevail on this issue simply by 19
demonstrating a reasonable mistake of fact on his part--a 20
reasonable belief, perhaps formed in part on the basis of 21
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- propaganda reports in the public media, that collateral damage was excessive to any expected military advantage. 1
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- c. ~~(C)~~ Conclusion. If the United States ratifies Protocol I, therefore, it should do so subject to an understanding that this paragraph of Article 57 only applies to commanders who have authority to terminate attacks. A draft understanding appears in the Annex. 3
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12. ~~(A)~~ Article 58--Precautions Against Effects of Attacks 8
- a. ~~(A)~~ Article 58 requires any party to the conflict that is in control of civilians to take certain measures to protect them against the dangers of war, "to the maximum extent feasible." This article thus recognizes that responsibility for avoiding civilian losses does not fall totally on the attacking party; the defender has a responsibility in this matter, too. 9
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- b. ~~(B)~~ The term "feasible" refers to what is practical or practically possible, and allows for the consideration of reasonableness and military necessity in applying the Article. It would thus be impractical to move major headquarters and other permanent military installations completely away from urban areas, since such installations require utilities, transportation services and a civilian 16
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work force that can only be obtained in an urban
environment. What the Article requires, rather, is that the
parties to the Protocol take civilian danger into account as
one factor among many in their defense planning. However,
several countries have voiced concerns about the possible
impact of Article 58 on their national defense, especially
in densely populated areas such as Europe.

c. ~~(S)~~ Conclusion. To ensure that Article 58 is interpreted
in a reasonable manner, a draft understanding has been
included in the Annex. Subject to the adoption of this
understanding, Article 58 is militarily acceptable.

13. ~~(S)~~ Articles 59 and 60--Nondefended Localities and
Demilitarized Zones

a. ~~(S)~~ Protocol Articles 59 and 60, on undefended localities
and demilitarized zones, supplement Article 25 of the 1907
Hague Regulations on Land Warfare, which prohibits
bombardment of "undefended" cities and towns. In practice,
it has come to be commonly accepted that an "undefended"
town is one which is open to unresisted occupation by enemy
land forces in the vicinity.

b. ~~(S)~~ Article 59 of the Protocol expresses and clarifies
this practice by requiring that a nondefended locality be

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- near enemy land forces and open for their occupation, and 1
that no hostile activities take place there. 2
- c. ~~(U)~~ Article 60 provides for the creation of 3
"demilitarized zones" in cases where the locality is not 4
subject to immediate occupation. The zones contemplated by 5
Article 60 can be created only by express agreement of the 6
parties to the conflict, however. 7
- d. ~~(S)~~ Conclusion. Both articles are in accordance with 8
customary international law and with existing legal 9
obligations. They are militarily acceptable. 10
14. ~~(S)~~ Articles 61-67--Civil Defense. Articles 61-67 of the 11
Protocol create a new class of persons and objects to be 12
specially protected during armed conflict. Under these 13
Articles, civil defense organizations, personnel, equipment, 14
and activities would receive a degree of protection that is, in 15
general, similar to that accorded medical personnel, equipment, 16
and activities under the Geneva Conventions of 1949. 17
- a. ~~(U)~~ General Protection. Under Article 62 of the 18
Protocol, civil defense personnel and organizations are thus 19
to be "respected and protected" by the parties to the 20
conflict (i.e., not deliberately attacked or unnecessarily 21
interfered with). Civil defense functions may be interfered 22

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with for reasons of imperative military necessity, a concept 1
that goes back to the general protection of civilian 2
property provided by Article 23(g) of the 1907 Hague 3
Regulations on Land Warfare. Invocation of this exception 4
is a matter of professional military judgment for commanders 5
on the scene. 6

b. ~~(U)~~ Arms. Civil defense personnel may carry "light 7
individual weapons" for personal protection (Articles 65 and 8
67), a rule similar to that applying to the arming of 9
medical personnel under the 1949 Conventions. An 10
understanding regarding light individual weapons is proposed 11
(see Annex). 12

c. ~~(U)~~ Occupied Territory. In occupied territory, the 13
occupying power is to allow civil defense organizations to 14
continue to function and furnish them with the facilities 15
necessary for this purpose (Article 63). A clarifying 16
understanding to this article is included in the Annex. 17

d. ~~(U)~~ Military Personnel. Military personnel may be used 18
for civil defense if they are "permanently assigned and 19
exclusively devoted" to such duties, and do not perform 20
other military duties during the conflict (Article 67). 21

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- e. (X) New Sign. Article 66 establishes a blue triangle in an orange square as the international distinctive sign for protected civil defense personnel, property, and activities.
- f. (X) Cessation of Protection. The special protection of civil defense personnel and activities would cease if they are used to commit "acts harmful to the enemy" outside their proper functions (Article 65), again a standard taken from the medical articles of the 1949 Conventions. For personnel performing civil defense duties, committing such acts would subject them to immediate attack. Prior to such attack, a warning and time limit for ceasing protection must be given "whenever appropriate." Whether a warning is "appropriate" in a particular case of abuse is to be decided by the military authorities affected by the violation, based on their assessment of the military situation. This interpretation is based on the generally accepted interpretation of parallel language on protection of hospitals and hospital ships under the First and Second Geneva Conventions of 1949.
- g. (X) Conclusion. In general, the system of protection for civil defense established by the Protocol is well-meaning, but creates a number of military operational problems. The main practical problems arise from the ambiguity of the
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definition of civil defense activities in Article 61. That 1
definition includes, in addition to expected activities such 2
as fire fighting, management of shelters, and provision of 3
medical services, a number of activities that could be of 4
military importance, such as warning of attacks, detection 5
of danger areas, decontamination, "emergency repair of 6
indispensable public utilities," and "preservation of 7
objects essential to survival." In theory, then, a civil 8
defense organization will be entitled to special protection 9
when it warns the civilian population of an impending 10
attack, but not when it warns enemy military organizations. 11
To the extent that such activities substantially lessen the 12
military impact of surprise, they should be considered to be 13
legitimate objects of attack. Obviously, there will be 14
considerable overlap among these situations, and in practice 15
it will often be unclear whether a particular activity is a 16
legitimate civil defense function or not. This ambiguity 17
could encourage misuse of the orange and blue civil defense 18
identification sign in an attempt to shield otherwise lawful 19
targets from attack. An attacking force will often have 20
difficulty deciding whether to respect the sign in a 21
particular case. To lessen the risk of misuse of this sign 22

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and avoid placing an unacceptable burden on proof of an 1
attacking force, an understanding is proposed that makes it 2
clear that Articles 61-67 do not preclude an attack on an 3
otherwise lawful military objective. 4

15. ~~(S)~~ Articles 68-71--Relief for the Civilian Population. 5
Articles 68 through 71 require the parties to the conflict to 6
assist relief efforts for the civilian population. Relief 7
workers are to be assisted, respected, and protected 8
(Article 71). 9

a. ~~(S)~~ Occupied Territory. In occupied territory, the 10
occupying power is, "to the fullest extent of the means 11
available to it," to ensure provisions of "clothing, 12
bedding, ...shelter," religious objects and other essential 13
supplies (Articles 69). This provision supplements 14
Article 55 of the Fourth Geneva Convention of 1949, which 15
already requires the occupying power to provide medical 16
supplies and food "to the fullest extent of the means 17
available to it." 18

b. ~~(S)~~ Other Areas. Outside occupied territory, Article 70 19
requires the parties to the conflict to "facilitate rapid 20
and unimpeded passage of all relief consignments, equipment 21
and personnel." This duty is, however, "subject to the 22

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agreement of the Parties concerned." The Protocol does not 1
state on what basis such agreement might be refused. One 2
reading of Article 70, suggested by the plain meaning of its 3
text, would allow the agreement between the parties to cover 4
only technical arrangements and the conditions of 5
distribution, as stated in paragraph 3 of the Article. Such 6
an interpretation would cause a radical, if perhaps 7
unintended, change in the customary law of seige and 8
blockade warfare, which has always allowed the beseiging and 9
blockading power to cut off all supplies going to areas 10
under enemy control. 11

c. ~~(W)~~ Military Necessity. One prominent legal commentary 12
on the Protocol suggests an alternative interpretation, 13
however, based on negotiating history. Under this 14
interpretation, agreement to transit of relief supplies 15
could be refused due to "imperative considerations of 16
military necessity."* This interpretation would also make 17
the Protocol compatible with United States law, which allows 18
the President to cut off relief supplies "subject to the 19
jurisdiction of the United States," to any areas of the 20
world if such supplies would "endanger the Armed Forces of 21
the United States which are engaged in hostililties."** 22

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- d. (X) Conclusion. Both in order to ensure compatibility with United States law and to ensure that the requirements of military necessity are taken into account, an understanding reflecting the above interpretation is recommended. A draft appears in the Annex. Subject to this understanding, Articles 68-71 are acceptable. 1
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16. (X) Articles 72-79--Persons in the Power of a Party to the Conflict. Articles 72-79 are intended to protect persons who are "in the power" of a party to the conflict, including prisoners of war, civilian internees, and anyone else, including a state party's own nationals, who is somehow affected by the armed conflict and under the control of one of the parties to the conflict. 7
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- a. (X) Refugees. Article 73 clarifies the 1949 Geneva Convention on Civilian Persons by expressly extending its protections to refugees and others who do not have a clearly defined nationality at the beginning of the armed conflict. 14
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- b. (X) Reunion of Families. Article 74 creates a general duty to facilitate the reunification of families whose members are dispersed by the conflict. 18
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c. ~~(b)~~ Fundamental Guarantees. Article 75 establishes 1
certain minimum norms of humane treatment for anyone 2
affected by a conflict, including a prohibition on murder, 3
torture, degrading treatment, and the taking of hostages. 4
Minimum due process requirements for anyone being punished 5
for an offense relating to the conflict are also listed. 6
The United States welcomed the adoption of Article 75 7
because it applied to anyone deprived of liberty for reasons 8
related to an armed conflict. In the Korean and Vietnam 9
conflicts, captured Americans were denied prisoner of war 10
status due to Communist allegations that they were all "war 11
criminals." Article 75, it was hoped, would undercut such 12
excuses in future wars, since paragraph 7, "to avoid any 13
doubt," expressly states that it applies to persons accused 14
or convicted of "war crimes." However, during a plenary 15
session of the Diplomatic Conference that adopted the 16
Protocol, the Soviet delegation stated its "understanding" 17
that the effects of Article 75 "do not extend to war 18
criminals and spies," who would be dealt with under national 19
legislation alone. There is, therefore, considerable reason 20
to doubt that adoption of Article 75 will affect the 21
behavior of Soviet-bloc governments in future armed 22

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conflicts. An understanding to counter this perspective is 1
proposed (see Annex). 2

d. ~~(P)~~ Protection of Women. Article 76 establishes special 3
rules for the protection of women, including a prohibition 4
on execution of death sentences on pregnant women and 5
mothers with dependent infants. 6

e. ~~(P)~~ Protection of Children. Article 77 prescribes 7
similar rules to protect children, including a prohibition 8
on execution of persons under the age of 18 when they commit 9
an offense. 10

f. ~~(P)~~ Evacuation of Children. Article 78 sets up detailed 11
rules to govern evacuation of children out of their national 12
territory. Under these rules, the desires of parents or 13
legal guardians should be respected and detailed information 14
recorded on each child evacuated. 15

g. ~~(P)~~ Protection of Journalists. Article 79 clarifies the 16
position of journalists, declaring them to be civilians and 17
entitled to treatment as such. The Article authorizes the 18
issuance of a uniform identify card for journalists. 19

h. ~~(P)~~ Conclusion. Articles 72-79 are militarily 20
acceptable. It is understood that the special protections 21
afforded women and children in Articles 76 and 77 of 22

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Protocol I apply only to noncombatants. Women and children 1
who directly participate in military operations are not 2
entitled to special respect but should be treated as other 3
combatants are, in accordance with the provisions of the 4
Geneva Conventions and this Protocol. Entitlement to 5
special protection would only begin when they are captured. 6
In the case of Article 75, its adoption is militarily 7
advantageous insofar as it might make mistreatment or 8
captured American military personnel more difficult to 9
justify in future conflicts. An understanding to reject 10
Soviet misinterpretation of this article should be adopted 11
if the United States ratifies. 12

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E. COMPLIANCE MECHANISMS (U)

1. (U) US Negotiating Objectives. In World War II, the Korean War and the war in Southeast Asia the United States faced the problem of systematic violations of the Geneva Conventions by its adversaries. A major objective of the United States in entering the negotiations that led to the Protocol was, therefore, to achieve more effective mechanisms to ensure compliance with this body of law. In particular, the United States sought to strengthen the institution of the "protecting power." Under this concept, a neutral state assumes the responsibility for protecting a country's citizens who are in the custody or control of a particular enemy power, whether as prisoners of war, civilian internees, or inhabitants of occupied territory. This practice, which worked reasonably well in the two World Wars, has only rarely worked since 1945, largely because of the refusal of Communist governments to allow a neutral power to inspect either their prisoner of war or internment camps.
2. (U) The Soviet Compliance Record. Soviet policies on Geneva Convention matters have strongly influenced those of its allies and client states. The Soviet record of compliance with these instruments should have considerable impact on US

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expectations as to whether the Conventions and the Protocol 1
would be followed in practice by adversaries in future 2
conflicts. 3

a. (X) During World War II, the USSR was not a party to the 4
1929 Geneva Conventions. It was, however, bound by the 1907 5
Hague Regulations on Land Warfare, which contain basic rules 6
on the humane treatment of prisoners of war and civilians in 7
occupied territory. The Soviets consistently disregarded 8
these obligations. After the September 1939 invasion of 9
Poland, thousands of Polish prisoners of war disappeared and 10
have never been accounted for by the USSR; some of them were 11
apparently killed and buried in mass graves in the Katyn 12
Forest. During the 1939-1940 conflict with Finland, the 13
Finns allowed the international Red Cross to inspect one of 14
their PW camps and furnished the Red Cross with information 15
on captured Russians. The Soviets never reciprocated. 16
During World War II itself, about 40 percent of German 17
prisoners of war died in Soviet captivity. After the German 18
invasion of Russia, the Red Cross offered its services to 19
both belligerents. The Germans gave the Red Cross one list 20
of captured Russians and allowed them to briefly visit one 21
prisoner of war camp, but, again, despite assurances to the 22

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contrary, the Soviets never reciprocated in practice. The 1
Germans, therefore, refused to cooperate further where 2
Russian prisoners of war were concerned. In the Far East, 3
the Soviets also failed to account for thousands of Japanese 4
prisoners of war captured in the closing days of the war. 5
(To a degree, Soviet mistreatment of German prisoners of war 6
and civilians can be rationalized as a result of the 7
similarly brutal Nazi policies toward Russians; this does 8
not account, however, for Soviet mistreatment of the Poles 9
and Japanese PWs.) 10

b. (U) Afghanistan is the first extended combat operation 11
conducted by the Soviet Union since 1945. In the view of 12
the United States, Afghanistan is occupied territory, 13
governed by the provisions of the 1949 Geneva Convention on 14
Civilian Persons. In the Soviet view, Afghanistan is 15
involved in an internal conflict, with the Soviet Army 16
helping the legitimate government. Even on that premise, 17
however, common Article 3 of the 1949 Conventions would 18
apply to the conflict. Soviet practices in Afghanistan have 19
suggested no change in its policies since World War II, 20
insofar as those policies place an extremely low priority on 21
compliance with the Geneva Conventions. Torture, 22

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indiscriminate killing of noncombatants, and executions 1
without trial, all forbidden by common Article 3, have been 2
widely practiced by Soviet forces in Afghanistan. In 1982, 3
the international Red Cross negotiated an agreement among 4
the Soviets, the Afghan Government, and the guerrillas, 5
under which prisoners taken by the guerrillas would be 6
interned in Switzerland. Several prisoners have been 7
interned under this arrangement, but its future is in doubt 8
due to a failure to reciprocate on the part of the Afghan 9
and Soviet Governments. The guerrillas entered into this 10
arrangement in the expectation that the Red Cross would also 11
be allowed to visit political prisoners being held in Afghan 12
Government prisons. After one such visit in 1982, the 13
Afghan Government refused to allow any further Red Cross 14
visits. Red Cross appeals to the Soviet and Afghan 15
Governments to allow further visits have not, to date, been 16
effective. 17

c. (✓) Conclusion. For 40 years, the Soviet Union has 18
persistently refused to carry out its humanitarian 19
obligations in armed conflicts. In particular, it has 20
persistently refused to allow any third-party inspection of 21
its prisoner of war camps or other detention facilities, 22

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whether by a neutral protecting power or by the
International Committee of the Red Cross.

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3. ~~(U)~~ Compliance Mechanisms in the Protocol. Consistently
with practices described in the preceding paragraph, the
Eastern Bloc countries strongly resisted any effort to require
third-party supervision of compliance with the Protocol and the
Geneva Conventions. The results of the effort to strengthen
the Geneva Conventions' compliance mechanisms were, therefore,
meager.

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a. ~~(U)~~ Third-Party Involvement (Articles 5, 81, and 89).

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Article 5 of the Protocol describes in detail the procedures
to be used in appointing a neutral protecting power. It
does not, however, expressly require that a state holding
enemy prisoners of war or civilians accept such a power.
On the contrary, it expressly refers to the requirement that
a protecting power be accepted by the detaining power. In a
sense, this is a step backward from the 1949 Conventions,
which do not mention the requirement that the detaining
power "accept" the protecting power (though the need for
this consent was recognized in custom). Article 5 of the
Protocol does state that the detaining power "shall accept"
the services of the International Committee of the Red Cross

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(or a similar organization) if a protecting power is not 1
agreed upon. The same language already appears in the 1949 2
Conventions, but this has not prevented Communist 3
governments, and others, from refusing to allow the Red 4
Cross to function as a alternative to a protecting power. 5
Article 81 of the Protocol requires the parties to help both 6
the national and international Red Cross in their 7
humanitarian activities. Article 89 requires the parties to 8
cooperate with the United Nations in the event of serious 9
violations of the Conventions and Protocol. Neither of 10
these provisions creates an unambiguous, positive obligation 11
to allow third-party supervision of the implementation of 12
humanitarian law in armed conflict. There is no reason to 13
believe that Articles 5, 81, and 89 of the Protocol will be 14
more successful than comparable provisions in the 1949 15
Geneva Conventions. 16

b. ~~(a)~~ Fact-Finding Commission (Article 90). One major 17
innovation of the Protocol is the creation of a permanent 18
15-member International Fact-Finding Commission to 19
investigate alleged grave breaches or serious violations of 20
the Protocols and the Conventions and to "facilitate, 21
through its good offices, the restoration of an attitude of 22

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respect for the Conventions and (the) Protocol." The Commission cannot act, however, without the consent of the parties to the dispute. Such consent can be given either on a one-time, permanent basis or on an ad hoc basis for a particular dispute. Given the persistence of the Soviet refusal to allow third-party supervision of the Geneva Conventions, it is extremely unlikely that either the USSR or any of its allies or clients would consent to the activities of the Commission. Historically, the United States has consented to the jurisdiction of such bodies on a permanent basis (e.g., the World Court in The Hague), and the US Government would presumably do so again if it ratifies the Protocol.

c. (X) Criminal Liability and "Grave Breaches" (Articles 85-88). Following World War II, the Allied Powers prosecuted a number of enemy personnel for "war crimes"--violations of the laws and customs of war as they then existed. The 1949 Geneva Conventions, building on this precedent, created the concept of "grave breaches" of the Conventions. These are exceptionally serious, deliberate violations of the Conventions (e.g., murdering or torturing prisoners of war). The parties to the Conventions are

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required to search for persons suspected of such breaches 1
and either bring them to trial when found or extradite them 2
to another party for trial. In practice, these provisions 3
have been largely a dead letter, and few if any trials or 4
extraditions have been held as a result of the "grave 5
breaches" provisions of the Conventions. The Protocol does 6
little to strengthen the "grave breaches" system, though 7
Article 88 does state a generalized obligation to cooperate 8
with other parties in criminal prosecution and extradition 9
matters. Article 85 builds on the 1949 provisions by 10
reading into them a new set of "grave breaches" of the 11
Protocol. Again, these are serious and deliberate 12
violations of the Protocol, especially those parts of it 13
that regulate combat operations (Articles 48-57). 14
Article 86 creates an obligation on commanders to prevent 15
the commission of grave breaches whenever they have 16
information that should lead them to believe that 17
subordinates have been or will be committing grave breaches 18
of the Conventions or the Protocol. It also makes it clear 19
that a grave breach can be committed by inaction as well as 20
by a positive act. Article 87 requires the parties to 21
ensure that their military commanders disseminate the 22

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Protocol and the Conventions to their commands and suppress, 1
prevent, and report grave breaches of those instruments. 2
The obligations created by Articles 86 and 87 are well 3
within the precedents for war crimes liability established 4
by American tribunals after World War II. To fully 5
integrate them into military law would probably require the 6
adoption of punitive regulations by the Services. In 7
general, the Protocol provisions on grave breaches are 8
acceptable, with two exceptions. First, Article 85, 9
paragraph 3(c), makes deliberate attack on works and 10
installations containing dangerous forces a grave breach. 11
This implements Article 56 of the Protocol, and since a 12
reservation of that Article is recommended, a parallel 13
reservation should be taken to Article 85, paragraph 3(c). 14
Second, Article 85, paragraph 4(c), makes "practices of 15
apartheid," in willful violation of the Conventions or 16
Protocols, a grave breach. As with Article 1, paragraph 4, 17
and Article 47, this provision is intended to express a 18
political point of view, not to create an enforceable 19
obligation. "Apartheid" is a concept unique to the internal 20
law of the Republic of South Africa. Without a thorough 21
knowledge of South African domestic law, it is impossible to 22

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say what this paragraph forbids. While a reservation to 1
this provision might validly be recommended, such a 2
reservation would probably be misconstrued as expressing 3
support for the "apartheid" policy. An understanding is 4
therefore recommended, if the United States ratifies the 5
Protocol. A draft appears in the Annex. 6

d. ~~(U)~~ Miscellaneous Mechanisms (Articles 6, 7, 82, 83, 84, 7
and 91). The Protocol includes various other mechanisms to 8
encourage compliance. Most of these simply build on the 9
existing provisions of the Hague and Geneva Conventions, 10
which require dissemination and education in the rules of 11
international humanitarian law. Thus, the Protocol 12
contemplates the adoption of implementing regulations for 13
the armed forces of states party to it (Article 84) and the 14
dissemination of the Protocol to those forces (Article 83). 15
It also requires that legal advisors be made available to 16
national armed forces (Article 82) and encourages the 17
training of specialized experts in the Protocol and 18
Conventions (Article 6). Article 91 requires states whose 19
armed forces have violated the Protocol or Conventions to 20
pay compensation to injured parties, a provision that merely 21
restates existing law of state responsibility. One 22

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promising compliance mechanism introduced by the Protocol is 1
in Article 7, which authorizes the Government of Switzerland 2
to convene a meeting of states party to the Protocol, at the 3
request of any party and with the approval of a majority of 4
parties, to discuss "general problems concerning 5
application." Attempts to convene such a meeting to discuss 6
specific alleged violations would probably meet with 7
considerable resistance, especially from any Eastern Bloc 8
parties, since the Article limits the meeting's competence 9
to "general problems." It might still be possible to 10
discuss specific violations as evidence of a "general 11
problem" but the alleged violators would probably regard 12
such efforts as out of order and walk out of the meeting or 13
not participate. 14

e. ~~(*)~~ Conclusion. While its compliance articles are 15
acceptable, the Protocol has not significantly improved the 16
international machinery for ensuring compliance with 17
international humanitarian law in armed conflict. The 18
United States did not, therefore, achieve its most important 19
negotiating objective in participating in the Protocol 20
negotiations. This conclusion lends greater importance to 21
the earlier recommendation that the limits on reprisals in 22

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Articles 51-56 be reserved. If the United States cannot
rely on neutral supervision to ensure compliance with
humanitarian law, then the threat of unilateral retaliation
retains its importance as a deterrent sanction to ensure at
least a minimum level of humane behavior by US adversaries.

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F. APPLICABILITY TO NUCLEAR AND CHEMICAL WEAPONS ~~(U)~~ 2

1. ~~(U)~~ The United States participated in the negotiation of the 2
Protocol on the assumption that its rules on the conduct of 3
combat operations would not apply to the use of nuclear 4
weapons, a position based on statements in the introduction to 5
the original draft of the Protocol tabled by the Red Cross. 6
During the course of the negotiation, the United States and 7
several of its allies made statements for the record reflecting 8
this position. These statements were expressly contradicted by 9
only one delegation (India), but the legal advisor to the East 10
German delegation has recently asserted, in an article 11
published by the Red Cross, that his delegation's statement in 12
relation to Article 51's ban on "indiscriminate" attacks was 13
also intended to assert that the Protocol applied to nuclear 14
weapons. This statement referred to "the uncontrolled 15
development and barbarous use of highly-sophisticated weapons" 16
and to using Article 51 as "a solid basis for mobilizing public 17
opinion against imperialist methods and means of warfare."*** 18
Both the United States and Great Britain signed the Protocol 19
subject to an understanding that its rules on the conduct of 20
warfare did not apply to nuclear weapons. In 1983, the Joint 21
Chiefs of Staff advised the Secretary of Defense that this 22

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understanding should be expanded to include use of chemical 1
weapons as well as the use of nuclear weapons.**** 2

2. (9) By its express terms, the Protocol does not exclude 3
chemical and nuclear weapons from the purview of its rules. In 4
the absence of an understanding excluding such weapons from the 5
scope of the Protocol, the rules against indiscriminate methods 6
of warfare and excessive collateral damage in Articles 51-57 7
might severely limit the utility of such weapons. The problem 8
with taking a reservation on this subject is that such an act 9
would constitute a formal admission that, in the absence of the 10
reservation, the Protocol does apply to nuclear and chemical 11
weapons. This could create problems if the United States 12
needed to launch such weapons from the soil of allies who had 13
not taken a similar reservation, or a reservation to Articles 14
35 and 55 on collateral impact on the environment. At a 15
minimum, a reservation would, as the East German delegate 16
predicted, make the Protocol a more solid basis for mobilizing 17
local opinion against deployment of nuclear and chemical 18
weapons. 19

3. (10) The problem with using an understanding to expressly 20
exempt these weapons from the terms of the Protocol is that an 21
understanding is merely a statement that a particular country 22

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intends to interpret a treaty in a particular manner. Other 1
countries can reject the understanding as an erroneous 2
interpretation of the treaty, but still regard the first 3
country as a party bound by all its terms. There is already 4
considerable dispute among legal experts as to whether the 5
Protocol, by its terms, would apply to nuclear and chemical 6
weapons, so rejection of such an understanding is not unlikely. 7
The only solution, consistent with ratification of the 8
Protocol, that would arguably protect our interest in 9
preserving flexibility in the employment of weapons of mass 10
destruction would be to make our agreement to enter treaty 11
relations with any country expressly conditional on acceptance 12
of our understanding concerning nuclear and chemical weapons. 13
Rejection of such an understanding would, in effect, require 14
rejection of the ratification itself. However, the 15
understanding would have to be broadly worded to make it clear 16
that the rules related to use of weapons in the Protocol do not 17
have any effect on the use of nuclear or chemical weapons. 18
This wording is needed to minimize the risk that after 19
ratification some nations might, nevertheless, attempt to apply 20
the Protocol to such weapons by arguing that the Protocol 21
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merely codifies existing general international law norms; e.g.,
prohibiting indiscriminate attacks.

4. ~~(P)~~ Conclusion and Recommendation. It is recommended that
if the United States ratifies, it should expressly condition
its ratification on acceptance of an understanding excluding
the use of nuclear and chemical weapons from regulation by the
Protocol. Such an understanding would still leave herbicides
and riot control agents under the Protocol rules, but
reservations proposed earlier to Articles 35 and 55 should take
care of any unforeseen environmental problems surrounding the
use of these weapons. A draft understanding appears in the
Annex.

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G. EVALUATION AND CONCLUSIONS (S)

1. (S) The Protocol is one of the most complex agreements ever negotiated on the law of armed conflict. The complexity has been generated by both the length of the agreement and by the vagueness and breadth of its many provisions. While containing certain improvements to the 1949 Geneva Conventions, there is considerable controversy over what some provisions mean. Additionally, many of the Protocol provisions do not mirror principles of military strategy and tactics. Moreover, the operational and legal problems associated with the Protocol have necessitated numerous reservations and understandings. A resolution of the issue of ratification requires a balancing of the problems identified with the advantages to the United States which might result from ratification of the Protocol. 1
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2. (U) The objectives of the United States in entering into the Protocol negotiation were to improve compliance procedures for existing and future humanitarian law, to improve accounting for missing personnel in future wars, and to increase protection for medical aircraft. Of these three objectives, the first is obviously the most important, since the value of the other two will largely depend on whether there is a reasonable chance that our adversaries will comply with the Protocol. As noted 15
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above, US efforts to improve the compliance mechanisms failed almost completely, due to Eastern Bloc resistance. Although some improvements were made in the areas of missing personnel and medical aircraft, there is still no firm obligation to permit teams to search for, identify and recover the dead. Practical difficulties may often prevent US medical aircraft from using some of the protection of the Protocol. Further, the Soviet Union's record of compliance with humanitarian law, together with the experiences of the United States in its last three major wars, give little reason for confidence that adversaries in future conflicts would make a serious effort to comply with either the Protocol or the 1949 Geneva Conventions.

3. (X) The argument is sometimes made that, where humanitarian law treaties are concerned, the United States should not be concerned with the possibility of enemy violations when deciding whether or not to ratify. As long as one side in a war complies, this argument goes, then at least some innocent victims of war have been saved, and that is a better result than if neither side complies. There might be some validity to this argument if the Protocol merely regulated the subjects traditionally covered by the Geneva Conventions; i.e., protection of medical activities and persons in the custody of

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an enemy power. Articles 48-60, however, go far beyond this and attempt to regulate all aspects of combat operations. If one side in a war tries to conduct all its operations in conscientious compliance with such a comprehensive set of rules, perhaps under neutral supervision, while its adversary makes little effort to do the same, it seems inevitable that the result would be a degradation in the combat performance of the first belligerent. This is true even of rules that are, in principle, acceptable, such as Articles 52 and 57.

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4. (C) A critical issue with respect to Articles 35-60 of the Protocol is the applicability to nuclear weapons. Although the US position has been clearly stated that the Protocol does not cover such weapons, there is contrary opinion. Regrettably, the specific terms of the Protocol are silent on the nuclear issue. The bottom line is that the US nuclear deterrent is the cornerstone of our defense of the free world and the United States should carefully consider whether ratification would compromise US ability to protect strategic interests.

5. (X) Against the improvements in missing in action accounting and protection of medical aircraft that might flow from Protocol ratification, are to be weighed the militarily significant problems associated with the Protocol, including:

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- a. (X) The likelihood that some nations would reject the critical nuclear understanding. 1
- b. (X) Changes in the legal status of guerrillas, who would enjoy a better legal position than regular combatants in some situations. 2
- c. (X) The virtual elimination of reprisals as a deterrent against violations of the law of armed conflict. 3
- d. (X) Presumptions that objects and persons be considered civilian in case of doubt. 4
- e. (X) Prohibitions against attacking certain dams, dikes and nuclear power stations. 5
- f. (X) The injection of a political element into the application and administration of humanitarian law by Article 1, paragraph 4; Article 47; and Article 85, paragraph 4(c); 6
- g. (X) Ambiguous restraints against the use of cities and towns for military activities, such as logistics and C2 sites, and against attacks as enemy forces conducting military operations from cities and towns. 7
- h. (X) The likelihood that Soviet bloc countries will reject the Western understanding of the fundamental guarantees in Article 75. 8

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6. (X) Statistically, in order to make individual provisions 1
acceptable, it would be necessary to enter at least 23 2
reservations or understandings covering some 27 different 3
numbered articles. In other words, there are operational and 4
legal problems with more than 25 percent of the Protocol, 5
exclusive of the problem concerning the applicability to 6
nuclear weapons. Historically, so many reservations and 7
understandings would likely be considered incompatible with the 8
object and purpose of the treaty by many other nations. The 9
technical, legal, and operational difficulties associated with 10
other parties' selective acceptance or rejection of our 11
reservations and understandings could make the entire Protocol 12
unworkable. Thus, even with the numerous fixes designed to 13
make individual provisions acceptable, the reservations and 14
understandings as a whole do not adequately reconcile the 15
overall legal and operational problems associated with the 16
Protocol. Consequently, as a practical matter, there is a 17
serious question whether the United States can, in good faith, 18
ratify the Protocol with the many reservations and 19
understandings necessary to correct the Protocol's numerous 20
ambiguities and defects. Finally, it should be noted that, 21
even if the many reservations to the Protocol had not been 22

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necessary, there would still be serious problems in using it as a guide for military operations due to the large number of clarifying understandings required. The Protocol is neither a reliable codification nor an acceptable development of the law applicable in armed conflict. Even on the best assumptions, it can be made practical and acceptable only by the adoption of an excessive number of reservations and understandings. This result is in contrast to a fundamental objective of the United States during the Protocols negotiation: to develop new rules of law that are clear, are capable of being accepted by States, and are capable of being applied in practice.

7. ~~(S)~~ Even if the United States does not ratify the Protocol, there is some danger that the unacceptable portions of it might become binding on our government as customary international law. This would require that the Protocol be generally accepted by the other nations of the world, including the other major military powers, and that its provisions be actually followed in war for a sufficient period of time to become a general practice accepted as law. At present, only 46 nations are party to the Protocol, as compared to the 161 nations party to the 1949 Geneva Conventions, and the over 170 nations party to the UN Charter, so the Protocol is far from being generally

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accepted at this time. The Protocol is so complex that it is 1
unlikely that all of it would ever be accepted as customary 2
international law. A far more likely scenario is that certain 3
parts of the Protocol would eventually be accepted in practice 4
by most of the world's nations, and would then become customary 5
law. The United States should, therefore, encourage the 6
adoption as customary law of advantageous portions of Protocol, 7
specifically those portions dealing with medical aircraft and 8
missing in action personnel. 9

8. (X) New rules of customary international law do not bind 10
nations that have persistently objected to the new custom. The 11
United States should, therefore, publicly make known its 12
opposition to those parts of the Protocol which are militarily 13
unacceptable (primarily Articles 50-58). This might prevent 14
these provisions from becoming accepted by other nations as 15
customary law, and would prevent the United States from 16
becoming bound even if they are accepted as custom by other 17
nations. 18

9. (X) On balance, the problems with the Protocol seem to far 19
outweigh the benefits of ratification. Further, ratification 20
simply as a leadership device or as an incentive for compliance 21
by others historically has not born fruit. A decision against 22

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ratification, however, would still permit the United States to introduce into its military practices those provisions which are fundamentally fair, clear, and genuinely humanitarian in their nature. This approach would compromise neither our legitimate military concerns nor our principled world leadership. Therefore, the United States should not ratify this Protocol.

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* M. Bothe, K. Partsch and W. Solf, New Rules for Victims of Armed Conflicts (1982), p. 434
** 50 United States Code 1702(b)
*** Volume VI, "Official Records of the Diplomatic Conference 187 (1978)"
**** JCSM-92-83, 28 March 1983, "The 1977 Additional Protocols and Weapons of Mass Destruction (U)"

~~CONFIDENTIAL~~

ANNEX

DRAFT RESERVATIONS AND UNDERSTANDINGS

1. Treaty relations with the United States are expressly	<u>3</u>
conditioned on acceptance of the following understanding:	<u>4</u>
That the rules relating to the use of weapons introduced by	<u>5</u>
this Protocol apply exclusively to conventional weapons	<u>6</u>
without prejudice to any other rules of international law	<u>7</u>
applicable to other types of weapons. In particular, the	<u>8</u>
rules so introduced do not have any effect on and do not	<u>9</u>
regulate or prohibit the use of nuclear or chemical weapons.	<u>10</u>
2. The United States reserves Article 1, paragraph 4.	<u>11</u>
3. In reference to Article 11(5), the United States reserves	<u>12</u>
the right to authorize any surgery necessary to save the life	<u>13</u>
of any person in its custody or under its control.	<u>14</u>
4. In reference to Articles 16 and 17, the United States makes	<u>15</u>
the following reservations:	<u>16</u>
a. Article 16 is reserved to the extent that it would affect	<u>17</u>
the internal administration of the United States Armed	<u>18</u>
Forces, including the administration of military justice.	<u>19</u>
b. To the extent permitted under existing international law,	<u>20</u>
the United States reserves the right to stipulate the	<u>21</u>
conditions under which medical care is to be provided to	<u>22</u>
individuals committing belligerent acts against the United	<u>23</u>

States or its allies and cobelligerents. Measures taken	<u>1</u>
under this reservation will comply with the 1949 Geneva	<u>2</u>
Conventions and will recognize the obligation of the Parties	<u>3</u>
to an armed conflict to ensure that all victims of the	<u>4</u>
conflict, including the sick and wounded, receive humane	<u>5</u>
treatment and adequate care.	<u>6</u>
5. The United States Government understands that the provision	<u>7</u>
in Article 28(2) prohibiting medical aircraft from carrying	<u>8</u>
equipment used to collect or transmit intelligence data does	<u>9</u>
not preclude the presence of communications equipment and	<u>10</u>
encryption materials, or their use solely to facilitate	<u>11</u>
navigation, identification, and communication in support of	<u>12</u>
medical operations.	<u>13</u>
6. In reference to paragraph 3 of Article 35, and paragraph 1	<u>14</u>
of Article 55, the United States reserves the words "or may be	<u>15</u>
expected."	<u>16</u>
7. In reference to the second paragraph of Article 39, the	<u>17</u>
United States reserves the words "or in order to shield, favor,	<u>18</u>
protect or impede military operations."	<u>19</u>
8. The United States understands, in relation to Articles 41,	<u>20</u>
56, 57, 58, 78, and 86, that the word "feasible" means that	<u>21</u>
which is practicable or practically possible taking into	<u>22</u>

account all circumstances ruling at the time, including 1
humanitarian and military considerations. 2

9. It is the understanding of the United States that Article 3
41, paragraph 3, does not obligate a Detaining Power to release 4
prisoners of war simply because these individuals cannot be 5
immediately evacuated from a combat zone. The United States 6
continues to recognize, however, an obligation to provide for 7
the safety of such personnel. 8

10. It is the understanding of the United States in relation to 9
Articles 51(5)(b), 52(2), and 57(2)(a)(iii) that the military 10
advantage anticipated from an attack must be considered as a 11
whole and not only from isolated or particular parts of the 12
attack and that incidental civilian losses are excessive only 13
when tantamount to the total disregard for the safety of the 14
civilian population. It is the understanding of the United 15
States that whether targets are "clearly separated and distinct 16
military objectives" will be judged on the basis of the 17
viewpoint of the attacking force taking into account all 18
factors either within or beyond the control of the attacking 19
force which might affect its ability to separate and identify 20
military targets. 21
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11. The United States reserves the first paragraph of Article 43, Article 44, and the third paragraph of Article 46.	<u>1</u> <u>2</u>
12. The United States reserves Article 47.	<u>3</u>
13. In reference to paragraph 1 of Article 50, the United States reserves the second sentence of that paragraph. The United States reserves the third paragraph of Article 52.	<u>4</u> <u>5</u> <u>6</u>
14. The United States reserves Article 56, and paragraph 3(c) of Article 85.	<u>7</u> <u>8</u>
15. The United States declares that it accepts the obligations of Articles 51-55, except as reserved herein, only on the basis that any adverse party against which the United States might be engaged will itself scrupulously observe those obligations as well as its other obligations under the law applicable in armed conflict. In particular, if an adverse party makes deliberate attacks, in violation of Articles 51-55, against the civilian population or civilians, or against civilian objects, including such attacks in the territory of an ally of the United States, the United States will regard itself as entitled to take measures otherwise prohibited by those articles to the extent that it considers such measures necessary for the purpose of compelling the adverse party to cease committing violations of its humanitarian obligations.	<u>9</u> <u>10</u> <u>11</u> <u>12</u> <u>13</u> <u>14</u> <u>15</u> <u>16</u> <u>17</u> <u>18</u> <u>19</u> <u>20</u> <u>21</u> <u>22</u>

16. The United States understands that Article 53 establishes a special protection for a limited class of objects which, because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort. 1
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17. It is the understanding of the United States that paragraph 3 of Article 54 has no application to attacks that are carried out for a specific purpose other than denying sustenance of the civilian population or the adverse party. 7
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18. It is the understanding of the United States that the obligation to comply with Article 57, paragraph 2(b), only extends to commanders who have the authority to cancel or suspend attacks. 11
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19. It is the understanding of the United States that Article 58 does not prohibit the use of urban terrain for military purposes when military necessity dictates such use and further, that potential danger to the civilian populace is only one factor to be considered in formulating overall defense planning. 15
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20. The United States understands that in relation to Articles	<u>1</u>
51-58, military commanders and others responsible for planning,	<u>2</u>
deciding upon or executing attacks necessarily have to reach	<u>3</u>
decisions on the basis of their assessment of the information	<u>4</u>
from all sources that is available to them at the relevant	<u>5</u>
time.	<u>6</u>
21. The United States understands, in relation to paragraph 4	<u>7</u>
of Article 51, that neither harassing fires delivered on enemy	<u>8</u>
locations for the purpose of disturbing the rest, curtailing	<u>9</u>
the movement or lowering the morale of troops, nor interdiction	<u>10</u>
fires delivered on selected terrain for the purpose of denying	<u>11</u>
the enemy the unrestricted use of these areas, are indiscrim-	<u>12</u>
inate attacks.	<u>13</u>
22. In reference to Article 85, paragraph 4(c), the United	<u>14</u>
States understands that the word "apartheid" refers solely to	<u>15</u>
acts of discrimination on the basis of race or color, in	<u>16</u>
violation of the Conventions or this Protocol.	<u>17</u>
23. The United States understands that the term "light	<u>18</u>
individual weapons" excludes fragmentation grenades and similar	<u>19</u>
devices, as well as weapons which cannot fully be handled or	<u>20</u>
fired by a single individual and those designed or intended for	<u>21</u>
non-human targets.	<u>22</u>

24. It is the understanding of the United States that Articles	<u>1</u>
61-67 of the Protocol are not intended to restrict the rights	<u>2</u>
of belligerents to attack a military objective as defined in	<u>3</u>
other articles of the Protocol and other applicable	<u>4</u>
international law. It is further understood that deliberate	<u>5</u>
misuse of the civil defense sign is a violation of Article 38	<u>6</u>
of this Protocol, and that killing, injuring, or capturing an	<u>7</u>
enemy through such misuse is a violation of Article 37 of this	<u>8</u>
Protocol.	<u>9</u>
25. In relation to Article 63, paragraph 1, it is the	<u>10</u>
understanding of the United States that facilities will be	<u>11</u>
provided to civil defense organizations only within the	<u>12</u>
capabilities of the occupying power.	<u>13</u>
26. In reference to Articles 54 and 70, the United States	<u>14</u>
understands that these articles do not affect the existing	<u>15</u>
rules of naval warfare regarding naval blockade, contraband	<u>16</u>
control, submarine warfare or mine warfare, and further	<u>17</u>
understands reasons of imperative military necessity may	<u>18</u>
dictate against conclusion of the agreements contemplated by	<u>19</u>
Article 70.	<u>20</u>
27. It is the understanding of the United States that	<u>21</u>
Article 75 protects all persons not otherwise specifically	<u>22</u>

protected under the Conventions and Protocol I by more specific 1
and elaborate guarantees. The United States further under- 2
stands that all Parties must meet these standards of humane 3
treatment at all times and in all circumstances. The United 4
States rejects any reservation or understanding that attempts 5
to limit the class of persons to which this Article applies 6
other than those who are expressly excluded by the language of 7
the Article. 8
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