4 Protocols and Politics

4.0. Introduction

This chapter completes the description of essential laws of armed conflict that are in effect today with discussion of Additional Protocols I, II, and III. There are other multinational treaties, Security Council pronouncements, domestic laws, appellate opinions, and military orders and regulations that bear on conduct in armed conflict but, with an awareness of 1907 Hague Regulation IV, the 1949 Geneva Conventions, and the 1977 Additional Protocols, one has the essential basics of today's *jus in bello*. This, in turn, allows one to determine what law applies on any battlefield.

4.1. Why New Law of Armed Conflict?

The law of armed conflict (LOAC) is young, only a hundred years having passed since modern LOAC was "formalized" in 1907 Hague Regulation IV. Whereas customary law of war finds its roots in antiquity, treaty-based battlefield law, *jus in bello*, is an historical youngster. Like any youthful entity, it continues to grow and mature.

Soon after the 1949 Geneva Conventions began to gather ratifications (the United States ratified in August 1955, after the U.S.-North Korean conflict ended), the international community recognized that the character of armed conflict was changing. World War II–type conflicts, large armies fighting large-scale battles involving thousands, even hundreds of thousands of troops, were giving way to guerrilla-type internal armed conflicts and revolutionary movements. Wars involving two or more states were seen less frequently, whereas non-international armed conflicts grew in number and ferocity. British General Rupert Smith writes, "War no longer exists. . . . war as battle in a field between men and machinery, war as a massive deciding event in a dispute in international affairs . . . "[1]

Human rights law (HRL), unknown until the end of World War II, was expanding across the international spectrum. Although it was (and is) concerned with the relationship of states and their own nationals in times of peace, any new LOAC would inevitably be influenced by the impact of human rights laws.[2] Insurgencies were challenging

[1] Gen. Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (New York: Knopf, 2007), 3.

[2] Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3d ed. (Oxford: Oxford University Press, 2000), 420.

Geneva. Combatant status, not addressed by the 1949 Conventions, became an important issue because of guerrilla actions. New attention focused on the law of occupation. "The Geneva Conventions did not cover all aspects of human suffering in armed conflict. . . . In addition, the law of The Hague, which is concerned with developing rules on hostilities and the use of weapons, had not undergone any significant revision since 1907."[3] By the late 1960s, LOAC was ripe for updating, and the United States led the way in pressing for the negotiation of new rules.

4.2. The 1977 Additional Protocols

In 1971 and 1972, government experts from more than a hundred states conferred in Geneva, sponsored by the International Committee of the Red Cross (ICRC), to review draft protocols modernizing the 1949 Conventions. Not all LOAC areas were on the table. "The Conference settled into the view . . . that it ought not to get into the matter of naval warfare and the protection of civilian persons and property at sea."[4] Broad change was in the air, however. Among the U.S. representatives to Geneva was Harvard Law School Professor Richard R. Baxter, formerly a colonel in the U.S. Army. Further conference sessions were held in 1974, 1975, 1976, and, finally, in 1977.

> In order to ensure broad participation, the Conference invited certain national liberation movements to participate fully in the deliberations, although only states were to be entitled to vote. In fact, in recognition of the particular importance of achieving universality of acceptance in addressing the laws of war, for most of the time the Conference used the procedure of making decisions by consensus. Various international organizations were represented in an observer status . . . [5]

The participation of national liberation groups in the drafting process was not welcomed by the major Western powers. The interests of the Palestine Liberation Organization, the Irish Republican Army, the African National Congress, and Algeria's FLN (*Front de Libération Nationale*), to name but four groups present, did not neatly coincide with those of, for example, the United States, the United Kingdom, or France. Although national liberation groups did not have a vote, they had significant influence over states sympathetic to their goals. In 1977, those goals often involved scaling back and constricting the power and influence of the major powers. The potency of revolutionary movements acting in concert with state sponsors was particularly felt because, attempts at consensus aside, each state present was entitled to one vote. The vote of Vanuatu was equal to that of France; the vote of Kiribati equal to that of Great Britain.* No delegates were antagonistic toward a democratic process, but not every state participated in, for example, United Nations peace enforcing operations. Not all nations present were involved in regional defense pacts, or were expected to come to the aid of countries in humanitarian crises. Yet, nations that did not have deployable armies could join in imposing on more

[3] Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), xxix.
[4] R. R. Baxter, "Modernizing the Law of War," 78 *Military L. R.* (1978), 165, 168. Footnote omitted.
[5] Roberts and Guelff, *Documents on the Laws of War*, supra, note 2, at 419.
* Neither Vanuatu nor Kiribati were independent nations during the period when the 1977 Additional Protocols were drafted.

powerful states their views of how the Geneva Conventions should be amended. The voting failed "to pay due regard to the practice of specially affected States. . . . [and the voting] tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine."[6]

The concerns of some of the major powers were realized in the final versions of the two Protocols Additional to the Geneva Conventions, usually referred to simply as "Additional Protocol I," and "Additional Protocol II." (A "protocol" is merely another term to describe a treaty or pact.) Many of the Protocols' provisions represented customary law, but some new provisions, in the understated words of the *Commentary*, "introduce fairly bold innovations."[7] The bold innovations were, for the most part, firmly resisted by the United States and, initially at least, by its major allies. After long and sometimes heated negotiations, however, the majority of states accepted the changes, despite objections of the Western community.[8]

The two Protocols supplement the 1949 Conventions, rather than replace any portion of them. They supplement the Conventions "by extending the scope of their application, the categories of protected persons and objects and the protection conferred."[9] Today, the 1949 Geneva Conventions cannot be considered without also considering their interrelated 1977 Protocols.

4.2.1. *1977 Additional Protocol I*

The full title, "1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts," informs us that the ninety-one substantive Articles of Additional Protocol I are concerned with *international* armed conflicts – conflicts involving two or more states. Additional Protocol I is subject to more ratifying state reservations and declarations than any other LOAC agreement. Internal, non-international armed conflicts are dealt with in Additional Protocol II.

4.2.1.1. New Grave Breaches in Additional Protocol I

We know that grave breaches of the Geneva Conventions are a closed category, limited to the offenses listed in the four 1949 Conventions. Additional Protocol I, Article 11.4, taking a tack not applauded by all,[10] adds to the Conventions' roster of grave breaches, making attacks on certain individuals or objects in specified circumstances grave breaches. Attacking an individual who is *hors de combat* is made a grave breach in

[6] This statement is not contemporary to the formation of the Additional Protocols. It is taken from the November 2006 U.S. response to the ICRC's 2005 three-volume study, *Customary International Humanitarian Law*. The U.S. response is at 101–3 *AJIL* (July 2007), 640.
[7] Sandoz, *Commentary on the Additional Protocols*, supra, note 3, at xxxiv.
[8] For a discussion of the negotiations: id., at 39–56.
[9] Id., at 1085.
[10] G.I.A.D. Draper, "War Criminality," in Michael A. Meyer and Hilaire McCoubrey, eds., *Reflections on Law and Armed Conflicts* (The Hague: Kluwer Law International, 1998), 169–70.

Article 85.3. Also made grave breaches in that Article are apartheid, delayed prisoner of war (POW) repatriation, attacking some protected objects, transfers or deportations of certain people to or from occupied territory, and depriving protected persons of a fair and regular trial. A question is whether these new grave breaches have validity with regard to states that have not ratified the Additional Protocols, or are they customary international law, binding even absent ratification?

4.2.1.2. Advances in Additional Protocol I

With Additional Protocol I, the bulk of the customary law of war has become formalized. With the notable exception of military necessity, customary *jus in bello* is almost completely reduced to a stronger multinational treaty form, with states explicitly bound by agreements specifically recognizing LOAC.

Additional Protocol I contains significant advances in LOAC. The core LOAC concepts of distinction, unnecessary suffering, and proportionality, formerly found only in customary law, are codified and described in Additional Protocol I, if only in broad terms.[11] Command responsibility, the accountability of military leaders for the offenses of their troops that they are aware of, is laid out in Articles 86.2 and 87.1. "Beyond the general principles, Additional Protocol I extends special protection to specified objects, most notably medical establishments, cultural objects, places of worship, objects indispensable to the civilian population . . . and works and installations containing dangerous forces."[12] Area bombing, widely practiced by both sides during World War II, is forbidden in Articles 51.2 and 51.5, providing new protections for civilian populations. After the Vietnam experience, the United States saw Article 24, giving new protections to medical aircraft, as a positive addition to LOAC. In contrast, the Vietnam experience, which included the use of herbicides like Agent Orange by U.S. forces, led other nations to include Article 35.3, prohibiting attacks on the natural environment.

Article 87.1, dealing with the duties of commanders, states that to not report a violation of the Conventions is itself a LOAC violation. Article 42 specifies that persons parachuting from an "aircraft in distress" (as opposed to paratroopers) may not be attacked during descent.* Article 82 requires that legal advisors be available to advise commanders and instruct troops on LOAC issues.

A particular failure of Additional Protocol I is its lack of restrictions on the use of either conventional or nuclear weapons. Sweden's leading effort to create conventional weapon restrictions was opposed by the USSR and its allies. The United States took no hard stand regarding conventional weapons – unlike its position opposing any restriction on the use of nuclear weapons, which was vigorously and successfully contested by the United States and other nuclear powers.

[11] Distinction is described in Art. 48; unnecessary suffering in Art. 35.2; proportionality in Arts. 51.5(b), and 57(2)(b). The proportionality definition, never easy to apply in concrete cases, "is little more than a cautionary rule, requiring the commander to stop and think before he orders a bombardment." Baxter, "Modernizing the Law of War," supra, note 4, at 179.

[12] Michael N. Schmitt, "War, Technology and the Law of Armed Conflict," in Anthony M. Helm, ed., *International Law Studies, Vol. 82, The Law of War in the 21st Century: Weaponry and the Use of Force* (Newport, RI: Naval War College, 2006), 137, 141.

* Art. 42 was resisted by some Arab States which, in past conflicts, had shot down Israeli aircraft, only to have the pilots to parachute back into Israel to rejoin the attack.

4.2.1.3. Objections to Additional Protocol I

There are significant objections to Additional Protocol I, particularly by the United States. Sir Adam Roberts and Professor Richard Guellf describe a controversial innovation that the United States continues to resist:

> First, the Protocol spells out in unprecedentedly detailed rules relating to discrimination in the conduct of military attacks. These are mainly in [Articles 48–67] dealing with the general protection of the civilian population . . . Some of these provisions caused concern in certain states because of fears that commanders might be subject to accusations of war crimes not based on an understanding of the fact that in war commanders have to take action on the basis of imperfect information.[13]

Second, through several Articles, Additional Protocol I essentially prohibits reprisals, raising concerns about what can lawfully be done to immediately deter enemy states that violate provisions of LOAC.

Third, under Article 47 of Additional Protocol I, mercenaries may be considered neither POWs nor lawful combatants. Although mercenaries retain fundamental humanitarian protections under Article 75, the United States believes that no combatant should be denied a battlefield status. "[B]ut many of the newly independent states had fought against mercenaries in their wars of independence and they saw little reason to protect such combatants . . . "[14]

4.2.1.3.1. *"CARs"*

The objections of many Western powers center on two other Protocol I provisions. A fourth objection is contained in Additional Protocol I's first Article. Article 1.1.3 notes that the Protocol supplements the 1949 Geneva Conventions, and applies in situations of international armed conflict. So far so good, but Article 1.4 goes on to expand the definition of what constitutes an international armed conflict, declaring that "The situations referred to in the preceding paragraph" – international armed conflicts – "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination . . . "

This provision, then, applies all of the 1949 Conventions, and all of Additional Protocol I, not only to international armed conflicts as they are commonly understood, but also to situations in which insurgents profess to be fighting colonialism, in which guerrillas allege they are conducting armed resistance to a force or government occupying their country, and in which rebels say they are fighting their racist government. This was indeed a "fairly bold innovation." Commonly referred to as the "CARs" provision (Colonial domination, Alien occupation, Racist regime) it was hotly contested in Geneva's conference rooms.

Some established states saw the CARs provision as providing rebels – in their view, trouble-makers, brigands, and armed criminal groups – with the full panoply of Geneva Convention protections. A Central American government, perhaps beset by internal political division and civilian unrest, would not be eager to extend Geneva protections to individuals seen by the government as no more than outlaws.

[13] Roberts and Guelff, *Documents on the Laws of War*, supra, note 2, at 420.
[14] Philip Sutter, "The Continuing Role for Belligerent Reprisals," 13–1 *J. of Conflict & Security L.* (Spring 2008), 93, 112.

National liberation movements, along with their sponsoring states, primarily the USSR and its allies, saw things differently, however, and had the numbers to make their view prevail. The CARs Article "was steamrollered through the first session of the Conference . . . "[15]

> The concept of the right of self-determination . . . which was proclaimed by the French Revolution, and was subsequently often denied, has from the outset constantly come up against the legal order; this did not prevent it from being applied with increasing frequency and from growing in strength. . . .
>
> The Charter of the United Nations therefore consisted of turning this principle of self-determination of peoples into a right established in an instrument of universal application. . . .
>
> The General Assembly recognized the legitimacy of the struggle of colonial peoples against colonial domination in the exercise of their right to self-determination . . . [16]

Additional Protocol I followed suit. The ICRC's *Commentary* says, "In our opinion, it must be concluded that the list [CARs] is exhaustive and complete: it certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist régime."[17]

Some established powers, including the United States, were unmoved. They would have preferred a continuation of armed authority limited to the state, with a LOAC that protected traditional combatants. CARs, they argue, blurs national and international conflicts, making the applicability of Additional Protocol I, and therefore the 1949 Conventions, turn on the asserted motive of a rebel force. Meanwhile, those considering themselves as oppressed saw a resort to arms – with international protections through the Geneva Conventions and Additional Protocol I – as a precondition to freedom.

> Historically, nations that view themselves as likely victims of aggression and enemy occupation have argued that guerrillas, partisans and members of resistance movements should be regarded as patriots and privileged combatants, while major military powers have argued that only regular, uniformed and disciplined combatants who distinguish themselves clearly from the civilian population should have the right to participate in hostilities.[18]

"The post World War II process of decolonization – sometimes peaceful, sometimes violent – created among most newly independent countries strong support for wars of national liberation against the colonial powers."[19] Energized by the Vietnam War, at Geneva those countries sought new LOAC provisions that legitimized guerrilla tactics.

To a significant extent, the passage of time has rendered CARs a less important issue than it was in 1977. "The fight against the remnants of colonialism is no longer an issue today."[20] Japan was stripped of its colonies after World War II. Most states with colonial

[15] Baxter, "Modernizing the Law of War," supra, note 4, at 172.
[16] Sandoz, *Commentary on the Additional Protocols*, supra, note 3, at 41–3. Footnotes omitted.
[17] Id., at 54–5.
[18] Waldemar Solf, "A Response to Douglas J. Feith's Law in the Service of Terror – The Strange Case of the Additional Protocol," 20 *Akron L. Rev.* (1986), 261, 269.
[19] George H. Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols," in Christophe Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles, in Honour of Jean Pictet* (Geneva: ICRC, 1984), 135.
[20] Hans-Peter Gasser, "Acts of Terror, 'Terrorism' and International Humanitarian Law," 847 *Int'l Rev. of the Red Cross* (Sept. 2002), 547, 549.

holdings, such as Portugal and Belgium in Africa (the Belgian Congo), Portugal and the U.K. in China (Macao and Hong Kong), and the U.K. in South America (Guyana), have relinquished their overseas holdings. The Philippines gained independence from the United States long before the Additional Protocols came into force. France continues her colonial presence in South America in French Guiana, and New Zealand retains a small colonial holding in the Pacific, Tokelau.[21] Colonies are largely a relic of history.

"Alien occupation" was already governed by 1907 Hague Regulation IV Articles 42 through 56, and by 1949 Geneva Convention IV. In Additional Protocol I the term was presumably "inserted to catch the votes of the Arab States . . . "[22] involved in one of the few continuing instances of alien occupation: the Israeli occupation of the West Bank. American support of Israel precludes the United States accepting that Hamas or the PLO might be covered by the Geneva Conventions.

What constitutes a "racist regime" is arguable, but cases such as Bosnians in Kosovo, and Saddam Hussein-controlled Iraqi dominance of Kurds, are ended. Rhodesia threw off its racist rule in 1980, becoming Zimbabwe. The prototypical racist regime, South Africa, officially ended apartheid in 1994.

Despite the retreat of situations involving colonial domination, alien occupation, and racist regimes, CARs remains a U.S. objection to Additional Protocol I.

4.2.1.3.2. *Modification of POW qualifications*

A continuing and significant objection held by many states is Protocol I's alteration of traditional views of combatants who may be considered lawful belligerents.

A century and a half ago, Francis Lieber summarized the customary law of war when he wrote, "Men, or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army . . . with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers . . . are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."[23] Building on the Lieber Code, the first Article of 1907 Hague Regulation IV holds that, to benefit from the laws of war – to enjoy the combatant's privilege, or to be a POW upon capture, for instance – combatants, including partisans, guerrillas, and insurgents, are obliged to meet four preconditions.

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war. . . .

More than fifty years later, the words of Hague Regulation IV are repeated almost verbatim in Article 4.A.(2) of Geneva Convention III, concerning the right of "volunteer corps, including those of organized resistance movements," to POW status.

[21] In Feb. 2007, the people of Tokelau, a group of three small atolls between New Zealand and Hawaii, with a population of 1,400, voted to reject independence and continue as the colony of New Zealand.

[22] Baxter, "Modernizing the Law of War," supra, note 4, at 173.

[23] Instructions for the Government of Armies of the United States in the Field (Army General Orders 100 of 24 April 1863), Art. 82.

Additional Protocol I alters that customary law formulation, significantly broadening it to embrace as POWs individuals previously subject to trial as unprivileged belligerents/unlawful combatants. Unprivileged belligerents have been defined as "persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949."[24]

In altering the customary formulation, Article 43.1 repeats Hague Regulation IV and Geneva III's first and fourth requirements that armed forces, groups, and units must be under a command responsible for the conduct of subordinates, and that they must enforce compliance with the rules of armed conflict. (The requirement of "responsible command" does *not* mean there necessarily must be a hierarchal chain of command similar to that in national armed forces.[25])

Article 44.3, however, modifies the traditional second requirement that lawful combatants wear a distinctive sign or emblem recognizable at a distance, to "distinguish themselves from the civilian population *while they are engaged in an attack or in a military operation preparatory to an attack*." What constitutes "a military operation preparatory to an attack" is not detailed.[26] The same Article alters the traditional third requirement, that lawful combatants must carry their arms openly, to a requirement that they carry their arms openly *during "military engagement," and "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack . . . "* Once again, it is unclear just when arms must openly be carried.

Worse was to come, in the eyes of the United States and other major military powers. Article 44.4 provides that a "combatant who falls into the power of an adverse Party while failing to meet the requirements [of distinction] shall forfeit his right to be a prisoner of war, *but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war . . . "* (Emphasis supplied.) This Article "effectively erases the distinction between lawful and unlawful combatants and gives prisoner of war protection to all combatants regardless of their conduct in respect to the law of war."[27] Armed resistance groups are essentially granted one of the most significant benefits of the LOAC, POW status upon capture, without fulfilling its requirements.[28]

Shortly after the Protocols were opened for signature, U.S. Army Major General George Prugh, one of the U.S. representatives to the Protocols' negotiations, put the best face possible on Article 44: "A long-range patrol, operating in the adversary's rear area, would fit the situation permitting the patrol to retain the status of combatant merely by carrying arms openly during each military engagement and while engaged in the preceding deployment. . . . As understood by the U.S. delegation . . . the Article did not authorize soldiers to conduct military operations while disguised as civilians."[29]

[24] Richard R. Baxter, "So-called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs," 28 *Brit. Y.B. Int'l L.* (1951), 323, 328.

[25] *Prosecutor v. Musema*, ICTR-96–13-A, Trial Judgment (27 Jan. 2000), para. 257.

[26] For an interpretation of Art. 44.3's ambiguous language, see: Maj. William H. Ferrell, III, "No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict," 178 *Military L. R.* (Winter 2003), 94, 108.

[27] Sutter, "The Continuing Role for Belligerent Reprisals," supra, note 14, at 111.

[28] A. D. Sofaer, "Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Convention," 82 *AJIL* (1988), 784, 785–6.

[29] Maj. Gen. George S. Prugh, "Armed Forces and Development of the Law of War," (*Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre*) (1982), 277, 285.

(The last sentence apparently indicates the expectation that, prior to actual engagement, the patrol would revert to wearing a uniform, or other fixed distinctive sign.)

Nevertheless, it is primarily this issue which makes Additional Protocol I "implacably objected to by the United States."[30] The United States believes that the traditional criteria for POW status are not only adequate but necessary to ensure that civilians not be allowed to, for example, conceal their arms as they pass a combatant patrol and then, appearing to be innocent and no danger, and showing no sign or symbol of enemy allegiance, suddenly fire on the patrol at close range, as from ambush. That, the United States contends, is a violation of the requirement that combatants distinguish themselves from noncombatants, and is antithetical to law of war arrived at through hundreds of years of battlefield practice and custom. "Declaration of belligerent status is essential to the protection of the civilian population. If . . . a combatant can disguise himself as a civilian and be immune from the use of force against him until he opens fire, this will prejudice the legal protection of all citizens. Unless a clear line can be drawn between combatants, who fight openly, and civilians, who are to be protected, all civilians will be put at peril."[31]

In the U.S. view, Additional Protocol I is objectionable not only because it loosens the preconditions for POW status; to allow insurgents to shelter under the umbrella of Geneva by simply declaring that they are fighting against colonial domination, alien occupation, or a racist regime politicizes the Conventions, introducing subjective elements into LOAC. Application of the Geneva Conventions was previously based on the equality of application to all belligerents. Politics should play no part in the protections afforded by LOAC.

An insurgent might respond that no doubt the four requirements for lawful combatancy and POW status suit established governments very well, but they are a recipe for guerrilla suicide. How long would any revolutionary group survive, wearing its colors on shoulder patches to be seen by any passing policeman and soldier? Or, in countries where it is not the custom, if guerrilla forces went about with their weapons in view? As British publicist Colonel G.I.A.D. Draper wrote, "any resistance fighters in occupied territory that seek to meet the 'open' nature that these conditions require of them would cease to be effective very quickly."[32] In the 1770s, did American colonists wear a sign or symbol recognizable at a distance, or carry their arms openly while deploying? Has *any* guerrilla group ever complied with the four requirements?

There are valid reasons why insurgencies are resisted by established governments; reasons relate to political stability, security of the citizenry, and the continued welfare of the nation. In some states the rule of law is sometimes abused in the name of national security, yet far more frequently peace, stability, and progress are fostered by established governmental systems. Who determines when an established government is so corrupted and repressive that violent resistance is justified? Article 44.3 is an effort to protect those who would engage in armed resistance. The United States believes it goes too far in doing so, and that it is contrary to long-respected LOAC. And,

> Article 44 constitutes a considerable relaxation, for at least one side to a conflict, of the historic requirement . . . This change was not accomplished inadvertently. Some

[30] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 11. Footnote omitted.

[31] Baxter, "Modernizing the Law of War," supra, note 4, at 174.

[32] Draper, "The Legal Classification of Belligerent Individuals," in Meyer and McCoubrey, *Reflections on Law and Armed Conflicts*, supra, note 10, at 200.

of those pressing for it in the law-making process simply wished to favor the so-called national liberation combatants – to help them win – without regard to the consequences for noncombatants. Others rationalized the change in the hope that, in return for the relaxation of the uniform and open-arms requirement, irregular forces would have an incentive to comply with other parts of the law of war. The rationalization was of doubtful logic and morality . . . and any future adversary could now – lawfully – fight without uniforms and without bearing arms openly . . . It was of doubtful morality because even if the rationalization proved to be correct . . . that gain would be purchased with the lives of noncombatants.[33]

SIDEBAR. Under Additional Protocol I, the invocation of Geneva Convention protections – and obligations – requires only a simple declaration by a national liberation movement not a party to the Geneva Conventions. Article 96.3 requires that "the authority representing a people engaged against a High Contracting Party in a [CARs] armed conflict . . . may undertake to apply the Conventions and this Protocol to that conflict by means of a unilateral declaration addressed to the depositary [the Swiss government] . . . ," but it is not quite as simple as that. The *Commentary* to the Protocols explains that "the status recognized to liberation movements indeed gives them . . . the right to choose whether or not to submit to international humanitarian law, insofar as it goes beyond customary law. In this respect they are in a fundamentally different legal position from insurgents in a non-international armed conflict. . . . "[34] The head of the U.S. Diplomatic Delegation to the Protocol negotiations scoffs, regarding CARs and Article 96.3:

> The political phraseology of [the CARs] text was chosen because it was understood by its sponsors to be self-limiting to wars against Western powers by oppressed peoples and would not apply to wars within newly independent States. No matter that most liberation movements could not hope to comply with the obligations of the Protocol and the Geneva Conventions and therefore will probably not ask to have it applied or that the [CARs] text was written in such insulting terms that no government fighting rebels would ever be prepared to admit that the provision applied to it.[35]

Professor Yoram Dinstein concurs, calling Article 96 "one of the more preposterous innovations of the Protocol," because, although a liberation group's leadership may make an Article 96.3 declaration, the terrorists themselves will inevitably fail to observe LOAC.[36]

No national liberation movement has ever made serious application under Article 96.3.[37]

[33] W. Michael Reisman, "Editorial Comment: Holding the Center of the Law of Armed Conflict," 100–4 *AJIL* (Oct. 2006), 852, 858.

[34] Sandoz, *Commentary on the Additional Protocols*, supra, note 3, at 1089–90.

[35] Aldrich, "Some Reflections," in Swinarski, ed., *Studies and Essays on International Humanitarian Law*, supra, note 19, at 135–6.

[36] Yoram Dinstein, "Comments on Protocol I," 320 *Int'l Rev. of the Red Cross* (Oct. 1997), 515.

[37] In 1980, the African National Congress made what it called a "Declaration" to the ICRC, via a letter to the U.N. Secretary-General, limited to announcing an intent to respect the "general principles of humanitarian law applicable in armed conflicts." The declaration did not refer to either Art. 96.3 or to Art. 1.4. U.N. Doc. A/35/710 (1980).

The *Commentary* to Additional Protocol I notes that, "the text of Article 44 is a compromise . . . It is aimed at increasing the legal protection of guerrilla fighters as far as possible, and thereby encouraging them to comply with the applicable rules of armed conflict, without at the same time reducing the protection of the civilian population. . . ."[38] The *Commentary* continues, "the visible carrying of arms and distinguishing signs may either have no significance (for example, in sabotage or in an ambush), or they may really be incompatible with the practicalities of the action . . . Because of this, refusing to allow specific procedures [foregoing a visible sign and concealing weapons] would be to refuse guerrilla warfare."[39] At the end of the day, it is telling that no party to any armed conflict has ever invoked either the CARs provisions or the expanded combatant status of Article 44.[40] Has the sound and the fury been about nothing?

It is ironic that Article 44.3 allows the feigning of civilian noncombatant status, while Article 37 prohibits perfidy and provides a specific example, "feigning of civilian, noncombatant status." The incompatibility of those two Additional Protocol I provisions, both of which reasonably envision engaging in combat in civilian garb, illustrates the compromises that the drafters felt necessary to incorporate, hoping to induce liberation movements to recognize and conform to LOAC.

4.3. 1977 Additional Protocol II

Additional Protocol II has raised relatively few problems for the international community. Like Additional Protocol I, Additional Protocol II supplements the 1949 Geneva Conventions; it does not amend or replace any part of them. Like Additional Protocol I, Additional Protocol II cannot yet be said to be customary law, but many of its provisions are.[41] "Because there are doubts as to which of its provisions are now part of customary international law, and because its fundamental guarantees largely overlap with common Article 3 (which undoubtedly is part of customary law), common Article 3 has almost systematically been preferred as a basis to bring criminal charges [at *ad hoc* tribunals]."[42]

Additional Protocol II is an effort to "broaden the scope of application of basic humanitarian rules [as] experience demonstrated the inadequacy of the common Article [3]."[43] Additional Protocol II develops and supplements common Article 3 and applies in noninternational armed conflicts, its mere eighteen substantive provisions largely repeating humanitarian norms that are mandated in other treaties. However, "the provisions are so general and incomplete that they cannot be regarded as an adequate guide for the conduct of belligerents."[44] It is not helpful that the drafters had in mind two varieties of internal armed conflicts; one involving major civil war, like that in Spain in the 1930s, and another more like the "contained" civil wars of Nigeria and the Congo, in the 1970s. "Through this definition two levels of internal armed conflicts were created, even as to parties to both the Conventions of 1949 and Protocol II – the lower level, governed by

[38] Sandoz, *Commentary on the Additional Protocols*, supra, note 3, at 522.
[39] Id., at 529–30, fn. 40.
[40] Hans-Peter Gasser, "Acts of Terror, 'Terrorism' and International Humanitarian Law," in 847 *Int'l Rev. of the Red Cross* (Sept. 2002), 547, 563.
[41] *Prosecutor v. Tadić*, IT-94–1, Appeals Chamber Decision on Jurisdiction (2 Oct. 1995), para. 117.
[42] Guénaël Mettraux, *International Crimes and the* Ad Hoc *Tribunals* (Oxford: Oxford University Press, 2005), 140.
[43] Roberts and Guelff, supra, note 2, at 481.
[44] Id., at 482.

Article 3, and the higher level, governed by Protocol II. Such nice legal distinctions do not make the correct application of the law any easier."[45] Indeed, today the distinction is forgotten and common Article 3, rather than Additional Protocol II, has become the protection invoked in non-international armed conflicts of every variety.

Nevertheless, Additional Protocol II is a part of today's *jus in bello*. Who is protected by it? Victims of internal or civil armed conflicts. Additional Protocol II Article 4.1, with echoes of common Article 3, specifies that "All persons who do not take a direct part or who have ceased to take part in hostilities . . ." are protected and "shall in all circumstances be treated humanely."

Article 1.2 attempts to make clear when Additional Protocol II does *not* apply: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflict." The same problems of application encountered with common Article 3 apply to Additional Protocol II, however. Who decides if and when Additional Protocol II becomes operative? When do "sporadic acts of violence" rise to a rebellion or civil war constituting a non-international conflict?

The International Criminal Tribunal for Rwanda offers guidance in applying Additional Protocol II, writing that an armed conflict may be distinguished from an internal disturbance by the intensity of the fighting and the degree of organization of the parties involved.[46] But what government willingly announces that it is host to an internal revolution so serious as to constitute a non-international armed conflict? Entrenched authority is more likely to contend that, regardless of the level or breadth of internal violence, the government is in control, the violence is less than sporadic, and it will be contained by the national police or units of the army. "The governmental authorities against which the rebellious forces are engaged, even though these forces may claim to be engaged in efforts to achieve self-determination, describe such opponents as 'terrorists' and refuse to acknowledge that they possess any rights under the law of armed conflict."[47]

Nor should supporters of insurgents be allowed to take refuge behind the tired bromide that, "One man's terrorist is another man's freedom fighter." "On this view, there is nothing for theorists and philosophers to do but choose sides, and there is no theory or principle that can guide their choice. But this is an impossible position, for it holds that we cannot recognize, condemn, and actively oppose the murder of innocent people."[48]

4.3.1. *Advances in Additional Protocol II*

Although Additional Protocol II largely recapitulates noncombatant protections already specified in customary law, or contained in common Article 3, there are provisions worthy of note. The Protocol does develop the humanitarian protections of common Article 3. It includes specific provisions for the protection of civilians from attack, as well as adding protection for objects indispensible to the survival of the civilian population. Article 4.3 provides requirements for the care of children, including education, and a ban on the recruitment or participation in hostilities of persons under age fifteen. The requirement of fair trials of persons charged with offenses, contained in common Article 3, is expanded

[45] Baxter, "Modernizing the Law of War," supra, note 4, at 172.
[46] *Prosecutor v. Akayesu*, ICTR-96–4-T, Trial judgment (2 Sept. 1998), para. 625.
[47] L.C. Green, "'Grave Breaches' or Crimes Against Humanity?" 8 *J. of Legal Studies* (1997–1998), 19, 20.
[48] Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004), 13.

on by Article 6. The starvation of civilians as a method of combat, allowed in the Lieber Code's Article XVII, is prohibited in Article 14.

4.3.2. *Objections to Additional Protocol II*

LOAC has always been state-oriented, although that tradition is tested by Additional Protocol I. "The strongly positivist basis of international law, certainly since the 19th century, has focused on the state as the source of legal obligation"[49] and the source of legal authority and power, as well. Several states, with little concern that they might face internal rebellions, contend (in a turnabout favoring revolutionary groups) that Additional Protocol II is effectively neutered by its implementing requirement: Article 1.1 mandates that Additional Protocol II is applicable only in armed conflicts between the armed forces of a ratifying state "and dissident armed forces or other organized armed groups which . . . exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." One writer notes that, " . . . the provisions in art. 1 of Additional Protocol II, including the requirement of 'territorial administration', exclude the activities of the Irish Republican Army in Ireland, the Basque Separatists in Spain, and the Shining Path in Peru. By confusing the application of Additional Protocol II in this way, states have ensured that international legitimacy is not given to groups that fight within their borders."[50]

Controlling sufficient territory from which to launch military operations is a difficult threshold for a revolutionary group to surmount, one seldom met since the Royalist forces of General Francisco Franco during the Spanish Civil War, in the 1930s. Conflicts in Colombia, El Salvador, Guatemala, Liberia, Rwanda, Sierra Leone, and the former Yugoslavia, for instance, "have raised questions regarding the extent to which 1977 Geneva Protocol II may be effective in practice."[51] The ICRC responds that:

> The three criteria that were finally adopted on the side of the insurgents i.e. – a responsible command, such control over part of the territory as to enable them to carry out sustained and concerted military operations, and the ability to implement the Protocol – restrict the applicability of the Protocol to conflicts of a certain degree of intensity. This means that not all cases of non-international armed conflict are covered, as in the case in common Article 3."[52]

In practice, the three criteria have meant that Additional Protocol II has seldom played a role in non-international armed conflicts. Examples of its apparent application are Colombia's 1999 ceding of approximately 160,000 square miles of south-central Colombian territory – about the size of Switzerland – to the *Fuerzas Armadas Revolucionarias de Columbia* (FARC) and *Ejército de Liberación Nacional* (ELN) terrorist movements,[53] and Pakistan's 2009 conceding the Swat valley to the Taliban.[54] "Practice since 1977

[49] BGen. Kenneth Watkin, "21st Century Conflict and International Humanitarian Law: Status Quo or Change?" in Michael Schmitt and Jelena Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff, 2007), 265, 272.

[50] Alison Duxbury, "Drawing Lines in the Sand – Characterising Conflicts For the Purposes of Teaching International Humanitarian Law," 8–2 *Melbourne J. of Int'l L.* (2007), 258–72, 269. Footnote omitted.

[51] Roberts and Guelff, supra, note 2, at 482.

[52] Sandoz, *Commentary on the Additional Protocols*, supra, note 3, at 1349.

[53] Geoff Demarest, "In Columbia – A Terrorist Sanctuary?" *Military Review*, n.p. (March–April 2002).

[54] Jane Perlez, "Pakistan Makes A Taliban Truce, Creating A Haven," *NY Times*, Feb. 17, 2009, A1. "The government announced Monday that it would accept a system of Islamic law in the Swat valley and agreed

shows that in the instances where Protocol II could be deemed to apply, legitimate governments had had a tendency not to recognize its applicability."[55] The result has been the continued suffering of civilians in Chechnya, Yemen, El Salvador, and Ethiopia, among other states.

4.4. 1977 Additional Protocols I and II in U.S. Practice

Shortly after the Geneva conferences formulating the Additional Protocols concluded, Harvard Law Professor R. R. Baxter, a member of the U.S. Delegation, wrote, "The two new Protocols will now have to be submitted to the Senate for its advice and consent prior to ratification. This procedure will probably move quickly, and before long the two new Protocols will be in force for the United States."[56] It was not to be.

The Protocols were opened for signature in December 1977, the United States signing both on the first day they were opened. More than thirty years later, America has ratified neither. The United States signed believing that reservations and statements of understanding, common to most international agreements, could cure America's problems with Additional Protocol I. In 1997, Ambassador George Aldrich, head of the U.S. Delegation, wrote, "Looking back . . . I deeply regret . . . I did not press, within the executive branch of my government, for prompt submission of the Protocols to the Senate. . . . I failed to realize that, with the passage of time, those in both [the U.S. State and Defense] Departments who had negotiated and supported the Protocols would be replaced by skeptics and individuals with a different political agenda."[57]

Indeed, the Department of State did take aim at Additional Protocol I: "The Protocol grants irregulars a legal status which is at times superior to that accorded regular forces. . . . No distinction has ever previously been made under the law of war based on the cause for which one of the parties claims to be fighting. . . . liberation groups can enjoy many of the benefits of the law of war without fulfilling its duties. . . . "[58] Additional Protocol II, largely seen as a recapitulation of common Article 3, drew little fire from either the Department of State or Defense.

After nine years of U.S. consideration and debate, on January 29, 1987, President Ronald Reagan recommended to the Senate that it ratify Additional Protocol II.[59] In the transmitting letter he also concluded that the United States could not ratify Additional

to a truce, effectively conceding the area as a Taliban sanctuary. . . . [W]ith the accord, 'the government is ceding a great deal of space' to the militants . . . "

[55] Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge: Cambridge University Press, 2008), 46.

[56] Baxter, "Modernizing the Law of War," supra, note 4, at 182.

[57] George H. Aldrich, "Comments on the Geneva Protocols," 320 *Int'l R. of the Red Cross*, n.p. (31 Oct. 1997). Hays Parks argues that throughout Protocol negotiations, the American delegation did not well represent the United States Moreover, he writes, "[t]he delegation members prepared their position papers with little or no consultation with the military service staffs, the Office of the Secretary of Defense, or the JCS, and then submitted their position papers to the JCS for approval . . . [There was a] lack of military cognizance over the actions of the U.S. delegation." W. Hays Parks, "Air War and the Law of War," 32–1 *Air Force L. Rev.* (1990), 1, 143.

[58] Judge Abraham D. Sofaer, Legal Advisor, Dept. of State, "Agora: The Rationale for the United States Decision," 82 *AJIL* (1988), 784, 785–6.

[59] Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987), reprinted at 81–4 *AJIL* (Oct. 1987), 912, and Cases and Materials, this chapter.

Protocol I, calling it, "fundamentally and irreconcilably flawed."[60] No action was taken by the Senate on either Protocol; Additional Protocol II had become too closely associated with Additional Protocol I, and its ratification was not advised.

Between the 1977 conclusion of the Protocols' negotiations and 1987, the United States had gone from a proponent of LOAC change to a vocal opponent. "Protocol [I] encroached upon two politically sensitive topics"[61] – CARs and POW status. Initially, the objections of the Department of Defense to Additional Protocol I were not as vociferous as is generally believed.* Certainly Defense has consistently held strong objection to Additional Protocol I's broadening of POW status availability but, Ambassador Aldrich noted, "the Department of Defense was involved at every step of the way in the negotiation of the Protocol, [and] the Joint Chiefs of Staff approved every one of our position papers . . . "[62] As time went on, though, Department of Defense objections hardened.

Political administrations change and new viewpoints dominate. The Additional Protocol negotiations were conducted throughout President Gerald Ford's tenure (1974–1977); the resulting Additional Protocols were initially considered during President Jimmy Carter's term (1977–1981); their unacceptability was decided in President Reagan's presidency (1981–1989).[63] In a period of nine years, the Protocols' turnabout, from support to opposition, was complete.

In late 1987, Hans-Peter Gasser, ICRC Legal Advisor, commented on the U.S. decision to not seek ratification of Additional Protocol I.

> Failure by the United States to ratify Protocol I would not render that treaty inoperational, because 68 states from different parts of the world are already bound by it. In addition, many other administrations are preparing to ratify it. . . .
>
> Failure to ratify by a major power such as the United States would deprive the world of a common framework for the humanitarian rules governing armed conflicts. It would hinder the development and acceptance of universal standards in a field where they are particularly needed: armed conflict. . . .
>
> Representations by a nonparty to Protocol I regarding violations . . . might have less impact than if they came from a state that had itself formally undertaken to respect those rules.
>
> . . . I trust that the United States will eventually ratify not only Protocol II but also Protocol I, as this is truly "law in the service of mankind."[64]

[60] Id.

[61] Theodor Meron, "The Time Has Come for the United States to Ratify Geneva Protocol I," 88 *AJIL* (1994), 678, 679.

* Two U.S. representatives to the Conferences were Maj. Gen. George S. Prugh, recently retired from active duty as the Judge Advocate General of the Army, and Maj. Gen. Walter D. Reed, on active duty as Assistant Judge Advocate General of the Air Force, soon to become the Judge Advocate General.

[62] George H. Aldrich, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions," 85 *AJIL* (1991), 1, 11.

[63] Several years after Additional Protocol II's failure of ratification, Ambassador Aldrich bitterly noted that "One polemicist, Douglas J. Feith, then [1985] a Deputy Assistant Secretary of Defense, even described the negotiations as a 'sinister and sad tale' and a 'prostitution of the law.'" Id., at 4. At the time of the 9/11 attacks on America, Mr. Feith was the Under Secretary of Defense for Policy, and a leading advocate for the invasion of Iraq. Thomas E. Ricks, *Fiasco* (New York: Penguin, 2006), 31, 55. Feith boasts, "I helped counter an effort by terrorist groups and their state supporters to co-opt the Geneva Conventions . . . The arguments I used in the mid-1980s to defend the Conventions resurfaced after 9/11, and helped shape President Bush's decision on the legal status of enemies captured in the war on terrorism." Douglas J. Feith, *War and Decision* (New York: Harper, 2008), 38.

[64] Hans-Peter Gasser, "An Appeal for Ratification by the United States," 81 *AJIL* (Oct. 1987), 912, 924–5.

"The controversial strictures of Protocol I preclude any chance of its achieving universal acceptance . . . "[65] Nevertheless, a broad international acceptance of both Protocols approaching universal acceptance has been achieved. As of this writing, 168 states have ratified Additional Protocol I. Additional Protocol II has been ratified by 164. (Currently, 192 states are represented in the U.N. General Assembly.[66]) Year by year, the number of states ratifying the Protocols increases, along with the births of new states that quickly become new accessions.

In 1988, adding pressure on America to accept Protocol I, a U.S. Department of State Deputy Legal Advisor announced that the United States affirmed that it considers fifty-nine of Additional Protocol I's ninety-one substantive Articles to be customary international law. When those fifty-nine Articles are involved, all nations are bound whether or not they have ratified the Additional Protocol.[67] Twenty years after the Protocol's refusal by the president, the United States considered itself bound by sixty-five percent of the Protocol.[68] In January 2001, the Persian Gulf War, Operations Desert Storm and Desert Shield, commenced. The Allied coalition included British, Canadian, Egyptian, and French forces, as well as Gulf Cooperation Council forces (Saudi Arabia, Bahrain, Qatar, the United Arab Emirates [UAE], Oman, and Kuwait), along with medical support from Japan, Poland, and Hungary, and basing rights in Saudi Arabia, Italy, Spain, Germany, Greece, and Turkey.[69] Most of that coalition had already ratified Additional Protocol I and followed most of its provisions. To a large extent the United States did so, as well, because of the need to coordinate command and control issues, air operations, and rules of engagement within the coalition. As the Defense Department's report on the war observes, the United States followed Protocol I because numerous provisions are "generally regarded as a codification of the customary practice of nations, and therefore [as] binding on all."[70]

[65] Dinstein, "Comments on Protocol I," supra, note 36, n.p.

[66] The United Nations Web site lists 192 G.A. members. (www.un.org/members/list.shtmo) The ICRC Web site lists 194 member states, including the Holy See and the Cook Islands, neither of which are U.N. members. (www.icrc.org/IHL.nsf/(SPF)/party_main _treaties).

[67] Mike Matheson, "Additional Protocol I as Expressions of Customary International Law," 2–2 *Am. U. J. Int'l L. & Policy* (Fall 1987), 415, 425. The Articles confirmed as customary law, in the U.S. view, are Article 5 (subject to refusal by the state in question), Articles 10 through 35, Article 37, 38, 40, 42, 51 (except the prohibition of reprisals in this and subsequent Articles), 52, and 54, Articles 57 through 60, and Articles 62, 63, and 70, and Articles 73 through 90. Notably, the Matheson confirmation has not been repeated in further, or later, official government statements.

[68] The Matheson announcement, made in his official capacity as a State Department Deputy Legal Advisor and indicating the U.S., rather than a personal, position, has been called "overbroad" [*2005 Operational Law Handbook* (Charlottesville, VA: Int'l and Operational Law Dept., 2005), errata sheet], and "personal opinion" [W. Hays Parks, "'Special Forces' Wear of Non-Standard Uniforms," 4 *Chicago J. of Int'l L.* (2003), 519, fn. 55], and "no longer considered 'authoritative.'" (Charles Garraway, "'England Does Not Love Coalitions.' Does Anything Change?" in Anthony M. Helm, ed., *International Law Studies, Vol. 82, The Law of War in the 21st Century: Weaponry and the Use of Force* (Newport, RI: Naval War College, 2006), 234, 238. None of the authors cited, however, provide a basis for their assertions that the Matheson statement is not authoritative. No retreat from or disavowal of the Matheson announcement has been issued by any branch or department of the U.S. government.

[69] U.S. Dept. of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (Washington: GPO, 1992), 21–2.

[70] Meron, "The Time Has Come for the United States to Ratify," supra, note 61, at 681, citing the Dept. of Defense Final Report to Congress regarding the Persian Gulf War.

In other words, historical experience is that when the United States is engaged in coalition warfare with Protocol I–ratifying states as allies, America is also effectively bound, despite not having ratified. Because every U.S. ally, save Israel and Turkey,* has ratified, virtually any combat operation involving an ally will effectively bind the United States to follow its basic provisions. America can disregard Protocol I only when engaged in armed conflict on its own and without allies – and then it can disregard only those provisions which are contended to not be customary law.

In 1994, Theodor Meron urged that "international reality and a fresh view of U.S. interests have compelled rethinking of U.S. attitudes . . . " and "power implies responsibility and invites leadership. By ratifying the Protocol, we would be recognizing the former and accepting the latter."[71]

Prospects for U.S. ratification remain distinctly dim, but it hardly matters. U.S. armed forces are, in many respects, effectively bound.

Is American resistance to Additional Protocol I principled and idealistic, or is it foolish and self-defeating, or a bit of all of those things? In a scathing review of the Protocol that captured the frustrations of many Protocol opponents, Hays Parks wrote:

> [T]he ICRC is unqualified to draft provisions regarding the regulation of modern war. And while some of the "experts" who attended its preparatory conferences in 1971 and 1972 may have known something about the law of war, their knowledge of modern warfighting was weak. The draft provisions bring to mind John Galsworthy's statement that, "Idealism increases in direct proportion to one's distance from the problem."... . [T]he ICRC's composition (as a private organization of private citizens in a neutral nation) betrayed it, through lack of knowledge of modern warfighting, and through the ICRC's alliance throughout the drafting and negotiating process with the governments (though not the military) of Switzerland and Sweden. . . . Finally, the ICRC undertook a major and commendable step – though a calculated risk – to introduce the law of war to the Third World. Its effort failed miserably, for instead of requiring the nations of the Third World to rise to certain minimum standards of conduct in combat, the law of war succumbed to the tyranny of the majority . . . The new law of war contained in Protocols I and II regrettably takes a step back by reverting to concepts regarding the justness of one's cause that were expressly rejected by the 1949 Geneva Conventions . . . [72]

Over time, much of the world, rather than rejecting the Protocols, has learned to live with them and, in some respects, appreciate them. In 2004, Canadian Brigadier General Kenneth Watkin, a friend of America and Judge Advocate General of the Canadian Armed Forces, wrote:

> The United States has not ratified Additional Protocol I. As that Protocol was drafted specifically to deal with the changing nature of conflict associated with guerrilla warfare and national liberation movements . . . the unwillingness to adjust the law to meet the realities of those conflicts demonstrates a preference for the mid-[twentieth] century

* Should Turkey gain admittance to the European Union, it must ratify the Additional Protocols as a membership requirement.

[71] Meron, "The Time Has Come for the United States to Ratify," supra, note 61, at 680, 686.

[72] Parks, "Air War and the Law of War," supra, note 57, at 219.

> legal status quo. Such resistance to change, particularly by dominant nation states, has been a regular feature in the development of international humanitarian law.[73]

Perhaps. Should captured al Qaeda fighters be granted POW-like status? Should the Taliban be protected by the Geneva Conventions? A British military writer notes, "The existence of the Protocol cannot be ignored, nor the fact that the majority of the United States' traditional allies are parties to it. . . . We need to know what the United States position is and uncertainty simply undermines the trust that is vital for coalition operations."[74]

Politics has always played a role in LOAC. In 1977 Additional Protocols I and II, its role has been particularly significant.

4.5. 2005 Additional Protocol III

At the end of Additional Protocol I, Annex I identifies persons and objects protected by the 1949 Geneva Conventions and Protocol I. Article 4 of the Annex pictures three emblems protecting, *inter alia*, medical and religious personnel. The protective symbol agreed upon was, of course, a red cross. It is universally known that a red cross on a white field, worn on a helmet, brassard, motor vehicle, aircraft, or ship, identifies a medic (in the U.S. Army), corpsman (in the U.S. Marine Corps and Navy), medical worker, or medical transport or ship. The symbol indicates that the wearer or object is not a lawful target and should not be fired on.

The Red Cross protective emblem was adopted at an October 1863 meeting of the International Standing Committee for Aid to Wounded Soldiers. The minutes of the meeting give no reason for selecting that symbol, although there certainly is no suggestion that it was religiously inspired.[75] The participants sought "a single simple sign, recognizable from a distance, known to all and identical for friend and foe: a sign of the respect due to the wounded and to the medical personnel: a sign which would have the backing of the law."[76] Article 7 of the first 1864 Geneva Convention mandated the red cross on a white background as that sign.

During the Russo-Turkish War (1876–1878), Turkey attributed a religious significance to the red cross and, in a *fait accompli*, informed the Swiss depository of the first Geneva Convention that, although Turkey would respect the red cross, its own forces would use a red crescent as the protective sign. This was the first of many divisive suggestions for additional protective signs. The ICRC, possessed only of moral authority, could only argue (and hope) for no further unilateral derogations.

By the time of the 1907 Hague Peace Conference, the ICRC had reached a *modus vivendi* with the Turks' use of the red crescent, essentially agreeing to their use of a differing sign but urging no others. The next dissent arose at the Peace Conference itself. Persia opted to employ the lion and red sun in place of the red cross, leading to employment of a third protective sign. It, along with the red crescent, was finally officially recognized in the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick.

[73] Watkin, "21st Century Conflict and International Humanitarian Law," supra, note 49, at 282.
[74] Garraway, "'England Does Not Love Coalitions,'" in Helm, ed., *International Law Studies, Vol. 82*, supra, note 68, at 238.
[75] François Bugnion, *The Emblem of the Red Cross: A Brief History* (Geneva: ICRC, 1977), 11–12.
[76] Id., at 7.

At a 1949 diplomatic conference in Geneva, the new State of Israel sought recognition of the red shield of David, the familiar six-point star, already used by the Israelis in the 1948 war with Palestine, as a fourth protective emblem. Israel's effort was rebuffed. At the same conference, Iran, the successor state to Persia, agreed to give up its special emblem, the lion and red sun.

At subsequent international conferences, Israel continued to seek authority to use the red shield of David, resisted by Arab states that considered the six-point star a religious symbol. The disagreement kept Israel, unlikely to adopt a cross or crescent as an emblem, from joining the International Federation of Red Cross and Red Crescent Societies, which enjoyed near-universal membership. Meanwhile, Israel employed the red shield of David protective sign in its armed conflicts.

Over the years, other emerging states proposed their own new protective emblems: Afghanistan proposed a red archway; India, a red wheel; Lebanon, a red cedar tree; a red rhinoceros was proposed by Sudan; Syria, a red palm; Zaire, a red lamb; and, in a short-lived effort, Sri Lanka sought a red swastika.

Finally, in December 2005, Switzerland convened a diplomatic conference at which Additional Protocol III was adopted, adding a new, third, neutrality emblem, "the red crystal." The red crystal is a red, four-sided, diamond-shaped sign with thick borders.[77] A state opting to adopt the red crystal may add its own smaller emblem to the interior of the open diamond. Israel will add the red shield of David's six-pointed star. Indicative of the politics involved in Additional Protocol III's adoption,

> Syria . . . mounted efforts to block the protocol . . . Adoption of the emblem removes a long-standing barrier to full membership [in the Red Cross/Red Crescent movement] of the Magen David Adom (MDA), Israel's national [Red Cross] society . . . and removes a major irritant in relations between the nongovernmental American Red Cross and the International Red Cross and Red Crescent Movement. (The American Red Cross has . . . withheld more than $35 million in dues from the International Federation of Red Cross and Red Crescent Societies to protest the failure to resolve the issue.)[78]

Upon adoption of the red crystal the *New York Times* huffed, "About time."[79] The ICRC warned, "The danger of proliferation [of neutrality emblems] therefore cannot be ignored. The ICRC for its part will not endorse a solution allowing every State and every National Society to use the emblem of its choice."[80] There will be no new emblems approved in the near future. Additional Protocol III entered into force in early 2007 and quickly began gathering ratifications and accessions. The United States became a state party in March 2007.

4.6. Summary

All three Additional Protocols come weighted with international and domestic political freight. Agree with them or not, Additional Protocols I, II, and III must be taken into account.

[77] The emblem may be seen at www.icrc.org/eng. The ICRC *Commentary* to Additional Protocol III is found at 865 *Int'l Rev. of the Red Cross* (March 2007), 178–207.
[78] John R. Crook, ed. "Contemporary Practice of the United States, 100–1 *AJIL* (2006), 244. Footnote omitted.
[79] "Message to Red Cross: About Time," NY *Times* (Dec. 9, 2005), A36.
[80] François Bugnion, *Red Cross, Red Crescent, Red Crystal* (Geneva: ICRC, 2007), 31.

Additional Protocol I remains contested. "To its supporters [CARs] was an acknowledgement of the failure of traditional international law to address the needs of colonized peoples. Critics of national liberation movements point to the illegality of the whole strategy of guerrilla warfare, the blurring of the combatant/non-combatant distinction and the resultant impossible burden on their opponents."[81] This is not an argument that either side will win.

The United States, frequently called on to provide combatant forces to keep or enforce peace in the world's far corners, to protect humanitarian missions, and to end armed incidents in violent places, has reason to object to Additional Protocol I, most particularly with regard to the Protocol's relaxing the criteria for POW status. States with lesser stakes in the realities of *jus in bello* can more easily accept Protocol I's "fairly bold innovations," and object to the U.S. position. Still, influential voices within the United States urge ratification of the 1977 Protocols, with understandings and reservations, as originally envisioned, as many U.S. allies have done.

The United States remains unlikely to ratify Protocol I, but that is not as significant as it once was. "The Reagan administration won a battle in rejecting the Protocol I amendments to the Geneva Conventions in 1987. But it lost the war, for by 2001 almost all of our allies had ratified Protocol I."[82] Having once accepted that sixty-five percent of the Protocol is customary international law, and necessarily forced to comply with the remaining portion of the Protocol when operating in combat coalitions in which all of our allies have ratified, U.S. rejection of Additional Protocol I nears irrelevance. Additional Protocol I "is thoroughly represented in U.S. military doctrine, practice and rules of engagement."[83] The Army's school for military lawyers notes in its 2008 *Operational Law Handbook*, "This difference in obligation has not proven to be a hindrance to U.S. allied or coalition operations . . . "[84] The same *Handbook* adds, regarding targeting restrictions in Additional Protocol I, "These rules are not United States law but should be *considered* because of the pervasive international acceptance of AP I and II."[85]

Additional Protocol II, like Additional Protocol I, saw its first opportunity for adjudication in the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Additional Protocol I has provided a rich body of appellate case law. Not so, Additional Protocol II, however.

> The *ad hoc* Tribunals have produced very little jurisprudence related to Additional Protocol II . . . and no accused has been convicted for a violation of the Protocol . . . The limited categories of armed conflicts to which Additional Protocol II may be said to apply and doubts as to the extent to which it is now part of customary international law

[81] Luc Reydams, "'*A la Guerre Comme à la Guerre*:' Patterns of Armed Conflict, Humanitarian Law Responses and New Challenges," 864 *Int'l Rev. of the Red Cross* (Dec. 2006), 729, 743.

[82] Jack Goldsmith, *The Terror Presidency* (New York: Norton, 2007), 117.

[83] Maj. Jefferson D. Reynolds, "Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for a Moral High Ground," 56 *Air Force L. Rev.* (Jan. 2005), 23–4. Language in several joint Armed Service publications says as much. In Joint Publication 3–63, *Detainee Operations* (06 Feb. 2008), for example: "Commanders of forces operating as part of a multinational (alliance or coalition) military command should follow multinational doctrine and procedures ratified by the United States. For doctrine and procedures not ratified by the United States, commanders should evaluate and follow the multinational command's doctrine and procedures, where applicable and consistent with U.S. law, regulations, and doctrine."

[84] Maj. Marie Anderson and Emily Zukauskas, eds., *Operational Law Handbook, 2008* (Charlottesville, VA: Int'l and Operational Law Dept., The Judge Advocate General's Legal Center and School, 2008), 15.

[85] Id., at 22. Emphasis in original.

> have deterred the Prosecution . . . from entering the realm of Additional Protocol II with much enthusiasm, preferring instead to rely on common Article 3 . . . [86]

Even the head of the U.S. Delegation to the Protocol negotiations could find little good to say: "Protocol II . . . affords very limited protections and has escape clauses designed to make its applicability easily deniable. In the end, the only useful result of Protocol II may be to make it somewhat more likely that [common] Article 3 . . . may be found applicable in lieu of Protocol II."[87]

Overall, "neither the 1949 Geneva Conventions nor the Additional Protocols are 'perfect' documents. They reflect the compromise of negotiation inherent in the treaty making process."[88] If not ideals, however, they remain guides to which the international community can look.

The effect of Additional Protocol III adding a red crystal (with an additional interior symbol permitted), to the red cross and red crescent protective signs remains to be seen. Perhaps we will see a red rhinoceros after all. For some combatant forces, protective signs are becoming a moot point for medical personnel. Israel directs its uniformed medical personnel to not wear any identifying protective sign in combat. On Iraq and Afghan battlefields, many U.S. corpsmen and medics forgo red cross markings on armbands and helmets because the enemy specially targets medical personnel. In the era of transnational terror, un-uniformed insurgency, and frequent disregard for LOAC, the red crystal, like the red cross, may become merely a convenient aiming point.

Finally, an Australian law professor provides a real-world perspective: " . . . I will continue to discuss the importance of the legal characterisation of an armed conflict, the legal distinction between international and non-international armed conflict, and the recognition of an internationalized armed conflict. But . . . these are just that – legal distinctions – and do not define the suffering of peoples who are affected by violence and conflict . . . "[89]

CASES AND MATERIALS

THE UNITED KINGDOM'S MANUAL OF THE LAW OF ARMED CONFLICT

Introduction. *In considering what LOAC applies, when is an armed conflict "international" and when is it "non-international"? The distinction is not always clear. The United Kingdom's*

[86] Mettraux, *International Crimes*, supra, note 42, at 144.
[87] Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols," supra, note 19, at 136.
[88] BGen. Kenneth Watkin, "21st Century Conflict and International Humanitarian Law: Status Quo or Change?" in Michael Schmitt and Jelena Pejic, *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff, 2007), 265, 292.
[89] Duxbury, "Drawing Lines in the Sand," supra, note 50, at 272.

2004 Manual of the Law of Armed Conflict[90] *provides excellent guidance to recognizing a non-international armed conflict and, by implication, an international armed conflict. Also note paragraph 15.32, relating the United Kingdom's view of war crimes and grave breaches in internal armed conflicts.*

1.33.3. International law has historically regulated relations between states. A state's internal affairs, including responsibility for the maintenance of law and order and the defence of territorial integrity against domestic insurgents, were largely regarded as the exclusive business of the state concerned. The notion of international law regulating a conflict occurring within a state would generally have been regarded as being at variance with this approach. However, it was possible for insurgents in an internal armed conflict to be recognized as belligerents and for the law of armed conflict to apply.

1.33.4. The internal use of force against criminal and terrorist activity is not regulated by the law of armed conflict unless the activity is of such a nature as to amount to armed conflict. However, human rights law would apply. Sometimes, as a matter of policy, governments and armed forces have applied basic principles drawn from the law of armed conflict, in such matters as the treatment and interrogation of detainees, even in situations in which the law of armed conflict did not formally apply.

1.33.6. In practice, many armed conflicts have at the same time certain aspects which have the character of an internal armed conflict, while other aspects are clearly international. For example, an internal conflict may become internationalized, with the armed forces of outside states actively involved. Different parts of the law of armed conflict may, therefore, apply to different phases or aspects of the conflict. There is thus a spectrum of violence ranging from internal disturbances through to full international armed conflict with different legal regimes applicable at the various levels of that spectrum. It is often necessary for an impartial organization, such as the International Committee of the Red Cross, to seek agreement between the factions as to the rules to be applied.

3.4.1. Conflicts of this nature [in which peoples are fighting against colonial domination, alien occupation, or racist regimes] within the territory of a state had hitherto been regarded as internal. Under the Protocol [I], such conflicts are treated as if they were international armed conflicts.

3.6.1. The point at which situations of internal disturbances and tensions develop into an armed conflict is open to interpretation. Although Common Article 3 specifically provides that its application does not affect the legal status of the parties to a conflict, states have often been reluctant to admit to such a development. Traditional factors that might be used to indicate the existence of an armed conflict, such as recognition of a status of insurgency by third parties . . . have lessened in importance. . . . Whilst states may not be willing to admit to the application of Common Article 3 as a matter of law, its provisions are frequently applied in fact.

3.9. The application of the law of armed conflict to internal hostilities thus depends on a number of factors. In the first place, it does not apply at all unless an armed conflict exists. If an armed conflict exists, the provisions of Common Article 3 apply. Should the dissidents

[90] U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), footnotes omitted.

achieve a degree of success and exercise the necessary control over a part of the territory, the provisions of Additional Protocol II come into force. Finally, if the conflict is recognized as a conflict falling within Additional Protocol I, Article 1(4) [colonial domination, alien occupation, racist regimes], it becomes subject to the Geneva Conventions and Protocol I.
15.1.1. In practice many conflicts since 1945 have had the characteristics of both international and non-international armed conflicts. For example, in many cases, outside states have become involved in support of the rival parties in what may have originated as an internal conflict. In such cases, the more fully developed rules applicable in international armed conflict may be applied. . . .

15.2.1. 'Situations of internal disturbances and tension, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' do not amount to armed conflict. These situations are covered mainly by the municipal laws of states. The main body of international law applicable to these situations is human rights law, including the law relating to crimes against humanity and genocide, but in addition, as a matter of policy, states have sometimes taken the view that, even if a particular situation is not an armed conflict under international law, the relevant principles and rules of the law of armed conflict will be applied.

15.3. Once the level of violence has reached the intensity of an armed conflict, the provisions of Common Article 3 to the Geneva Conventions apply.

15.3.1. The point at which internal disturbances and tensions develop into an armed conflict is open to interpretation. Attempts to define the term 'armed conflict' have proved unsuccessful and although Common Article 3 specifically provides that its application does not affect the legal status of the parties to a conflict, states have been, and always will be, reluctant to admit that a state of armed conflict exists. Factors that may determine whether an internal armed conflict exists include whether the rebels possess organized armed forces, control territory, and ensure respect for the law of armed conflict. . . . The terms of Common Article 3 are really no more than 'rules which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed'. It follows that whilst states may not be willing to admit to the application of Common Article 3 as a matter of law, its provisions are frequently applied in practice.

15.4.1. These provisions do not preclude the application of the relevant national law – except to the extent that a particular rule of national law directly conflicts with any of the provisions of Common Article 3. Thus captured insurgents, whether nationals of the state or not, may be tried for offenses they have committed, provided that the basic requirements of the law of armed conflict for humane treatment and judicial guarantees are observed. Captured insurgents are not legally entitled to be treated as prisoners of war. Common Article 3 does, however, state that the parties should 'further endeavour to bring into force, by means of special agreements, all or part' of the main provisions of the Conventions. Thus there is nothing to prevent greater application of the Conventions, for example, the conferring of status akin to that of prisoners of war, where agreed and appropriate.

15.5.5. There has been no consensus between states as to the extent to which rules of the law of armed conflict other than those specifically laid down in treaties apply to internal armed conflicts. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia suggests that some of those rules do apply and the Rome Statute of the International Criminal Court . . . lists a series of acts which, if committed in internal armed conflicts, are considered war crimes. While it is not always easy to determine the exact content of the customary

international law applicable in non-international armed conflicts, guidance can be derived from the basic principles of military necessity, humanity, distinction, and proportionality. . . .

15.32. Although the treaties governing internal armed conflicts contain no grave breach provisions, customary law recognizes that serious violations of those treaties can amount to punishable war crimes.

PROSECUTOR V. TADIĆ

(IT-94-1-A) Defense Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995)

Introduction. *Case law, one of the primary sources of LOAC, is helpful in interpreting its provisions. The ICTY is a rich source of modern LOAC case law even though binding only the parties before the court. Early in the long-running Tadić case, the ICTY's Appeals Chamber addressed the question of when an armed conflict arises, but provided little guidance in differentiating between international and non-international armed conflicts. From the tribunal's order:*

We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[91]

Two years later, the Tadić Trial Chamber was more helpful:

The test applied [for] the existence of an armed conflict for the purposes of the rules contained in Common Article 3 [a non-international armed conflict] focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, at a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.[92]

Conclusion. *For a fuller discussion of the Tadić court's findings on this issue, see Chapter 5, Cases and Materials.*

COMMENTARY TO 1949 GENEVA CONVENTION I, FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD[93]

Introduction. *The* Commentary *to Convention I provides a brief but instructive discussion of the distinction between international and non-international armed conflicts.*

[91] *Prosecutor v. Tadić*, supra, note 41, at para. 70.
[92] *Prosecutor v. Tadić*, IT-94-1-T, Judgment (7 May 1997), para. 562. Footnotes omitted.
[93] Jean S. Pictet, ed., *Commentary, I Geneva Convention* (Geneva: ICRC, 1952), Art. 3.1, at 49–50.

What is meant by "armed conflict not of an international character"? That was the burning question which arose again and again at the Diplomatic Conference. The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms – any form of anarchy, rebellion, or even plain banditry. . . . [T]hese different conditions, although in no way obligatory, constitute convenient criteria . . . they are as follows:

(1) That the party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
(2) The legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
(3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or
    (b) that it has claimed for itself the rights of a belligerent; or
    (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
    (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
(4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
    (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory.
    (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
    (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

That above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection.

Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible. . . . [N]o Government can object to respecting, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact respects daily, under its own laws, even when dealing with common criminals.

Conclusion. *For a thoughtful argument that Pictet's criteria for the finding of internal armed conflict are too broad, allowing its invocation in situations not intended by the drafters, see:* Lindsay Moir, The Law of International Armed Conflict *(Cambridge: Cambridge University Press, 2002), 34–42.*

LETTER OF TRANSMITTAL: 1977 ADDITIONAL PROTOCOL II

Introduction. *Moving beyond the question of when a conflict within a single state constitutes an armed conflict within the meaning of Common Article 3, recall that the United States has signed, but not ratified, the two 1977 Additional Protocols to the 1949 Geneva Conventions.*

Could U.S. objections to the Protocols be satisfied through reservations and statements of understanding? Are U.S. objections little more than domestic politics, or are they grounded in principled objections to significant issues? Does President Ronald Reagan's letter to the Senate requesting the required advice and consent for the ratification of Additional Protocol II shed light on these questions?

The White House, January 29, 1987.

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to ratification, Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977. I also enclose for the information of the Senate the report of the Department of State on the Protocol.

The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict, with the objective of giving the greatest possible protection to victims of such conflicts, consistent with legitimate military requirements. The agreement that I am transmitting today is, with certain exceptions, a positive step toward this goal. Its ratification by the United States will assist us in continuing to exercise leadership in the international community in these matters.

The Protocol is described in detail in the attached report of the Department of State. Protocol II to the 1949 Geneva Conventions is essentially an expansion of the fundamental humanitarian provisions contained in the 1949 Geneva Conventions with respect to non-international armed conflicts, including humane treatment and basic due process for detained persons, protection of the wounded, sick and medical units, and protection of noncombatants from attack and deliberate starvation. If these fundamental rules were observed, many of the worst human tragedies of current internal armed conflicts could be avoided. In particular, among other things, the mass murder of civilians is made illegal, even if such killings would not amount to genocide because they lacked racial or religious motives . . . This Protocol makes clear that any deliberate killing of a noncombatant in the course of a non-international armed conflict is a violation of the laws of war and a crime against humanity, and is therefore also punishable as murder.

While I recommend that the Senate grant advice and consent to this agreement, I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. Like all other efforts associated with the International Committee of the Red Cross, this agreement has certain meritorious elements. But Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if

they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view. Finally, the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable.

It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.

The time has come for us to devise a solution for this problem, with which the United States is from time to time confronted. In this case, for example, we can reject Protocol I as a reference for humanitarian law, and at the same time devise an alternative reference for the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts. We are therefore in the process of consulting with our allies to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law. I will advise the Senate of the results of this initiative as soon as it is possible to do so.

I believe that these actions are a significant step in defense of traditional humanitarian law and in opposition to the intense efforts of terrorist organizations and their supporters to promote the legitimacy of their aims and practices. The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

Therefore I request that the Senate act promptly to give advice and consent to the ratification of the agreement I am transmitting today, subject to the understandings and reservations that are described more fully in the attached report. I would also invite an expression of the sense of the Senate that it shares the view that the United States should not ratify Protocol I, thereby reaffirming its support for traditional humanitarian law, and its opposition to the politicization of that law by groups that employ terrorist practices.

Ronald Reagan