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THE 1974 DIPLOMATIC CONFERENCE ON THE LAW OF WAR: A VICTORY FOR POLITICAL CAUSES AND A RETURN TO THE "JUST WAR" CONCEPT OF THE ELEVENTH CENTURY

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To many individuals, attorneys as well as laymen, the phrase "Law of War" appears to be a contradiction in terms. The feasibility of establishing rules and regulations by which men intentionally and systematically kill other human beings is continually questioned in many quarters. The attempt to place legal restraints on organized violence is often viewed as at best a ludicrous act, and at worst, as an attempt to legitimate irrational and immoral behavior. However, even the most severe critics of the law of armed conflict must acknowledge that history bears stark witness to the fact that war has been a constant companion of human affairs.

In the 3,500 years since man began writing his history, he has recorded only 270 years unmarked by conflict.¹ The United States itself has enjoyed only two brief decades of peace in the last two centuries. Thus, though the nature of war has changed as civilization and technology have changed, Isaiah's prophecy of swords being beaten into plowshares has not come to pass.² Instead, the 2,400 years since Plato's death have proved his prediction that only the dead have seen the end of war; current evidence of his philosophical foresight lies in the fact that violence continues to flourish in today's international community in the form of "wars of self-determination."³ Acknowledging the reality of war and the death and destruction resulting from it, men have attempted both to control the means and methods of waging combat and to eliminate the unnecessary suffering of combatants and non-combatants, on and off the

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¹ L. Monrross, War Through the Ages 313 (3d ed. 1964).
² Isaiah 2:4.
³ This concept is extensively discussed at a later point. See notes 24-26, 28-67 and accompanying text infra.
battlefield. The Law of War\(^1\) has been consistently developed on the premise that excessive violence and needless destruction are superfluous to actual military necessity, and are not only immoral but also counterproductive to the attainment of the objectives of the use of military force.

In February and March of 1974, representatives of the international community met in Geneva for a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, ostensibly aimed at once again modernizing and supplementing the humanitarian safeguards of the current law in this area. Many government representatives entered this session with the belief that substantial progress could be made toward improving the plight of those unfortunate enough to be involved in future conflicts. Indeed, as the conference began, chances of success in this most difficult and complex field of international law were viewed with at least guarded optimism.\(^5\) As the conference ran its course, however, this optimism gave way to a pervasive atmosphere of frustration and well-reasoned concern by many of the participants for the future stability of the entire structure of the Law of War. Upon its termination, all delegates agreed that events which occurred during this diplomatic session will have a significant, and in the view of some, a disastrous impact on the international community as a whole.

As the American delegation prepares to attend a second diplomatic conference dealing with the Law of War which convenes in early 1975, it is essential that the events leading to the 1974 Diplomatic Conference as well as the conference itself be analyzed. The ramifications of the results of that conference and of the factors which

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\(^1\) The "Law of War" has been defined in many ways. For purposes of this study, this area of international jurisprudence is divided into three distinct areas: (1) Conflict Management—rules which attempt to prohibit or minimize the impact of armed conflict in the international community; (2) The Hague Regulations—rules contained in the Annex of the Fourth Hague Convention of 1907 which control the actual conduct of combat; and (3) the 1949 Geneva Conventions—agreements which pertain to the humanitarian protections accorded combatants and non-combatants, both on and off the battlefield. Many have expressed the view that only the Hague Regulations may validly be categorized as the "Law of War." These individuals consider it inappropriate to classify conflict management norms in terms of the Law of War. Others prefer to think of the 1949 Geneva Conventions as an integral part of "international humanitarian law." Hopefully, the discussion which follows will demonstrate the interrelationship of each of these aspects of the Law of War.

\(^5\) As an example of the goals associated with this form of optimism, see Prugh, Current Initiatives to Reaffirm and Develop International Humanitarian Law Applicable in Armed Conflict, 8 Int'l Law. 262 (1974).
THE LAW OF WAR

I. EVENTS LEADING TO THE 1974 DIPLOMATIC CONFERENCE ON THE LAW OF WAR

While demonstrating the apparent inevitability of war, history has called attention to the fact that the laws of war have been developed on the basis of past experience. The drafters of the Hague Conventions of 1907 drew upon the experience of the conflicts of the 19th century and the Russo-Japanese War of 1905. In much the same way, the 1929 Geneva Conventions were considered in the context of World War I and the 1949 Geneva Conventions dealt with issues that arose out of World War II. It is therefore not surprising that the existing Law of War has proven somewhat inadequate in dealing with situations which have evolved out of the conflicts in Southeast Asia, Southern Asia, Africa, and the Middle East. Civil wars, mixed civil and international conflicts, and guerrilla warfare in general have all given rise to problems under the 1949 Conventions and 1907 Hague Regulations.

Recognizing the fact that modern methods and means of conducting warfare often present insoluble problems when viewed in the context of existing law, the XXth International Conference of the Red Cross, meeting at Vienna in 1965, urged the International Committee of the Red Cross (ICRC) to pursue the development of international

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7 The International Committee of the Red Cross was formed in 1863 as the International Committee for the Relief of Wounded Soldiers. The present name was adopted in 1880. The Committee’s headquarters are in Geneva; its officers are of Swiss nationality. This organization promoted the Geneva Conventions of 1864, 1906, 1929
humanitarian law.\(^8\) Consistent with this recommendation, in May 1967 the ICRC suggested that all states parties to the 1949 Conventions consider restoring certain aspects of the Law of War which had fallen into disuse through the years. An inventory of prevailing standards was distributed to these states.\(^9\)

In May of 1968, the United Nations Conference on Human Rights invited the Secretary-General of the United Nations to contact the ICRC with a view toward initiating an extensive study of the current Law of War.\(^10\) In September of that same year, the ICRC informed representatives of the National Red Cross (Red Crescent, Red Lion and Sun) Societies that it was launching a new effort to reaffirm and develop humanitarian law applicable in armed conflicts. In so doing, it pointed out that the 1949 Geneva Conventions, almost twenty years old, showed significant shortcomings due to a lack of balance between their basically humanitarian rules of protection and those rules and regulations which were related to the actual conduct of hostilities. This was particularly felt to be true in the area of protection of civilian populations. The ICRC was quick to note, however, that there would be no attempt to revise these Conventions, for, if fully applied, these were viewed as offering effective guarantees to the victims of conflicts. Efforts were to be directed toward supplementing the Conventions and giving added precision on certain fundamental points.\(^11\)

Preparations for the conference, at which concrete rules to supplement existing international law in this area were to be adopted, consumed almost six years and required numerous consultations among various international and governmental bodies.\(^12\) Two protocols

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\(^8\) This action is generally regarded as the initial step in the series of events leading to the 1974 Diplomatic Conference on the Law of War. XXth International Conference of the Red Cross, Resolution XXVIII (Vienna, 1965), *reprinted at* 75 INT'L REV. OF THE RED CROSS 305 (1967).

\(^9\) For a text of this ICRC circular (Circular No. 468), see 75 INT'L REV. OF THE RED CROSS 300-11 (1967).

\(^10\) For a text of the resolution adopted by this Conference, see 90 INT'L REV. OF THE RED CROSS 615-16 (1969).

\(^11\) Of special interest is the fact that the ICRC's efforts were directed only toward the supplementation and clarification of the 1949 Conventions. This original intent on the part of the ICRC is of particular importance in the discussion that follows.

\(^12\) In September 1969 at Istanbul, the XXIst International Conference of the Red Cross unanimously adopted a resolution requesting the ICRC to draft concrete rules which would supplement existing international humanitarian law and invited government experts to meet for consultations with the ICRC on such proposals. For the text of this resolution, see 104 INT'L REV. OF THE RED CROSS 615-16 (1969). On the basis of
evolved from these deliberations—Protocol I on International Armed Conflicts and Protocol II on Non-International Armed Conflicts. As a result of two Conferences of Government Experts, the ICRC revised both of these protocols and prepared commentaries thereon. In revising the protocols, the ICRC emphasized that problems relating to atomic, bacteriological, and chemical warfare were subjects most suitable for specific international agreements or negotiations by governments on a bilateral or multilateral basis. Consequently, these matters were not dealt with in the protocols submitted for consideration. In order to study these documents, the Swiss Government convened the 1974 Diplomatic Conference on the Law of War. Anxious to ensure maximum participation in a conference of this importance, the Swiss extended invitations to all states parties to the 1949 Geneva Conventions and all members of the United Nations.

On hundred and twenty-five states appeared at the conference. The United States delegation was headed by George H. Aldrich, Dep-

this resolution, in May 1971 the ICRC convened a three week “Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,” to which some thirty-nine governments, including the United States, sent experts. These individuals considered various proposals that were placed before the Conference by the ICRC.

Unable to cover all of its agenda and confronted with complaints that there had not been a sufficiently representative group of states present, this Conference requested the convening of a second session open to all states parties to the 1949 Geneva Conventions. This second meeting took place in Geneva from May 3 to June 3, 1972, and was attended by more than 400 experts delegated by seventy-seven governments. The subject matter considered by those attending consisted of two protocols drafted by the staff of the ICRC—Protocol I on International Armed Conflicts and Protocol II on Non-International Armed Conflicts. In addition to the two sessions of the Conference of Government Experts, the ICRC arranged a number of consultative meetings with interested individuals and groups. In particular, it submitted drafts in 1971 and 1972 to Red Cross experts and representatives of non-governmental organizations in order to benefit from their opinions.

During this same time period, 1968-1972, the ICRC remained in constant contact with the United Nations and closely followed the work of the General Assembly in the area of human rights in armed conflicts. Beginning in 1968, the Assembly adopted a series of resolutions dealing with this area of the law. Prior to the passage of each resolution, the Secretary-General submitted to the Assembly detailed reports on various aspects of human rights during hostilities. Representative of such reports is that of 1970. See Report of the Secretary-General, Respect for Human Rights in Armed Conflict, U.N. Doc. A/8052 (1970). Additionally, representatives of the Secretary-General actively participated in the two Conferences of Government Experts. These events undoubtedly acted as an effective incentive for the ICRC to move forward as quickly as possible with its work, since the ICRC views itself as a more objective and less politicized organization than the United Nations and as a more appropriate body than the United Nations to address these problems. The author concurs in this view.
uty Legal Adviser, Department of State. Having done extensive work toward formulating detailed positions on each of the two protocols, the United States delegation was prepared to engage in extensive negotiations on an article by article basis. As the conference opened, it became obvious that this was not to occur.

II. THE 1974 DIPLOMATIC CONFERENCE ON THE LAW OF WAR

During the five weeks of planned conference activities, four major obstacles prevented delegates from reaching agreement on any matters of substantive significance. Three of these areas of diplomatic confrontation concerned the organization of the conference itself, while the fourth and most serious point of conflict resulted from events which occurred in the first of the conference’s three main committees.13

A. Organizational Problems of the Conference

Prior to convening the conference, the Swiss Government proposed that negotiations and debate take place in three primary Committees and that an Ad Hoc Committee on Weapons be organized to discuss matters of concern in this particular area of the law. The conference agreed to this proposal. Committee I addressed the general provisions of Protocol I (International Armed Conflicts) and Protocol II (Non-International Armed Conflicts), Committee II was assigned the provisions of the Protocols concerning wounded, sick and shipwrecked persons, and Committee III was given responsibility for those articles dealing with the civilian population, methods and means of combat, and a new category of prisoners of war.

With the election of Mr. Pierre Graber, Vice President of the Swiss Federal Council and Head of the Political Department as President of the conference, the session opened in an atmosphere of agreement and purpose. However, this mood of optimism was quickly dispelled by the first of the three organizational matters which were to plague the substantive work of the delegates.

In months prior to the convening of the conference, the Swiss Government had consulted with a number of states that were to participate on the question of the manner in which the various con-

13 The discussion of the conference which follows is based primarily on an unpublished report of the United States delegation attending the session, submitted to the Secretary of State on June 10, 1974, by Mr. Aldrich and prepared by Richard R. Baxter, a member of the delegation [hereinafter cited as Delegation Report].
ference offices were to be filled. On the basis of these consultations, the Swiss Government submitted certain proposals to the diplomatic session as a whole. It soon became apparent, however, that these proposals were not acceptable to a majority of the delegations present. Debate revealed a widely held belief that offices should be allocated among regional groups, similar to the practice of the United Nations. As a result of this unexpected development, various regional groups were forced to engage in somewhat prolonged consultations in order to arrive at an acceptable allocation of offices. Final agreement was not achieved until March 1, more than one week after convocation of the session.

While the delegates were wrestling with the problem of officer allocation, a second and more serious obstacle to the initiation of substantive negotiations surfaced. This was the volatile question of whether states or organizations which had not received official Swiss invitations to attend the conference should nevertheless be allowed to participate in conference activities. This problem was fourfold.

Guinea-Bissau, which had acceded to the 1949 Geneva Conventions, with reservations, shortly before the opening of the conference, had not received an invitation to attend. This newly evolved state was nonetheless invited to participate in the activities of the session, a decision that was taken without a vote. Although the United States accepted this decision, it did submit a statement for the record emphasizing that its acceptance did not constitute any formal or informal recognition of Guinea-Bissau.

A more difficult question pertaining to representation occurred in the form of African and Arab national liberation movements, an issue which was foreshadowed by resolutions of the 1973 International Red Cross Conference and the United Nations General Assembly at its Twenty-eighth Session. These resolutions specifically called for participation of the liberation movements in the conference. The attempt to extend invitations to liberation groups was vigorously opposed by the United States and several other countries of the West European and Others (WEO) regional group. Opposition was based on the fact that past experience indicated that the participation of

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11 The United States was a member of the West European and Others regional group (WEO).
12 In the allocation of offices, Mr. Aldrich was elected to the Credentials Committee and Mr. Baxter, Rapporteur of Committee III, a post which also entailed membership on the Drafting Committee. Mr. Aldrich additionally served as Chairman of the WEO.
these organizations in the conference would most probably hinder any serious efforts toward advancing human rights in armed conflicts. The view was also expressed that since none of the organizations had gained international recognition as the legitimate representatives of an established state, they had no basis for participating in a conference called for the expressed purpose of formulating new concepts of international law.

The various liberation movements and their supporters\(^{17}\) refused to consider any form of settlement that called for the former to participate in the conference only as observers or as part of delegations from regional organizations, such as the Organization of African Unity. Many developing states continued to demand that each liberation movement be extended the rights and privileges of a sovereign state, including the right to cast a vote on every issue.

As in the problem of allocation of conference officers, it was not until March 1 that a resolution of invitation was agreed upon. The two most significant paragraphs of this resolution stipulated that the conference:

1. *Decides* to invite the National Liberation Movements which are recognized by the regional intergovernmental organizations concerned, to participate fully in the deliberations of the Conference and its Main Committees;

2. *Decides further* that, notwithstanding anything contained in the rules of procedure, the statements made or the proposals and amendments submitted by delegations of such National Liberation Movements shall be circulated by the Conference Secretariat as Conference documents to all the participants in the Conference, it being understood that only delegations representing States or governments will be entitled to vote.\(^{18}\)

As in the case of Guinea-Bissau, this resolution was adopted by the conference without a vote.\(^{19}\)

\(^{17}\) The supporters of such movements consisted primarily of Communist and third world states.


\(^{19}\) Those liberation movements attending the conference on the basis of the terms embodied in the Resolution were the African National Congress, the Angola National Liberation Front, the Mozambique Liberation Front, the Palestine Liberation Organization, the Panafriicanist Congress, the People's Movement for the Liberation of Angola, the Seychelles People's United Party, the South West African People's Organization, the Zimbabwe African National Union, and the Zimbabwe African People's Union.
In agreeing to this procedure, the Chairman of the United States delegation emphasized that participation by these groups in this particular diplomatic session should not be regarded as a precedent for future international conferences. Moreover, it is important to note that votes on each of these questions of representation were avoided only because there was a general consensus to do so, even though there was no consensus on the issuance of the invitations.20

The third and most serious problem of representation confronting the conference delegates was that of the “Provisional Revolutionary Government of the Republic of South Vietnam” (PRG), a group which had submitted an instrument of accession to the Geneva Conventions of 1949 only a month before the beginning of the conference. From the very first efforts by the PRG to gain representation, it was readily apparent that its objective was simply to use the conference as a public rostrum from which to carry out a time-consuming and purposeless propaganda campaign against both the Republic of Vietnam and the United States. This pattern of diplomatic behavior on the part of the PRG appeared to be particularly unsuited for a conference charged with supplementing the Law of War and advancing the cause of human rights in armed conflict.

In a significant tactical error, the delegation of the Democratic Republic of Vietnam (DRV) walked out of the conference immediately following its speech on the question of the PRG’s participation in the proceedings, two days prior to the vote on this matter. This was done as an expression of its disapproval of the failure of Switzerland to extend an invitation to this group. Seizing upon the diplomatic opportunity provided by the DRV’s absence, the United States actively sought either the adverse vote or abstention of as many delegations as possible. In the most dramatic vote of the conference, as of that point in the proceedings, the proposal to extend an invitation to the PRG to participate in the session was defeated by a vote of 37 to 38, with 33 abstentions, two-thirds being required for passage.21

The fourth and last organizational obstacle to achieving any substantive success occurred in the form of credentials. For varying reasons, the legitimacy of the credentials of several delegations attending the conference were challenged. Reservations were stated with respect to the Republic of Vietnam (a state which some delegations said should be represented in whole or in part by the PRG), South Africa (due to its policy of apartheid), Portugal (on the grounds that

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21 Id. at 5.
it had no right to speak for its overseas territories), the Khmer Republic (which several states asserted should have been represented by the Sihanouk regime), and Israel (on the ground that it was an aggressor). All of these reservations were noted and generated a certain degree of acrimonious debate. However, the report of the Credentials Committee was adopted without a vote, and no delegation was denied its right to participate.

From the nature of the four organizational difficulties which consumed the initial portion of the conference proceedings, it is evident that many of the delegations in attendance were significantly more interested in achieving political goals than in working toward a meaningful and effective Law of War. The true degree to which many states were willing to put political causes ahead of substantive achievement was demonstrated during the early meetings of Committee I.


Use of the phrase "work of the conference" in describing the various efforts of the three primary committees is a complete misnomer. The fact that virtually all of the work of the conference remains to be done at the second session which convenes in early 1975 indicates how little was accomplished during the five week conference of 1974. Due to the organizational problems which beset the proceedings and the activities of Committee I, only two weeks were devoted to substantive work.

During these two weeks of discussion, the conference failed to adopt a single provision of the more than 150 articles contained in the Draft Additional Protocols. Four articles and several paragraphs of a fifth were adopted in Committee III, and a technical annex on the identification of medical and civil defense personnel, transports, and installations were drafted but not adopted by a sub-committee of Committee II.\textsuperscript{22} Though there has been disappointment expressed over the fact that very little of any real value was accomplished in Committees II and III, it is the action that was taken in Committee I that has generated serious concern, not only for the success of the 1975 Conference but also for the future viability of the Law of War. Moreover, until the issues which Committee I's actions created are effectively dealt with, any further discussion concerning the particu-

\textsuperscript{22} Id. at 6.
lar provisions of Protocols I and II is rendered moot for all intents and purposes.

As Committee I opened its deliberations, three proposals were immediately submitted with respect to wars of "national liberation" and "self-determination"—a Soviet bloc proposal, a proposal by Algeria and fourteen other states (including Australia and Norway), and a proposal by Romania. Each of these would have had the effect of amending article 1 of Protocol I by making the law governing international conflicts applicable to wars fought for "self-determination against alien occupation or against colonialist or racist regimes." These three proposals were subsequently withdrawn, however, in favor of an expanded proposal of a similar nature, sponsored by 51 states. This proposal, together with another unrelated amendment to article 1, became Document CDDH/I/71, a document originally submitted by Argentina, Honduras, Mexico, Panama, and Peru.23

This proposed amendment of article 1 was vigorously opposed by the United States and a number of its European allies. Arguments as to the detrimental effect its adoption would have on the international community were forcefully stated. However, states of the Soviet bloc and the less developed countries, the principal supporters of the amendment, were adamant in their insistence upon the measure's adoption and expressed no interest in any form of compromise. As debate on the issue ended and a vote was taken, it was apparent that the sponsors of the proposal had far more than the necessary number of ballots. In an unmistakable expression of their acceptance of a "new" approach to the Law of War and their rejection of its traditional and current bases of application, the overwhelming majority of state delegates to Committee I voted for the adoption of Document CDDH/I/71.

The text of amended article 1, approved by a vote of 70 to 21, with 13 abstentions, reads as follows:

1. The present Protocol, which supplements the Geneva Conventions of August 12, 1949, for the Protection of War Victims, shall apply in the situations referred to in article 2 common to these Conventions.

2. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial and alien occupation and racist regimes in the exercise of their right of self-determination, as enshrined in the Charter

23 Id. at 7.

3. The High Contracting Parties undertake to respect and to ensure respect for the present Protocol in all circumstances.

4. In cases not included in the present Protocol or in other instruments of treaty law, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principle of humanity and from the dictates of public conscience.\(^4\)

In retrospect, the importance attached to and the support exhibited for this amendment by many of the delegations and their insistence upon placing its ideological acceptance before concepts of humanitarianism should have come as no great surprise. In recent years, wars of national liberation and self-determination have gained widespread support, especially from the newly evolved and third world states. Several international publicists, enamored with the idea of courageous men and women idealistically fighting for the freedom of various "peoples," have developed the somewhat novel "poor guerilla" theory, a concept that calls for special legal considerations to be given the often treacherous but always well-meaning revolutionary organizations engaged in guerrilla activities in various parts of the world.\(^5\) Moreover, recent documents of the United Nations, with its General Assembly now dominated by third world countries, have supported and broadly expanded the entire concept of self-determination.\(^2\) Lastly, and perhaps most importantly, the opportunity to force Western European and North American states to accept the basically third world concepts of national liberation and self-determination in the form of amended article 1 was most certainly viewed by the latter as a tremendous potential victory in their struggle to restructure traditional international law in a manner that would best meet their own particular needs and desires.

Based on the significant decree of support exhibited for amended

\(^{21}\) Id. at 9.


\(^{23}\) See U.N. Documents discussed at notes 37-40 and accompanying text infra.
article 1 in Committee I, it was generally felt that the measure might be submitted to the final plenary session of the conference and adopted by the requisite two-thirds vote. However, amidst a mixed atmosphere of surprise, disappointment, and relief, no final action was taken on article 1 by the conference as a whole. Instead, at the final plenary session, the following draft resolution was submitted by India and adopted without a vote:

The Conference,

Adopting the report of Committee I, containing its recommendation in paragraph 37 [that the text of article 1 approved by the Committee be adopted by the Conference],

Welcomes the adoption of article 1 of draft Protocol I by Committee I.27

Thus, amended article 1 has not been finally adopted. The dramatic shift in the concept of the applicability of the Law of War, so vigorously supported by advocates of wars of national liberation and self-determination, is not yet an accomplished fact. However, on the basis of the widespread enthusiasm demonstrated for the measure during the 1974 Conference, it is apparent that barring any substantial change in attitude by a sizable number of states, the formal adoption of article 1 is a virtual certainty in 1975. This fact gives rise to the basic consideration of whether the adoption of the article and the resultant shift in the types of conflict controlled by the traditional codified concepts of the Law of War will actually prove to be detrimental to the law's current degree of effectiveness. In short, what are the arguments for and against the adoption of this measure, and what are the major international ramifications that would flow from its final acceptance in 1975? The entire structure of the Law of War, present and future, now hinges upon the manner in which these issues are resolved and the nature of the decision made with regard to whether the United States and other major states should agree to be bound by the terms of article 1.

III. AMENDED ARTICLE 1: A DRAMATIC SHIFT IN THE TRADITIONAL CONCEPT OF THE LAW OF WAR

The major thrust of the argument advanced by those states advocating the adoption of amended article 1 centers around the fact that specific terms of the United Nations Charter and numerous resolutions of the General Assembly interpreting and implementing the

Charter state that peoples under colonial rule or otherwise denied their right of self-determination are entitled to independence. This being so, advocates of the amendment reason that these "peoples" may assert their right through the use of force and that the ensuing conflict must be categorized as international in nature, governed by the provisions of Protocol I.

Inherent in this contention is the thought, advanced during the past several decades by many of the newly evolved states, that the entire body of international jurisprudence must be modified in ways that will take into consideration their desires and needs. These states have consistently espoused the belief that international law as it presently exists is largely a product of Western European and industrialized North American countries, formulated on the concepts of colonialism, capitalism, and Christianity. As a result, many of its traditional rules are said to be inapplicable to the international community of the late twentieth century. The Law of War is considered a conspicuous example of these antiquated principles.

A discussion of this argument and the ramifications which would flow from its successful translation into the adoption of amended article 1 by the 1975 Diplomatic Conference can be accomplished by an analysis of three major problem areas: (a) the effect of article 1 upon international peace and security; (b) the circumstances under which certain national liberation movements would fall within the ambit of article 1; and (c) the effect of article 1 upon individual combatants engaged in armed conflicts.

A. The Effect of Article I Upon International Peace and Security

One of the principal concerns of those opposed to the adoption of article 1 is its marked tendency to restructure completely those concepts of international law which address the use of armed force in international relations. The most cursory study of the United Nations Charter evidences the fact that one of its primary goals is to prohibit a state from employing a threat or use of armed force, except in instances of legitimate individual or collec-

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25 If this argument proves successful, it is quite likely that proponents of amended article 1 will contend that in addition to the provisions of Protocol 1, each of the four 1949 Geneva Conventions must be deemed applicable to struggles "sanctioned" by the United Nations.

26 See note 4 supra regarding the norms of conflict management.

27 U.N. CHARTER, art. 2, paras. 3-4.
tive self-defense\textsuperscript{31} or in support of Security Council action pursuant to article 39. Moreover, no specific Charter article confers a positive right to use force on a self-help basis in order to achieve any of the enumerated purposes of the Charter,\textsuperscript{32} including that of self-determination. Lastly, and perhaps most significantly, public international law, including the Charter, only refers to the use of force by states in the international community. Periodic struggles by individuals against recognized governments within the territorial confines of a state have been considered solely matters of internal concern, affected by international rules and requirements only to a limited degree.\textsuperscript{33}

\textsuperscript{31} Id., art. 51.

\textsuperscript{32} The purposes of the United Nations are stated in Article 1 of the Charter.

\textsuperscript{33} These non-international conflicts are the sole subject matter of Protocol II. An attempt is made in this document to formulate specific rules and regulations applicable to these internal struggles. Currently, only common article 3 of the 1949 Geneva Conventions refers to conflicts of this nature:

\textit{ARTICLE 3. — CONFLICTS NOT OF AN INTERNATIONAL CHARACTER}

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

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those places \textit{hors de combat} by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

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

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

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

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
Notwithstanding these facts, however, amended article 1 of the Protocol defines the scope of international armed conflicts as including those “in which peoples are fighting against colonial and alien occupation and racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” Although the Declaration on Friendly Relations is a resolution of the General Assembly and thus not a binding international agreement, it is nevertheless generally considered to reflect recognized international law concepts. However, the Declaration is relatively innocuous and does not recognize any right to achieve self-determination or independence by force of arms. Consequently, reference to the Charter and the Declaration

GPW, supra note 6, art. 3.


The Declaration provides in pertinent part:

Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

(a) to promote friendly relations and co-operation among States; and

(b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations.

The territory of a colony or other non-self-governing territory has, under the Charter of the United Nations, a status separate and distinct from the territory of the State administering it; and such sepa-
on Friendly Relations in a multinational convention which defines the scope of international armed conflict as including wars of self-determination against colonialist and racist regimes results in a misleading impression; i.e., that it is the intent of these documents to sanction the use of force by certain “peoples” seeking to achieve an inherent right. Such an impression is extremely dangerous as well as legally unfounded. However, it has recently attained significant credibility as a result of several developments in the international community.

Throughout the last decade and continuing into the 1970s, substantial support has been demonstrated for conflicts waged for the avowed purpose of freeing certain “peoples” from a particular form of oppressive rule or creating a state where none previously existed. This sentiment was largely fostered by the war in Viet Nam. While Western European and United States authorities have consistently viewed these conflicts in terms of traditional concepts of conflict management, various other states have urged that special consideration be given participants in these “just wars.” They argue that inasmuch as the guerrilla patriot is fighting for an obviously just cause, he must not be restricted in his activities and methods of combat by traditional legal concepts largely formulated by the colonialist, imperialist, and racist states against whom he wages these wars of self-determination. The justness and correctness of his cause demands that the guerrilla be unfettered by legal principles that would stand in the way of the achievement of his goals. He cannot and must not be held to the same standards of international conduct expected of states and their uniformed combatants. Moreover, these states contend that the concept of conflicts waged in the name of self-determination is sanctioned by the United Nations and thereby approved by the international community, and must not be thought of in terms of traditional internal conflicts outside the purview of other states, but rather as one of struggles deserving both the moral and physical support of all countries. Several recent actions of the United States and the United Nations reflect this notion of a right to self-determination.

The immediate post-World War II years saw a shift in the concept of self-determination, which, at that time, formed the basis for the recognition of the rights of colonies. When the United Nations was formed, a Resolution was adopted which provided that the people of a colony or non-self-governing territory shall enjoy a right to self-determination.


31 That is, in terms of common article 3 of the 1949 Geneva Conventions and specific provisions of the U.N. Charter. See notes 30-31, 32 supra and note 45 infra.
Nations serve to demonstrate the substantive degree of international support that has been generated for this point of view.

On December 12, 1973, the United Nations General Assembly voted 83-13-19 to adopt a resolution entitled *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*. In its preamble, this resolution stated that colonialism is a crime which all colonial people have a right to oppose by any means necessary for success in their struggle.37 Among the operative provisions, two stand out:

2. Any attempt to suppress the struggle against colonial and alien domination and racist regimes . . . constitutes a threat to international peace and security.

3. The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions . . . is to apply to persons engaged in armed struggle against colonial and alien domination and racist regimes.38

This resolution was immediately preceded by another General Assembly resolution calling for the participation of national liberation movements in the 1974 Diplomatic Conference on the Law of War.39

Shortly after the adoption of these resolutions sanctioning the use of force in achieving self-determination, the United Nations Special Committee on the Question of Defining Aggression adopted a draft *Definition of Aggression*, accomplishing a task that had been underway since the earliest days of the organization. This document provides in relevant part:

Article 7—Nothing in this definition, and in particular Article 3, [enumeration of acts of force which qualify as acts of aggression] could in any way prejudice the right of self-

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37 U.N.G.A. Res. 3103 (XXVIII) (Dec. 12, 1973). The preamble provides in pertinent part:

[T]hat the continuation of colonialism in all its forms and manifestations . . . is a crime and that colonial people have the inherent right to struggle by all necessary means at their disposal against colonial powers and alien dominations in exercise of their right of self-determination recognized in the Charter . . . and the Declaration

38 Id.

determination, freedom, and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States . . ., particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principle of the Charter and in conformity with the above-mentioned Declaration.\footnote{U.N. Doc. A/Ac. 134/L. 46 (1974) (emphasis added).}

United Nations documents such as these bear stark witness to the fact that traditional concepts of conflict management are now thought of by much of the international community as inappropriate for “peoples” wars of “self-determination.” An indication of the future support given these conflicts by the majority of United Nations members is evidenced in the remarks of the newly elected president of the 29th General Assembly, Foreign Minister Abdelaziz Bouteflika of Algeria. Shunning the impartial image past presidents have sought to maintain, he opened this year’s General Assembly by accepting the office as a representative of “…generations of freedom fighters who contributed to making a better world with weapons in their hands.”\footnote{Id. Mr. Bouteflika has transformed his words into action. He recently welcomed Yassar Arafat, leader of the militant Palestine Liberation Organization, to the United Nations General Assembly hall, introducing him as the “Commander-in-Chief of the Palestine Revolution.” Mr. Arafat was escorted into the hall by the United Nations Chief of Protocol and provided with the type of armchair given only to heads of state. Secretary-General Waldheim attempted to prevent this form of treatment being accorded Mr. Arafat, but was reportedly told by Mr. Bouteflika “to mind his own business.” The Washington Post, Nov. 18, 1974, at A-18, col. 1.} It is these individuals, he contended, who demonstrate that “…revolutionary violence is the only way for people to liberate themselves.”\footnote{Id.}

On the basis of the relevant United Nations documents that have preceded it and the general tenor of current international opinion, it is apparent that the adoption of amended article 1 would largely vitiate current conflict management norms. This article, when considered in conjunction with the 1970 Declaration on Friendly Relations, United Nations General Assembly Resolution 3103 (XXVIII) and the newly drafted \textit{Definition of Aggression} tends to legitimize through positive international law a unilateral resort to armed force in order to achieve self-determination. Moreover, a viable legal argu-
ment might well exist that, since a certain "people" may unilaterally resort to force in order to achieve the internationally sanctioned right of self-determination, third states also have the right or perhaps even the duty to intervene militarily in support of these liberation movements. It is not difficult to imagine the possible consequences of the adoption of this theory by a substantial portion of the international community. Existing legal prohibitions against the use of force in order to achieve desired political goals would be completely negated. Furthermore, the decision to sanction the use of force in the achievement of self-determination might establish a precedent that would lead to the legitimization of unilateral or multilateral resort to force in order to accomplish any of the purposes set forth in the United Nations Charter. Such a result can readily and validly be analogized to the eleventh century "just war" concept used during the Crusades to justify killing in the name of God.

The effect that the adoption of amended article 1 will have on established concepts of conflict management is substantial. Reference to struggles for self-determination in the context of an article conferring a preferred status on particular armed conflicts elevates the principle of self-determination to the position of a legal right, justifying the use of armed force by now-favored liberation movements and perhaps even by third states, despite the fact that neither self-defense nor Security Council action is involved. Thus, where claims of self-determination are espoused, war once again becomes a legally recognized instrument for challenging and changing rights based on existing international law.

As a result, attempts to use the United Nations Charter to prevent unilateral recourse to war may be corrupted to the point that the Charter serves not as a prohibition against, but instead as a justification for again using armed force as an instrument for carrying out national policy. The adoption of amended article 1 by a majority of the world's states would clearly demonstrate a desire to refute the basic prohibitions against the use of force contained in the Charter. Discussion proceeds on the assumption that this desire will become a reality in 1975.


It can be persuasively argued that the real importance of the acceptance of amended article 1 by a majority of the international community lies in the fact that this provision effectively transforms
certain internal conflicts, which were previously considered matters exclusively within the domestic jurisdiction of a single state, into international conflicts. Consequently, all rights and protections contained in Protocol I and quite arguably those in each of the 1949 Geneva Conventions must be accorded the combatants. Thus, the importance of common article 3 of the 1949 Conventions and draft Protocol II (Non-International Armed Conflicts) is substantially reduced. Indeed, many states, including the People's Republic of China, no longer view the latter document as necessary.

This transformation of certain internal conflicts into conflicts of an international nature is viewed by some as an unprecedented infringement upon state sovereignty and by others as an essential step toward the universal application of the humanitarian aspects of the Law of War. Regardless of the point of view, there is little doubt that the purpose of amended article 1 is to control strictly the activities of a state during certain instances of armed violence which may occur totally within its own boundaries. This is especially significant in light of the fact that Protocol I, in marked contrast to the 1949 Geneva Conventions, sets forth specific guidelines with regard not only to humanitarian protection but also to the means and methods by which combat can legitimately be conducted. Proponents of amended article 1 would no doubt be quick to point out that the provisions of Protocol I would also control the conduct of national liberation groups. Yet due to the very nature of these conflicts, there is reason to question both the ability and willingness of such groups to adhere to the Protocol's provisions. This has led many observers to the conclusion that amended article 1 would in reality severely limit the defensive efforts of a government, while offering assistance to those individuals engaged in a struggle against it.

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43 See note 28 supra.
44 See note 33 supra.
45 This contention is based on common article 3 of the 1949 Geneva Conventions (see note 35 supra) and article 2, para. 7 of the United Nations Charter, which provides in pertinent part:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .

46 In this respect, Protocol I differs substantially from the 1949 Conventions it is intended to "supplement and clarify." These Conventions refer only to humanitarian protections, while rules pertaining to the means and methods of conducting combat are found only in the Hague Regulations. In Protocol I, specific guidelines relevant to the conduct of conflict are found, in part, in articles 33-41, 43, 46-50, and 52-53.
On one point, however, there is a full agreement. Adoption of amended article 1 will result in a substantial change in the concepts of international law applicable to struggles that have traditionally been dealt with under existing international conventions as internal conflicts. Given the effect this shift in the law could conceivably have on many states within the international community, it is imperative that specific guidelines be set forth with regard to the circumstances under which certain liberation movements will be considered within the ambit of amended article 1.

Before a detailed analysis of this particular issue is undertaken, it is essential to examine a rather widespread misconception surrounding the rights and privileges that must legally be accorded participants in eligible movements under the provisions of this article. Paragraph 1 of amended article 1 stipulates that Protocol I will apply in its entirety to all situations referred to in common article 2 of the 1949 Geneva Conventions. Thus, in order fully to understand the scope of applicability of amended article 1 and its effect on liberation movements, the specific wording of common article 2 must be thoroughly considered:

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

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

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Paragraph 1 of amended article 1, in referring to common article 2, states that Protocol I will apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." This wording of common article 2 must be considered in conjunction with that of paragraph 2 of amended article 1,

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47 See text accompanying note 24 supra.
48 GPW, supra note 6, at art. 2.
which stipulates that the "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . ." mentioned in common article 2 will include wars of self-determination waged against colonial and alien occupation and racist regimes.

Thus, although amended article 1 standing by itself does raise certain armed struggles for self-determination to the level of international conflicts addressed in paragraph 1 of common article 2, it must be noted that paragraph 1 refers only to conflicts "which arise between two or more of the High Contracting Parties"; i.e., to states party to the 1949 Geneva Conventions. It is evident that national liberation movements are not signatories of these Conventions.

Does this apparent inconsistency therefore mean that even though a certain war of self-determination is considered an international conflict in terms of amended article 1, a liberation movement has no right to be accorded the codified guarantees and privileges of Protocol I and the Conventions themselves, since it cannot be a signatory of the 1949 Conventions? Paragraph 3 of common article 2 states that a "Power" party to the 1949 Conventions is bound to abide by the terms of those Conventions even when it is engaged in a conflict with a "Power" not a signatory to the agreements, if the latter accepts and applies the Convention provisions. As previously noted, it is most improbable that liberation movements will be willing or able to conform to the Conventions and Protocol. More importantly, an examination of the official commentary to the 1949 Conventions evidences the fact that the words "Power" and "Powers" which appear in paragraph 3 of common article 2 refer to "states," in the most traditional sense of that term in international law. In light of this fact, it appears that amended article 1 does not make national liberation movements eligible to accede to the Geneva Conventions. As a result, article 1 does not entitle these movements to the guarantees, protections, and privileges of Protocol I and the 1949 Conventions. At most, amended article 1, as it is now worded, entitles national liberation movements to the benefits and obligations which customary, rather than codified, international law confers and imposes upon factions in a civil war that has been recognized as a belligerency.

As a result of the United Nations Charter and the development of other conflict management norms, the concept of "belligerency" is now generally viewed as an outmoded concept. Nevertheless, under traditional international law, if a civil struggle was recognized as a belligerency by third states, the factions involved in this conflict...
Legally, the foregoing argument is valid. However, it is essentially polemical in nature and quite obviously contravenes the apparent intent of the great majority of states attending the 1974 Diplomatic Conference: i.e., that participants in certain specified wars of national liberation should be accorded all of the rights and privileges set forth in Protocol I. Accordingly, it is inevitable that amendments enabling certain liberation movements to become parties both to Protocol I and the Geneva Conventions will be offered at the Law of War Conference in 1975. Past voting patterns indicate the acceptance of such an amendment by the conference as a whole.

With these realities in mind, attention must be focused on the circumstances under which liberation movements should be considered as falling within the ambit of amended article 1. If this provision is legitimately to grant the rights and protections afforded by Protocol I to "peoples" engaged in "armed conflicts" in order to achieve their "right of self-determination," those states advocating acceptance of this article in 1975 must respond intelligently and candidly to several basic and inescapable questions surrounding the concept:

1. What is meant by the terms "peoples" and "right of self-determination"?
2. What type of activity undertaken to achieve "self-determination" constitutes an "armed conflict" in terms of article 1? That is, under what circumstances do individuals actively engaged in opposition to governmental authority qualify for the rights and protections afforded by Protocol I?
3. What organization or body will be authorized to make the various determinations as to whether certain "peoples" are engaged in an "armed conflict" in order to achieve their "right of self-determination"? Alternatively, may these determinations be made by individual states?
4. What is meant by the phrase "colonial and alien occupation and racist regimes"?

Various state delegations expressed the fear that the meaning of "peoples" was so unclear that a state might be required to treat an ethnic minority in revolt as an international entity protected by Pro-
Protocol I and the 1949 Conventions. Such a fear and ones similar to it are not unfounded. Commentators have consistently pointed out that the term “peoples” has no generally accepted meaning which can be applied to the diverse world of political and social reality. An obvious example of the validity of this assertion that has particular relevance is the idealistic but misguided notion that United Nations resolutions and the first articles of the two Covenants on Human Rights asserting that “[a]ll peoples have the right to self-determination” mean what they say; i.e., that all peoples indeed have this right. Anyone tempted to accept an interpretation of such simplicity should consider the situations of the Germans, Koreans, Vietnamese, Biafrans or Ibos, South Sudanese, Baltic peoples, Formosans, Somalis, and the Kurds and Armenians, to name only a few. The granting of substantial international rights and protections to an undefined number of individuals is both unwise and unrealistic. “Peoples” must be defined.

There is a concomitant need for a definition of “self-determination.” Perhaps no international concept has been more hotly debated in recent years. For example, though working with substantially the same materials covering recent history and United Nations practice, Dr. Rosalyn Higgins and Professor Leo Gross have come to opposite conclusions regarding its legal validity. Whereas Dr. Higgins finds it inescapable that such a right has come into being, Professor Gross contends that it is an equally inescapable conclusion that such a right is not one which can be characterized as based on customary international law. Their views are representative of the divergence of opinion on this matter which generally exists throughout the international community.

Notwithstanding this lack of agreement, a careful analysis of the right of self-determination strongly suggests that such a right does exist. The difficulty inherent in this principle lies not in the fact of

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23 The United Nations Charter expressly refers to self-determination as a “principle” in Articles 1(2) and 55. One of the purposes of the United Nations in Article 1(2) is to “[d]evelop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples . . . .” Article 55 reads in pertinent part that the United Nations shall work: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . .” Although the Universal Declaration of Human Rights is silent on the
its existence but in a failure to articulate what the concept entails. Logic dictates that the principle should be clearly defined. Specific guidelines must be established regarding who may claim the right, and how it may be validly exercised.\footnote{As has been noted, the adoption of amended article 1 would apparently sanction the use of force in order to achieve self-determination in certain instances. However, in order to accord any degree of legitimacy and practical applicability to this article, the world community must refute or amend specific provisions of the United Nations Charter and allow those who would seek self-determination to kill and destroy in order to attain this goal.}

2. What type of activity undertaken to achieve "self-determination" constitutes an "armed conflict" in terms of article 1?

Any response to this question is inextricably tied to the definition of "peoples" and the concept of self-determination. It is also based on the premise that by adopting article 1, the world community sanctions force as a legitimate means of achieving political goals. Once these primary propositions are accepted, attention must focus on what is considered the "threshold problem" in this area; i.e., the difficulty of determining the point at which fighting between a government and its citizens becomes an "armed conflict" in terms of amended article 1.

Instances of armed opposition to governmental authority range from an attack by a group of a few individuals against a government building to a well-supplied and well-disciplined army of thousands waging an effective guerrilla war against government troops. What criteria should be used to determine whether fighting within a certain state has or has not reached the level of an "armed conflict"? Would...
the number of individuals involved be taken into consideration, the amount of territory effectively controlled, the length of the struggle, or the actual degree of combat activity involved? On the basis of these criteria and others that might be formulated, could a determination be made that the current struggle in Northern Ireland constitutes an "armed conflict" in terms of article 1? Indeed, would a takeover of a reservation by armed Sioux Indians in South Dakota be considered such a conflict?55

These are difficult questions. However, if the international community chooses to sanction the use of force as a viable and legitimate means of achieving self-determination, criteria must be developed to measure whether fighting between a government and a portion of its citizens has reached the level of the type of "armed conflict" addressed in article 1.

3. What organization or body will be authorized to make the various determinations as to whether certain "peoples" are engaged in an "armed conflict" in order to achieve their "right of self-determination"?

If the rights and protections afforded by Protocol I are to be granted to individuals participating in the type of armed conflicts referred to in article 1, it appears imperative that some organization be granted the authority to determine which armed conflicts and also which individuals are within the ambit of the article. Such an organization's task will not be an easy one, for it must decide whether a group of individuals is in fact a "people," whether these particular people have a "right of self-determination," and whether their activities can actually be considered an "armed conflict." All of these decisions quite naturally depend on the formulation of specific criteria upon which to base them.

Should the United Nations be granted this decision making authority? If so, to what particular organ of the United Nations should such a grant be made? The Security Council would most probably be plagued by the veto. The General Assembly, now largely controlled by third world and evolving states which so strongly support amended article 1, consistently fails to deal in terms of political reality. For this and other reasons,56 any attempt to grant authority to

55 This refers to the recent armed seizure of an Indian Reservation in South Dakota by a small number of Sioux. These individuals controlled a definite amount of territory, issued "passports," and declared themselves citizens of an independent state.
the United Nations would be opposed by many of the major powers.

Perhaps the power to make these determinations will be given to existing regional organizations. But a grant of such authority might tempt the members of these bodies to influence greatly, albeit indirectly, the internal affairs of neighboring states. In addition, it is quite possible that the decisions of particular regional organizations rendered with regard to questions surrounding the concept of self-determination would not reflect a general consensus of the world community. This is especially true in the context of the present situation in southern Africa.

The answer to this difficult problem might be found in the establishment of an independent body, designated under specific provisions of Protocol I. However, organizational and functional difficulties familiar to any international group would hinder all efforts along this line. These difficulties need not be fully enumerated, but they would certainly include such questions as which states might serve, how they would be elected or appointed, and the process by which decisions would be made.

The inability of the international community to designate or create an organization or body responsible for making the determinations which amended article 2 inherently requires may well result in unilateral, state-by-state decisions. The possibility of individual countries endorsing and supporting various "wars of self-determination" around the globe is not an encouraging one.

There does exist the possibility that the majority of the delegations attending the 1975 Diplomatic Conference will fail to see the necessity of having any organization or state recognize a particular struggle waged against a colonial or alien occupation or a racist regime as being within the ambit of amended article 1. The determination may be made that any group of individuals may simply declare its intention to wage a struggle against its government and file an accession to Protocol I. On the basis of the views expressed and the votes taken in 1974, this result is not inconceivable. It is this very fact that evidences the significance of the final consideration.

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44 Included among these "other" reasons would most probably be the contention that the United Nations Charter does not grant this degree of decision making authority to the General Assembly. The validity of this assertion rests on the interpretation of the functions and powers of the Assembly vis-a-vis the Security Council. This is the subject of constant debate. See U.N. CHARTER, arts. 10-14.

45 See text following note 42 supra.
4. **What is meant by the phrase "colonial and alien occupation and racist regimes"?**

This particular phrase has gained such popularity over the last decade that few would even venture to question its meaning. Yet when considered in the context of amended article 1, serious thought must be given to what body may decide whether a regime is racist or whether colonial or alien occupation actually does exist. Does the United Nations alone have this authority? On the basis of what tangible criteria is such a determination to be made? Even more significant than these considerations is the fact that it is this very phrase which so markedly indicates the singular purpose of article 1 and the political motivation and historical naivete of those states which support it.

There exists little doubt that the specific purpose of amended article 1 is not the advancement of humanitarianism in armed conflict, but the sanctioning of the use of force by a narrowly defined category of individuals in order that they might achieve current political goals. This fact evidences the deleterious effect the adoption of amended article 1 will have on the Law of War as a whole. Nevertheless, many states apparently lack either the ability or desire to consider the long-range implications. These members of the world community adamantly refuse to acknowledge that the now popular "wars of national liberation" are a temporally and geographically limited phenomenon and that the entire structure of the law should not be knowingly and eagerly distorted in order to accommodate them. This refusal exists despite the fact that some of the missionary zeal exhibited by supporters of article 1 in 1974 has already been dampened by recent events in Mozambique and Angola.

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58 A recent example of United Nations decisionmaking regarding "colonial and alien occupation" occurred in August of 1972. The Special Committee on Colonialism decided to study the situation in Puerto Rico on the grounds that it is a colonial territory of the United States entitled to independence. This was done despite the fact that the latest referendum showed only 4,206 out of over 700,000 Puerto Ricans desired such a status. The decision's politicized nature is evidenced by several comments of the committee's Communist delegates. The Soviet representative, Vasily S. Safronchuk, told the committee that it was "dealing with the fate of 3 million people subjected to ruthless exploitation . . . ." The PRC's counselor, Chang Yun-Kuan, declared "Puerto Rico is in fact a colony of the United States, and the Puerto Rican people's struggle for national independence is a just one . . . ." The Washington Post, Aug. 29, 1972, at A-1, col. 4. These words and phrases have a now familiar ring about them.

59 This refers to the significant steps recently taken by Portugal toward granting these entities their independence.
It is almost an inescapable conclusion that ten years hence the adoption of article 1 will serve not only as a monument to the lack of vision on the part of those states urging its acceptance, but also as a testimonial to their willingness to sacrifice the future in order to achieve short-range political desires. Indeed, it is ironic that the very states that have so consistently and fervently urged the development of a new and “universal” system of international law now demand the adoption of a concept of such limited application.

Discussion of the preceding factors reaffirms the obvious; many difficult questions surround the circumstances under which certain national liberation movements should be considered within the ambit of amended article 1. Although these problems are obvious, they are nonetheless being ignored by many states. A careful analysis of these questions is essential if state delegations are fully to understand the substantive impact of this provision upon the future development and application of the Law of War.

C. The Effect Of Article 1 Upon Individual Combatants Engaged In Armed Conflicts

The last of the primary concerns of those states opposed to the adoption of amended article 1 is the possibility that it will result in the unequal application of the Law of War to individual combatants. As logic dictates, the humanitarian aspects of the Law of War, embodied in the form of the 1949 Geneva Conventions, have always been based on the presumption that the individual soldier would not be held responsible for the decision of his state to wage war. The rights and protections accorded under the Conventions apply equally to all combatants and civilians who suffer and die in armed conflicts. Each of the four Conventions clearly sets forth the proposition that the benefits and burdens contained therein are afforded both to the aggressor and to the victims of aggression. As previously noted, it was the original intent of the drafters of Protocol I to reaffirm and develop the guarantees codified in the four Conventions.

By stipulating that some but not all struggles for self-determination are international conflicts within the ambit of amended article 1, Committee I rejected the concept of universality upon which Protocol I was originally based. In so doing, it has laid

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60 For purposes of this article, the Law of War is viewed as embodying conflict management norms, rules pertaining to the means and methods of conducting combat and the humanitarian protections accorded victims of armed conflict. See text accompanying note 4 supra.
the groundwork for the unequal and subjective application of the provisions of the Protocol. Implicit in the adoption of article 1 is the emergence of a legal scheme that would deny the status of permissible combatants to members of forces opposing certain efforts to achieve self-determination. Stated succinctly, a majority of the international community has chosen to revive the concept of the “just war.”

Evidence of this fact lies in the contention by some states that all law applicable to armed conflict must consider the just nature of a cause of self-determination and also prohibit assistance to or protection of “aggressors.” Thus, in those situations where a state must resort to armed force in order to oppose a group of “people” engaged in an “armed conflict” considered to be within the ambit of amended article 1, individual combatants opposing such struggles may be viewed as participants in a criminal war and therefore treated as war criminals rather than as prisoners of war if captured. Manifestations of this idea include the existence of a Soviet bloc reservation to article 85 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), the treatment of United States prisoners held captive by the North Vietnamese, and the extended concept of war crimes and crimes against humanity reflected in Soviet and Chinese thought and incorporated in various United Nations General Assembly Resolutions.

Article 85 of the GPW provides that prisoners of war prosecuted for pre-capture offenses retain the applicable benefits afforded all prisoners under this Convention even if convicted. However, each Communist state has filed a reservation to the effect that prisoners of war convicted of war crimes and crimes against humanity under the Nuremberg principles will be treated as common criminals. An example of the implementation of this reservation was the treatment of United States prisoners in North Viet Nam. Although the North Vietnamese did not prosecute any American prisoners of war for war crimes, they did deny POW status to all United States captives and sought to justify their denial on the grounds that the prisoners were

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61 GPW, supra note 6, art. 85.
62 For the reasoning behind this provision, see COMMENTARY (Pictet), supra note 49, at 415-16.
63 North Vietnam’s reservation to article 85 provides:

The Democratic Republic of Vietnam declares that prisoners of war prosecuted and convicted for war crimes or for crimes against humanity, in accordance with principles laid down by the Nuremberg Court of Justice, shall not benefit from the present Convention, as specified in article 85.
war criminals. Since present Communist doctrine defining war crimes and crimes against humanity is broad enough to include individual combatants fighting against socialism or alleged wars of self-determination, amended article 1 will go far toward providing a codified legal base upon which Communist states can level war crime charges against captives in future conflicts.

Indicative of current Soviet thought regarding the question of what constitutes a war crime is this passage from a recently published Soviet text on international law:

Resolutions of the twenty-fifth session of the General Assembly of the United Nations firmly require specifically that the regime of the military prisoner be applied to the partisans under conditions of national liberation war, for example, in the territories under Portuguese rule, or in Namibia, . . .

It is necessary to emphasize that the legality of partisan movements is closely bound with the legal, just character of the war of the country on whose side the partisans are acting. A totally different international-legal evaluation must be given the actions of any type of irregular units which an aggressor might use, designating them "partisans." Specifically, one should view as totally devoid of any such legality the attempts of the U.S.A. to create units of "partisans" designed for dispatch to other countries with the goal of suppressing a national-liberation movement of peoples and for conducting diversionary covert operations. Actually, this is not a partisan movement, but one of the forms of intervention, a violation of widely recognized norms of contemporary international law.44

This same philosophy is reflected in United Nations General Assembly Resolution 3103 (XXVIII), Basic Principles of the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes. As previously noted, the resolution's preamble reaffirms the proposition that colonialism is a crime which all colonial people have a right to oppose by any means at their disposal.45 Aside from the operative provisions already discussed,46 two others are especially noteworthy:

4. The combatants struggling against colonial and alien domination and racist regimes captured as prisoners are to be ac-

45 See note 37 supra.
46 See text accompanying note 38 supra.
corded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Convention relatives to the Treatment of Prisoners of War, of 12 August 1949.

5. The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.\(^7\)

It is quite apparent from these provisions that a return to the “just war” concept is likely to lead to unequal treatment of victims on the several sides of a conflict, depending upon whether the cause for which they fight is recognized as “just”; i.e., within the ambit of amended article 1. This fact must necessarily be of great concern to those states truly committed to the impartial application of humanitarian safeguards to all victims of armed conflict.

IV. THE 1975 DIPLOMATIC CONFERENCE: OPTIONAL COURSES OF U.S. ACTION

In light of the preceding analysis of the three primary areas of concern to the United States regarding the seemingly inevitable adoption of amended article 1 by the 1975 Diplomatic Conference, it is apparent that article 1 will sanction the use of force by various individuals or states in order to achieve certain, but not all, political goals. This will result in the vitiation of existing codified conflict management norms. Additionally, it is quite conceivable that no means can be formulated whereby determinations can be made as to whether certain liberation movements should or should not be considered within the ambit of amended article 1. A failure to create such a mechanism will likely result in these determinations being made on an individual, state-by-state basis. Furthermore, a return to the concept of the “just war” of self-determination may lead to the treatment of individual combatants fighting on the “wrong” side in such wars as “war criminals.” Such a designation could then be utilized as a legal basis upon which to deny these individuals prisoner of war status.

As the United States delegation prepares to attend the 1975 Diplomatic Conference, several avenues of approach toward the difficulties posed by amended article 1 might be taken. The United States may

choose to work toward the defeat of article 1. However, the degree of support exhibited for the measure and events which have occurred since that time indicate that the article's adoption is inevitable. Barring some unforeseen reversal of attitude, the concept of the "just war" will become an integral part of Protocol I. Thus, any concerted effort on the part of the United States to defeat article 1 in its present form will not only end in failure but will also act to solidify the efforts of the proponents of the measure.

Alternatively, the United States might turn its efforts toward mitigating the effect of article 1 upon existing international law by proposing various amendments to other articles in Protocol I. In pursuing this approach, the United States might condition any acceptance of national liberation movements as parties to Protocol I and possibly the Geneva Conventions or as beneficiaries on a reciprocal basis, on a reaffirmation of article 85 of the GPW. A reaffirmation of this nature could be made an integral part of article 42 of Protocol I. This

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68 A meeting of various state delegates was held in San Remo, Italy, in late August and early September of 1974 in order to discuss a compromise solution to the problems posed by amended article 1. Nothing of a substantive nature was accomplished; no change in the respective attitudes of the parties had occurred.

69 For a discussion of the provisions of this article and the Communist countries' reservations to it, see notes 61-64 and accompanying text supra.

70 The text of article 42 provides:

ARTICLE 42 — NEW CATEGORY OF PRISONERS OF WAR
1. In addition to the persons mentioned in article 4 of the Third Convention, members of organized resistance movements who have fallen into the hands of the enemy are prisoners of war provided such movements belong to a Party to the conflict, even if that Party is represented by a government or an authority not recognized by the Detaining Power, and provided that such movements fulfill the following conditions:
   (a) that they are under a command responsible to a Party to the conflict for its subordinates;
   (b) that they distinguish themselves from the civilian population in military operations;
   (c) that they conduct their military operations in accordance with the Conventions and the present Protocol.
2. Non-fulfillment of the aforementioned conditions by individual members of the resistance movement shall not deprive other members of the movement of the status of prisoners of war. Members of a resistance movement who violate the Conventions and the present Protocol shall, if prosecuted enjoy the judicial guarantees provided by the Third Convention and, even if sentenced, retain the status of prisoners of war.*

*Note

If, as many Governments wished, the Diplomatic Conference
article could be amended to provide that violations of international law applicable in armed conflict, other than failure to combatants to distinguish themselves from the civilian population, would not result in forfeiture of prisoner of war status or the benefits of the GPW by any person referred to in article 471 of the Convention or in proposed article 42 of Protocol I.

should decide to mention in the present Protocol members of movements of armed struggle for self-determination, a solution would be to include in this Article a third paragraph worded as follows:

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

1 GPW, supra note 6 provides:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
While such an "amendment approach" might prove to be substantially more successful than an effort to defeat the adoption of article 1, it must be recognized that any attempt to alter significantly the purpose or effect of this article will be viewed with suspicion and distrust by many state delegations. The suggested reaffirmation of article 85 would provoke a strong reaction on the part of Communist states. Indeed, if the conference should adopt a United States proposal along these lines, it is likely that the Communist countries

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.
would interpose new reservations to article 85 which are more objectionable than the present ones. The United States would then have to give serious consideration to an outright rejection of all reservations to the article, which would result in the absence of a treaty relationship between the reserving and rejecting parties.

Communist opposition to United States efforts to mitigate the effects of article 1 is a certainty. However, the most intense and concerted opposition to such efforts will come from the lesser developed and third world states. To these countries, the amended article represents much more than a simple change in a particular international agreement. It is viewed as a victory for the "have-nots" against the "have"; for the weak but united against the strong; for the formerly oppressed against their former oppressors. To the developing nations, it is visible evidence of the fact that international jurisprudence must now reflect the desires and goals of all nations, and especially of the hitherto diplomatically unimportant developing countries, rather than those of the relatively few developed and industrialized societies. It is a visible symbol of a long sought moral and political victory.

As a result, a majority of those states advocating the adoption of amended article 1 are not concerned with its legal ramifications or the impact these will have on the United Nations Charter and other codified concepts of the Law of War. Many quite candidly state that if adoption of article 1 causes legal problems, they will belong to the developed, industrialized nations and not to those advocating adoption of the article. Stimulated by the prospect of achieving what they consider to be a stunning political victory, these third world countries' pervasive attitude appears to be "The law be damned—we won."

In the face of attitudes such as these, there exists the strong possibility that all attempts by the United States to mitigate the effects of article 1 through the amendment process will be forcefully and effectively rebuffed. Moreover, serious consideration must be given as to whether such an approach should be attempted. Even if successful in all of its efforts toward amendment, could the United States effectively negate the impact article 1 would have on existing international norms? Could amendments, regardless of the precision of their wording, offset sanctioning of the use of force in order to achieve political goals or clarify the vague and subjective nature of the article's applicability, while simultaneously protecting those combatants deemed to be opposing a "just war"? Would any number of amendments alter the deleterious effect article 1 will have on each of the
four Geneva Conventions, those international agreements which Protocols I and II were originally intended to supplement and clarify? And what of Protocol II? No amendment can reinstate a feeling of necessity for this document, now rendered moot for all intents and purposes.

The argument can be made that in order to avoid being omitted from the “mainstream” of current international thinking, the United States should agree to the adoption of article 1 and then focus its efforts on a just and objective application of its terms. There is little chance that an approach of this kind would meet with success. Furthermore, it is doubtful whether such “behind the scenes” maneuvering on the part of the United States would effectively compensate for the apparent sanctioning of concepts so alien to the traditional American view of the proper use of force and the concept of humanitarian protection. Can the United States afford to accord itself the luxury of convenient hypocrisy in an area of such basic concern and importance? Should the United States delegation, in an effort to reach agreement on specific provisions of Protocol I, be willing to reduce the overriding question of the applicability of all of the Protocol’s provisions to a matter of subjective and emotional judgment? Would this form of “compromise” really advance the cause of humanitarian rights in armed conflict or accomplish the original intent of the drafters of the Protocol? Is some form of agreement so vital to American interests that the United States delegation must be willing to jeopardize the 1949 Conventions and various other codified norms of international law?

It would be both unwise and unnecessary to sacrifice so much in order to achieve so little. If states advocating the acceptance of amended article 1 refuse to discuss its revision or specific guidelines with regard to when and how it will be applied, then the United States should frankly and concisely explain why it will not become a party to an international agreement which can appropriately be characterized as nebulous, subjective, and hypocritical. Rather than lend its support to a Protocol which apparently confirms all the familiar charges leveled against international jurisprudence as a whole, the United States should focus its efforts on preserving currently existing conflict management norms and the humanitarian protections and safeguards contained within the 1949 Conventions.

There does exist the strong possibility that Protocol I as amended will be accepted by a majority of the states attending the 1975 Diplomatic Conference, with or without American support for the measure. However, it is not incumbent upon the United States to become a
party to an unworkable and ill-advised document. Indeed, the opposite is true. An American refusal to append its signature to Protocol I will not result in a loss of the rights and privileges accorded American soldiers involved in combat under the 1949 Geneva Conventions. These exist as specifically required guarantees and are not based on political and subjective judgments. Moreover, a decision on the part of the United States to refuse to lend even its tacit support to Protocol I and its inherent political objectives may cause other states to give more serious consideration to the legal ramifications of article 1. When international law is reduced to an instrument which reflects only narrowly defined political aspirations, all states in the world community suffer. This fact must be repeatedly and systematically emphasized in the international forum.

The events of the 1974 Diplomatic Conference clearly evidence that the international community, in its present historical and political context, is unwilling and unprepared to move forward in advancing the cause of human rights in armed conflicts. The protections and guarantees set forth in Protocol I will become lost in a morass of political and subjective judgments. Until the concept of "just war" is again recognized as an invalid rationale upon which to base death and destruction, no real progress in this area can be realized. The task confronting the United States in 1975 and in the years to come will therefore be to preserve existing norms and protections, for unless currently existing law is both preserved and shielded from inconsistent, politicized application during the next several years, there will exist no basis upon which to build in the future. A failure to meet this challenge and a decision to yield to short-range political expediency in the name of "compromise" will only hasten the world’s return to the eleventh century.

There is a recent occurrence which vividly confirms this proposition. The Palestine Liberation Organization, with the help of the Arab bloc, prepared a United Nations General Assembly Resolution which recognizes the right of the Palestinian people to return immediately to their homeland and to establish a sovereign state. The Resolution recognizes the right of the Palestinian people to attain these goals "by all means at their disposal . . . ," a phrase viewed as encompassing the use of force and terror. The Washington Post, Nov. 19, 1974, at A-17, col. 1. An amended resolution was adopted. The New York Times, Nov. 23, 1974, §1, at 1, col. 1. It recognized the right of the Palestinians to regain their "rights by all means in accordance with the purposes and principles of the Charter of the United Nations . . . ." Id. § 1, at 4, col. 3.

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