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Law in the Service of Terror— The Strange Case of the Additional Protocol

Douglas J. Feith

WERE THERE nothing more to it than destruction and brutality, terrorism would not command the world's attention as it does. It is gripping because its purpose is grand: the getting (or keeping) of political power. To fail to recognize terrorism as political method—more than simple madness or simple crime—is to preclude appreciation of why terrorist organizations do much of what they do.

Such organizations devote a great deal of effort to participating in international conferences, cultivating relations with governments, and capitalizing on their own earnest invocations of international law as the source and the sign of their struggles' legitimacy. It seems bizarre that a group willing to murder children as a means of conveying a message should concern itself with what people think of its legal or moral grounding. But such is the case.

That terrorist organizations take international law seriously (which is not at all to say that they comply with it) is evident from the history of the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict—hereafter the Diplomatic Conference—which met from 1974 to 1977

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under the auspices of the International Committee for the Red Cross (ICRC).

The record of the Diplomatic Conference sheds light on how terrorism, law, and politics tie together. It calls attention to the gulf that divides Western liberal political culture from that of totalitarian and most Third World powers with respect to conceptions of law and of human rights. It reveals the pitfalls of dialogue in the absence of common values, common interests, and common usage of words. And it opens for examination the negotiating techniques Westerners routinely employ in international forums, techniques rooted in the conviction that consensus is more important than principle.

Humanitarian Law

THE LAW of armed conflict has traditionally been divided into "Hague rules," which limit the means and methods of allowable warfare (e.g., what may be targeted, what weapons and techniques may be used), and "Geneva rules," which mandate humane treatment of war victims. The four Geneva Conventions of 1949 form the crux of international humanitarian law.

In the years after 1949, the sporadic efforts to promote conferences to modify the Geneva Conventions bore little fruit. But by 1974, the ground had become amply fertile, largely by means of United Nations General Assembly resolutions that supported "national liberation movements" and thereby highlighted the

Geneva Conventions' failure to sanction the kind of warfare such movements usually wage. Interest in creating rights for irregular forces combined with other interests—for example, that of the ICRC in increasing protection for its medical personnel and that of the United States in pressing North Vietnam for an accounting of U.S. prisoners of war and the remains of fallen U.S. soldiers—to draw 126 states in February 1974 to participate in the first session of the Diplomatic Conference.

Notwithstanding its humanitarian subject matter and the legal nature of its mission, the Diplomatic Conference from its inception operated as most United Nations forums then did (and do), as a theater for harshly expounded, highly ideological politics. The major international events and circumstances of the period—the successful wars against Portuguese rule in southern Africa; the North Vietnamese conquest of South Vietnam; the assertion of power by Third World oil exporting states, in particular Arab states; the PLO's inspirational alchemic accomplishment in converting terrorism into broadly based diplomatic stature; the Soviet Union's rapidly increasing military power and its growing role in "wars of national liberation" far outside Russia's historical sphere of activity; and the traumas inflicted on the United States by Vietnam and Watergate—tended to embolden many non-Western conference participants and proved uncondusive to disinterestedness and to deference to traditional principles of international order.

Liberation Law Promoted

THE Diplomatic Conference's work on updating the 1949 Conventions was based on two draft protocols, the first covering "international" and the second "non-international" armed conflicts. How to categorize "wars of national liberation" was a heated issue with weighty legal and diplomatic ramifications, and it arose at the outset.

So the Diplomatic Conference lost little time in adopting a resolution that invited the participation of "national liberation movements" from around the world. The following

groups accepted and, though they lacked entitlement to vote, participated in rewriting the international community's humanitarian law: African National Congress (South Africa); African National Council of Zimbabwe (Rhodesia); Angola National Liberation Front (FNLA); Mozambique Liberation Front; Palestine Liberation Organization; Panafricanist Congress (South Africa); People's Movement for the Liberation of Angola (MPLA); Seychelles People's United Party; South West Africa People's Organization; Zimbabwe African National Union; and Zimbabwe African People's Union.

The original working draft stated simply that Protocol I applies to those situations that the 1949 Geneva Conventions classified as international conflicts. At the Diplomatic Conference, amendments were proposed to specify that such situations include wars of national liberation, defined with reference to the struggles of "peoples" against "colonial domination," "alien occupation," and "racist regimes."¹ Most struggles of that kind, entailing the direct involvement of only one sovereign state, had for years commonly been deemed internal or non-international matters. Declaring such struggles to be international, however, would legitimate the many foreign interventions, diplomatic and material, made on behalf of the various "national liberation movements." As the East German representative explained:

[T]he General Assembly . . . [has] declared that "armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions". That resolution was extremely important because it confirmed that the colonial Power had no rights of sovereignty over colonial territories and peoples, [and] that assistance by foreign States to the liberation struggle of colonial peo-

¹ Quotations here are from the Official Records of the Diplomatic Conference—a summary account of the proceedings—as found in H. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions* (1979). Levie's four volumes reproduce much of the Official Records.

ples did not constitute interference in the domestic affairs of the colonial Power. . . .

Proponents of applying Protocol I to "national liberation" conflicts contended that the treaty should affirm both "the right of peoples to self-determination," and the "lawfulness" of armed conflict to realize that right. The characterization of self-determination as a right was repeatedly attributed to the United Nations Charter. Wars fought to achieve that right were often referred to as "just" or "legitimate." The failure of the Diplomatic Conference to consecrate such wars, it was said, would amount to a denial of both political reality and current law. According to the USSR representative, the "sole object" of the proposed national-liberation-war language was to "embody in humanitarian law a rule which was already in existence and which took into account the realities of the times." Opposition to such language could be attributed only to mean self-interest on the part of Western imperialists. The Tanzanian representative declared that his delegation "was not prepared to accept a humanitarian law drawn up solely in the interest of the imperialist powers." The Nigerian representative later added that "if the Conference did not agree that the national liberation struggles were governed by draft Protocol I, his delegation's fears would be confirmed: the problems would be dealt with solely from the point of view of the western Powers, in defiance of the principles of international law. . . ."

The Senegalese representative warned that a wrong decision on this issue by the Diplomatic Conference could aggravate the problem of terrorism:

To deny the international character of [wars of national liberation] was to trample on the most sacred rights of the peoples who were fighting.

It was the feeling of injustice so engendered which was mainly responsible for what was described as "international terrorism." When thousands of innocent people were daily being slaughtered in many parts of the world, it was difficult for people to be shocked at the few dozen innocent victims of the hijacking or sabotage of airliners. Without justice, humanitarian law was merely an empty word.

OPPONENTS of the amendments on "wars of national liberation" denounced them as destructive not only of humanitarian law, but of the prohibition against war promulgated in Article 2(4) of the United Nations Charter, the first principle of international law since World War II. They argued that the amendments would legally sanction the resurrection of the medieval "just war" doctrine² and effectively abolish the distinction between international and non-international conflicts. Furthermore, the most important terms in the amendments lacked definition, so the application of humanitarian law would depend on subjective judgments rooted in politics.

The British representative expressed "surprise" at the text of the amendments:

The various arguments had presented no convincing case for considering an internal struggle as an international one. Moreover, it was a basic principle of the Geneva Conventions, The Hague Regulations and other instruments that legal and humanitarian protection should never vary according to the motives of those engaged in a particular armed struggle. Deviation from that principle would mean damaging the structure of The Hague and Geneva Conventions and would involve the need to reconstruct the whole of humanitarian law. Moreover, to discriminate between the motives of those engaged in the struggle would violate essential principles of human rights.

It was true that self-determination was mentioned in the Charter of the United Nations,

² See generally John Norton Moore, "A Theoretical Overview of the Laws of War in a Post-Charter World, with Emphasis on the Challenge of Civil Wars, Wars of National Liberation, Mixed Civil-International Wars, and Terrorism," *American University Law Review* 31 (1982): 841-842. ("Just war is dead in international law. The United Nations Charter killed it, and rightly so. Under the Charter, the use of force is lawful in defense, but not as affirmative conduct to seek resolution of issues by force, however just the cause is perceived to be.")

but as principle, not as a right. Nowhere in the Charter did the right to engage in armed struggle appear. No resolution of the United Nations could amend the Charter, which would remain inviolate until amended in the proper manner. Terms like "struggle for the self-determination of peoples" were all too vague. What is a "people"? Such terms were elastic, as Biafra and Bangladesh had shown. They could not be used as a basis for law-making.

The Swiss delegate elaborated further on the distinction between law and politics:

[The amendments] tended to establish a particular category of conflicts on the basis of subjective criteria stemming from the causes of those conflicts and the aims of the parties. That entailed a move from the field of *jus in bello* to a zone which held dangers for the Conference, namely, *jus ad bellum*. . . . [I]t would be very dangerous, and against the spirit of humanitarian law, to classify armed conflicts on the basis of non-objective and non-legal criteria.

States like Iraq, Nigeria, the Soviet Union, and Yugoslavia, which can be (and have been) charged with denying the right of self-determination to certain of their national and ethnic groups, supported the national-liberation-war amendments without evincing concern that such groups would derive any aid or comfort from them. The amendments' opponents pointed out that there existed no objective standards for judging whether a group qualified as a national liberation movement. "Any separatist band of armed criminals in a colonial territory might claim to be engaged in an armed struggle in furtherance of their people's right to self-determination," observed the Irish representative. The amendments' supporters, however, saw the matter not primarily as one of definitive standards but of international recognition; the prevailing view was that a national liberation movement is any group recognized as such by "the regional intergovernmental organizations concerned"—for example, by the League of Arab States or the Organization of African Unity. Indeed, it was on that basis that the movements listed above were invited to participate in the Diplomatic Conference. Given the nature and

record of those regional bodies, one could confidently predict whether a given armed group would obtain recognition as an authentic national liberation movement or whether, for reasons of its unprogressiveness or the inadvisability of crossing its antagonist, it would be denied the protections of Protocol I.

Several states objected that extending Protocol I to wars of national liberation would discriminate invidiously against sovereign states in favor of irregular forces fighting them in their own territory. The problem would arise because the irregular force and its state-enemy would both enjoy rights under Protocol I and the 1949 Geneva Conventions, but only the latter would command the kind of resources (e.g., law courts and medical facilities) required for the fulfillment of the corresponding obligations. The Italian representative commented:

[T]he word "Powers" used in the . . . Geneva Conventions could only mean States and not authorities other than States. That fact was borne out not only by the letter and spirit of the Conventions, but also by the circumstances that application of many provisions of the Geneva Conventions called for complicated machinery which was, generally speaking, available only to States.

The United States representative later added:

Liberation movements could not fulfill all their obligations under the Conventions and would thus be branded as being in violation of those Conventions. The only benefit which those movements would receive from labeling their struggle as international would be enhanced political status, but nothing on the humanitarian plane.

The representatives of the Mozambique Liberation Front and the PLO dismissed this objection, treating the issue as one of good intentions, respect for law, and willingness to do all one can do, rather than as a matter of objective capability to perform an extensive list of specified duties.

The last major argument against extending Protocol I to wars of national liberation invoked the practical principle that humanitarian law

should be crafted to encourage compliance. If the law's applicability to a group of fighters hinged on their cause's legitimacy, a state battling a "national liberation" group would refuse to apply the law, lest it make a fatal political concession. In the words of the Israeli representative:

[Protocol I's national-liberation-war provision] had within it a built-in non-applicability clause, since a party would have to admit that it was either racist, alien or colonial. . . . [S]uch language . . . ensured that no State by its own volition would ever apply that article.

Ends and Means

A VERY LARGE portion of the Diplomatic Conference, which ran for over three years, was spent in this debate over the status of "wars of national liberation." Though it generated its share of heat, the debate is remarkable for the dearth of actual engagement between the sides. They generally talked past one another.

The participants who adhered to the traditional concepts underlying the 1949 Geneva Conventions, who for ease of reference and with general accuracy may be labeled "Western," distinguished between considerations appropriate for a political body, such as the United Nations General Assembly, and those suitable for either a humanitarian organization like the ICRC or a treaty-drafting body like the Diplomatic Conference. Accordingly, as we have seen, they made their case against the national-liberation-war amendments with legal arguments.

Their concept of law derived from that body of philosophy, the pride of Western civilization, whose appendages include the Magna Carta, the United States Constitution, and the *Declaration of the Rights of Man*. In brief, it is law as impartial principle, expressed in objective phraseology, duly defined, to be applied to specific cases by disinterested judges. Its essence is fair procedure—due process of law—which binds all elements of society, including the government. Its purpose is to safeguard the rights of individuals from the depredations of

other private actors and of the government. Where this conception prevails, law imposes limitations on all political activity within the state, even that of the party in power, which is held accountable for any violations. In such circumstances, the notion of a common good is derived from the ground up—that is, from the protection of the rights of individuals. This Western view of law does not allow for a group to invoke "the people's interest" to justify depriving an individual, without due process of law, of his life, liberty, or property. Nor does it allow for action in the name of the people in the absence of their express consent.

The Western representatives' legal arguments made no apparent impression on their interlocutors from the "Socialist" camp and from much of the Third World. In most of the world outside the West, law does not constrain governments; indeed, it often serves merely as a device by which ruling parties suppress their opponents. Adherents to the view that collective interests—described as those of the ruling party, the state, the people, or whatever—necessarily outweigh the interests of individuals have understandable difficulty in conceiving of law as it is known in the West. As the record of the Diplomatic Conference makes plain, the idea of law as separate from and above politics is the light and delight of a small minority of nations.

This helps account for much of the ships-passing-in-the-night nature of the Article I debate. The Western representatives wanted to weigh the merits of competing legal formulations. The non-Westerners wanted to use the Protocol to strengthen approved "national liberation movements." The Westerners argued that such a political aim may be legitimate for a political resolution of the United Nations, but not for a legal document. The non-Westerners rejected the distinction and continually made erroneous reference to General Assembly resolutions as international law.³ The Westerners

³ The United Nations Charter provides that the Security Council has authority to make "decisions" and that the other UN members are bound "to accept and carry out" such decisions. Article 25; see generally UN Charter

warned that vague and subjective wording would make humanitarian law a tool of politics. The non-Westerners already viewed it as such and evidently considered the circumstance desirable; none expressed qualms about making the applicability of the law to irregulars a matter for decision by the Arab League, the OAU, and other such political forums.

The Westerners defended the merit of the political neutrality of the UN Charter and the 1949 Geneva Conventions. They explained that amending and reinterpreting so as to politicize those treaties would negate the advance (rare and valuable, albeit largely theoretical) that they effected in the direction of world peace and respect for human rights. Certain states and causes, to be sure, could reap quick benefits from such mischief, but these would likely prove fleeting in a world where international law, having lost its neutrality, lost its moral force and therefore much of its sway over those states that heed it.

This cut little ice with the "Socialist" and Third World delegates, many of whom denied that existing international law was neutral and described it as pro-imperialist or pro-Western. Moreover, a number spoke as if there were no such thing as a neutral principle of law. They seemed to view international law as a zero-sum game: if a provision is supported by the West, it must be undesirable for the Third World.

Liberation Law Ascendant

THE DEBATE, in short, produced no meeting of minds on fundamentals. The Westerners presented their case forcefully and generally emphasized the points that most deserved emphasis—that the proposed national-liberation-war language would legitimate certain types of war, license belligerent foreign meddling in the sovereign domain of certain states, politicize humanitarian law, and thereby render that law even less sturdy a shield for its intended beneficiaries.

Given this critique, it may surprise the reader to learn that the relevant part of Article 1 of Protocol I, as ultimately adopted by the Diplomatic Conference with but one negative vote, reads (in relevant part) as follows:

4. The situations [to which Protocol I applies] include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The March 1974 vote in committee on that paragraph was 70 votes in favor and 21 against (Belgium, Canada, Denmark, Federal Republic of Germany, France, Israel, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Portugal, Republic of Korea, South Africa, Spain, Switzerland, United Kingdom, United States, Uruguay), with 13 abstentions (Australia, Austria, Brazil, Burma, Chile, Colombia, Greece, Guatemala, Holy See, Ireland, Philippines, Sweden, and Turkey).

Ultimately, however, the vote in plenary on Article 1, in May 1977, was 87 in favor and one against (Israel), with 11 abstentions (Canada, Federal Republic of Germany, France, Guatemala, Ireland, Italy, Japan, Monaco, Spain, United Kingdom, and the United States).

The PLO representative was gratified:

[He expressed] deep satisfaction at the result of the vote, by which the international community had re-confirmed the legitimacy of the struggles of peoples exercising their right to self-determination. . . . The overwhelming majority against the single vote cast by the

Chapters VI, VII, VIII, and XII. In contrast, the General Assembly's functions and powers are explicitly non-legislative: "The General Assembly may *discuss* any questions . . . [and] may make *recommendations*. . . ." Article 10 (emphasis added). In other words, the Security Council can make international law, but the General Assembly can make only non-binding declarations. The many contrary assertions of revisionist lawyers are simply not compatible with the plain language of the UN Charter.

Zionist representative was a source of deep satisfaction and would also be an encouragement to the peoples of southern Africa waging a just struggle for self-determination.

The Arab people of Palestine fell within all three of the categories mentioned in paragraph 4: they were under colonial domination; their territory was under foreign occupation, despite the assertions of the terrorist Begin; and they were suffering under a racist regime, since Zionism had been recognized in a United Nations resolution as a form of racism. He wished to express his gratitude to the justice- and peace-loving peoples who had given their support to the struggles of all peoples fighting for self-determination.

The record of the Diplomatic Conference is silent on why many of the no-voters became abstainers three years later. In fact, several, in explaining their plenary abstentions, cited the very objections to Article 1 on which they had justified their earlier "no" votes. The British representative recalled that "the main reason for [UK] opposition . . . was that [paragraph 4] introduced the regrettable innovation of making the motives behind a conflict a criterion for the application of humanitarian law." He stated that his delegation has "not wish[ed] to see the Protocol founder on that difference of opinion" and, because "the cardinal principle of equality of application to all participants had been respected," his delegation felt "relieved." The relief seems, however, to flow from begging the question, for the determination as to which fighting group qualifies as a "participant" remains under Protocol I a political judgment.

The United States offered no formal explanation of its plenary vote. It is noteworthy that certain U.S. government lawyers involved in the negotiations recommended, in a 1977 "working group review and analysis," that the U.S. government sign and ratify Protocol I, refrain from making any reservation regarding Article 1(4), and mitigate the problems inherent in that provision through a strict construction. They observed that "[t]he kinds of conflict that nations deemed covered by the general phrase wars of national liberation were those fought against the foreign element in Vietnam, Guin-

ea-Bissau, Angola, Palestine, southern Africa, and Mozambique," and concluded: "The narrow interpretation suggested above appears to be one that is in the United States interest."

—The Uniform and the Irregular—

FROM the point of view of the "Socialist" and Third World delegations, establishing the international character of "national liberation struggles" was a necessary step toward exempting the participants therein from the municipal law of their sovereign enemies. Under the 1949 Geneva Convention on Prisoners of War (GPW), combatants in international conflicts are deemed entitled to commit acts of belligerency that would be punishable if committed by an ordinary individual. And such combatants, if captured by their enemy, have a right to special treatment as prisoners of war. But the GPW does not bestow combatant status on just any fighter, guerrilla, terrorist, or irregular engaged in an international conflict. The conditions for qualification set forth in the GPW favor the interests of non-combatants above those of irregular forces.

Article 4 of the GPW affords combatant status to regular uniformed soldiers (whether or not the power for which they fight is recognized by its enemy as a party to the conflict) and, in subparagraph A(2), to:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . provided that such militias or volunteer corps, including such resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

These conditions have roots in the laws of war that reach back at least to The Hague Conventions of 1907 and 1899, the Brussels Declaration of 1874, and the American Civil

War. They effectively preclude non-uniformed paramilitary bands, like the typical terrorist group or national liberation movement, from qualifying for combatant/POW status. Such a force ordinarily is not recognized as a party to the conflict. Unless it has a secure base in a region beyond the writ of the government it is fighting, wearing uniforms and carrying arms openly would be suicidal. And, as previously discussed, such forces usually lack the facilities needed to fulfill the formidable obligations the Geneva Conventions impose on parties.

In attempting to explain the stringency of the GPW's standards, some commentators have alleged that the drafters were largely oblivious to guerrilla warfare. The evidence is abundantly to the contrary, however. The irregular exploits of the partisan and resistance movements in World War II were too celebrated to have faded from the drafters' memories by 1949.

The rationale for the conditions, especially the "openness" requirements in subsections (b) and (c), is to be found in the traditional solicitude for civilians that is the primary *raison d'être* of international humanitarian law. If one had to render all of humanitarian law while standing on one leg, one might well proclaim: combatants are to be distinguished from noncombatants; the rest is commentary. In a war in which the participants appear openly as soldiers, each soldier may reasonably assume that people who look like civilians *are* civilians and that they pose no threat and may safely be spared attack. On the other hand, as G.I.A.D. Draper has noted:

Once the . . . man with the bomb who is a civilian in all outward appearances but can blow you to smithereens as you pass him by, once you bring such a person within the framework of the protection given to regular armed combatants under article 4 of the Geneva Prisoners-of-War Convention, you make life for every single civilian hang upon a thread. . . .

At the Diplomatic Conference, however, traditional considerations of the rights and interests of individuals, however, conflicted with the conception of humanitarian law dominant among the "Socialist"/Third World majority. In that conception, humanitarian law is not about individuals, but causes. If a rule that protects

innocent bystanders impedes the success of a humanitarian cause—one aimed at liberating a territory from "colonialists," "aliens," or "racists"—it is not a humanitarian rule.

It was clear to all that the respective interests of the civilian and the irregular fighter conflict. "Openness" requirements are invaluable to the former and dangerous for the latter. Whereas the drafters of the GPW interpreted their charter in conformity with traditional individualist ideas of human rights, the majority at the Diplomatic Conference was intent on shifting the balance of the law in favor of the non-uniformed fighter.

Articles 43 and 44 of Protocol I, as adopted by the Diplomatic Conference (see box) make this radical shift. The final plenary vote on Article 44, in April 1977, was 66 in favor (including the U.S.), 2 against (Brazil and Israel), and 18 abstentions.

The Protocol I standards for irregular forces deviate from the long-standing rules in several respects. Among the most important are: (1) There is no requirement for a "fixed distinctive sign"—that is, a uniform. (As this exemption applies only to irregulars, Article 44 actually makes it easier for irregulars to obtain combatant/POW status than for a regular soldier to do so.) (2) The general requirement to carry arms openly has been dropped; one must do so only during certain military operations. And (3) a combatant forfeits his right to be a prisoner-of-war only if he violates the narrow "openness" rule of the second sentence of Article 44(3), but even then he retains all the POW protections afforded by the GPW.

It is not difficult to grasp why the PLO representative declared Article 44's adoption in committee "encouraging" and "an important step forward in the growing recognition, through international instruments, of the legitimacy of the struggle of national liberation movements and the need to guarantee their fighters adequate protection"; and one easily comprehends his statement, following its adoption in plenary, that "national liberation movements . . . could not fail to welcome the protection accorded to their combatants by [Article 44]. . . ." What may be less obvious is why the United States, breaking ranks with a number of

The First Protocol to the 1949 Geneva Conventions

Articles 43 and 44, in Relevant Part

- 43.1 The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
- 43.2 Members of the armed forces of a Party to a conflict . . . are combatants . . .
- 44.1 Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
- 44.2 While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
- 44.3 In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
- 44.4 A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the [GPW] in the case where such a person is tried and punished for any offences he has committed.
- 44.5 Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his activities.

its allies and other states, voted in favor of the Article and praised it as "an important advance in the law."

Love the Law You Get

EARLY ON at the Diplomatic Conference, the United States co-sponsored a draft article that would have granted POW status to captured members of irregular forces only if they "distinguished themselves from the civilian population in their military operations by carrying arms openly or by a distinctive sign recognizable at a distance or by

any other equally effective means" and otherwise complied with the laws of war. The draft article would have denied POW status to an individual irregular only if he failed to fulfill the broad "openness" conditions. The failure of individual irregulars to fulfill the two conditions would not have deprived other members of their irregular force of POW status upon capture.

That proposed article would have relaxed the GPW "openness" requirements by allowing irregular forces to choose their own means of distinguishing themselves from civilians, but, as a U.S. representative explained, "[t]he single important issue is that combatants be distin-

guished from civilians—how it is done is not so important as the fact that it is done.” The unique importance of openness in all military operations would have been reflected in the provision that made violation of that requirement the sole exception to the rule in favor of POW status. In justification of the proposed exception, the U.S. representative, calling it “fundamental,” “essential,” and “basic,” stated:

In our view, a combatant who deliberately fails to distinguish himself from other civilians while engaging in combat operations has committed such an extraordinary violation of the laws of war and so prejudices the protection for civilians that he loses his entitlement to be a prisoner of war. . . . The desire and urgency to protect the civilians is no different today than it was in 1907—or 1949—and the lives of civilians are no less important today than they were then.

The gap between this initial U.S. stand on the POW issue and the provisions of Protocol I is difficult to bridge. Article 44, after all, does not condition POW status for irregulars on their distinguishing themselves from civilians during all military operations, and Article 43 fails to make an irregular force’s compliance with the laws of war a condition for combatant status.

In explaining his delegation’s support for Articles 43 and 44, U.S. Ambassador George A. Aldrich attributed much weight to the first sentence in Article 44(3), which he described as a “basic rule” that “meant that throughout their military operations combatants must distinguish themselves in a clearly recognized manner.” The paramount justification, however, was the belief that Protocol I might induce groups like the PLO, SWAPO, and other “movements” participating in the Diplomatic Conference to comply with the laws of war:

[Article 44] conferred no protection on terrorists. It did not authorize soldiers to conduct military operations while disguised as civilians. However, it did give members of the armed forces who were operating in occupied territory an incentive to distinguish themselves from the

civilian population when preparing for and carrying out an attack.

Ambiguous Oaths

COMMENTATORS who think the Diplomatic Conference robbed civilian Peter to pay terrorist Paul are unimpressed with the several admirable provisions in Articles 43 and 44 that Ambassador Aldrich and other Protocol I proponents prefer to highlight. Notwithstanding the first sentence of Article 44(3), the skeptics see the new law as less kind to civilians and more generous to irregulars—guerrillas and terrorists—than is the old law of the GPW. They note that the first sentence of Article 44(3) is less precise than the corresponding provisions in the GPW and in any event is merely hortatory; no rights or privileges hinge on adherence to it. In contrast, fulfillment by irregulars of the “openness” requirements of the GPW is a condition of POW status thereunder. Moreover, the principle embodied in Article 44(3)’s first sentence is vitiated by the next sentence, which actually grants POW status to combatants who do not distinguish themselves from non-combatants during all military operations.

Under Protocol I, whatever protection non-combatants retain against the danger of combatants operating in civilian garb derives from this same, hotly debated second sentence of Article 44(3). Failure to satisfy the “openness” obligation it sets forth is the only offense that would cause a combatant to forfeit his right to be a POW. Yet, as the commentators roundly have remarked, several of the provision’s pivotal terms are undefined and subject to widely differing interpretation—for example, “deployment.” Ambassador Aldrich, in a 1981 law review article, outlined the problem:

[T]he term “deployment” is a critical one for guerrillas operating in occupied territory. The negotiating history reveals that there was no agreement on the meaning of that term. Some delegates asserted that any movement toward the place from which an attack was to be launched would be part of a “deployment.” Certainly, the word is ambiguous

For those who might wonder why such a “critical” term in so significant a provision was allowed to remain ambiguous, the ambassador volunteers that “its ambiguity was probably essential to agreement at the conference to the text.” For those who might rudely query, “Who needs an agreement under such circumstances?” no answer is offered.

As a consequence of the ambiguity of “deployment,” a state that captures in its territory a terrorist from one of the sanctioned “national liberation movements” and finds he is concealing a bomb would be required by Protocol I to grant him POW status unless it can establish that he was “engaged in a military deployment.” Article 45 of Protocol I lays the burden of proof squarely on the state. If states targeted by terrorists were to adhere scrupulously to these provisions, it would be a boon for the terrorists. If, as is likelier, the states (even though parties to Protocol I) prosecute and punish the terrorists as mere terrorists (not “combatants”), it will show disdain for Protocol I, with inevitable collateral damage to other (and more estimable) treaties on the laws of war.

The Swiss representative offered a noteworthy condemnation of Article 44:

[T]he article would only have the effect of doing away with the distinctions between combatants and civilians. The consequence would be that the adverse party could take draconian measures against civilians suspected of being combatants.

Like the praiseworthy first sentence of Article 44(3), the provision in Article 43(1) stating that the armed forces of a party to a conflict “shall be subject to an internal disciplinary system which . . . shall enforce compliance with the [laws of war]” lacks teeth. It states an obligation, but it does not state that a member of otherwise qualified armed forces forfeits his combatant status if those forces violate that obligation. The contention has been made that compliance with the laws of war is a “condition” for POW status for guerrillas, but such an inference appears ill-grounded. Where the drafters wanted to make POW rights conditional—e.g., in Article 44(3)—they did so expressly, and the thrust of Articles 43 through 46

is to create an overwhelming presumption in favor of granting such rights in any doubtful case.

Where does this leave the contention—the chief justification offered by the U.S. delegation for its support of Article 43 and 44—that dropping the broad “openness” requirements for irregulars creates an incentive for irregulars to comply with the laws of war? Need irregulars comply with the law to obtain combatant/POW status under Protocol I? For individual members of irregular forces, the answer is an almost unqualified negative. As noted earlier, the only violation of the law that strips an individual combatant of “his right to be a prisoner of war” is his failure to fulfill the narrow and opaque “openness” requirements of Article 44(3)(a) and (b), and even in that case he “shall . . . be given protections equivalent in all respects to those accorded to prisoners of war by the [GPW] and by this Protocol.” If there is an incentive here, it is pretty feeble, for it is hard to see the penalty for non-compliance.⁴

As for compliance by armed forces collectively, even a policy of violating the laws of war would not, under the express provisions of Articles 43 and 44, deprive a member of his entitlement to combatant/POW status. One could look for the elusive incentive in Article 96(3), which allows any so-called national liberation movement, by filing a unilateral declaration in which it undertakes to apply the laws of war to its struggle, to become, in effect, a party to the Protocol. But once such a movement successfully files its declaration, no provision of Protocol I can deny its members POW status on the grounds of collective non-observance of the rules. Hence, no incentive there either.

All in all, the humanitarian benefits of Articles 43 and 44, measured as a function of the putative incentive for irregulars to comply

⁴ Another key undefined term in Article 44(3) is “visible.” The PLO representative stated: “Contrary to the suggestions of certain delegations, his own delegation interpreted [“visible to”] to mean visible to the naked eye, since any recourse to electronic devices would divest the article of its value and undermine its very purpose.” 2 *Levie* 509.

with the law, fall far short of the costs entailed in blurring (not to say erasing for all practical purposes) the distinction between combatants and non-combatants.

Slowly over centuries, humanitarian law strove to mitigate war's harm to civilians through demanding discrimination between combatants and non-combatants. Now comes the Diplomatic Conference and, in the name of "developing" humanitarian law, through a single subordinate clause, lays waste the legal and moral achievement of ages. That clause, of course, is in Article 44(3): "Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant *cannot* so distinguish himself . . ." (emphasis added). The "cannot" is a masterstroke of amoral draftsmanship.

Notwithstanding the exegeses of Westerners straining to rationalize their complicity, the PLO representative quoted above correctly proclaimed the significance of this work of the Diplomatic Conference. It amounted to an endorsement, in the politically potent form of a legal instrument, of both the rhetoric and the anti-civilian practices of terrorist organizations that fly the banner of self-determination. One can find phrases and even whole sentences in Protocol I that repudiate bald terrorism and deprecate attacks on civilians, but they are not the gist of its operative provisions. They are a faint counterpoint to the booming "progressive," collectivist, ends-justify-the-means blare of the innovative elements of the document.

— *The Wages of Consensus-Mongering* —

THERE IS much that is unconstructive in the goings-on of multilateral diplomatic forums around the world. But for truly malign perverseness, it would be hard to top the Diplomatic Conference. The Official Record tells a sinister and sad tale. What makes

it sinister is the harm done to potential victims of war and terrorism through prostitution of the law. Beyond that, what makes it sad is the role played by the Westerners. The stakes were higher at the Diplomatic Conference than at a typical UN forum. The subject matter was no ordinary diplomatic resolution, but a treaty with actual potential for affecting the safety and well-being of war victims. The Westerners, from the outset, demonstrated appreciation of the stakes, astuteness in substantive analysis, and skill in pleading. But on issue after issue, when confronting the "Socialist" and Third World states' resolute attachment to patently harmful proposals, the Westerners backed down. They usually put up a good fight for a while, but then they either signed on or they slunk into the shadow of an abstention. At any of several junctures, they could have walked out and rendered the whole exercise academic (for without the major Western powers, no humanitarian agreement would have much standing in the world). But they stayed. Representatives of tyrannies upheld their convictions—stood on their principles, as it were—while the representatives of states where law really governs exalted the necessity for flexibility and compromise above all other principles. Thus with nary a negative vote, the assembly issued up a pro-terrorist treaty masquerading as humanitarian law.

— *Postscript* —

THE UNITED STATES signed Protocol I and Protocol II in December 1977. The decision on whether to submit either or both of the items to the Senate for advice and consent on ratification is currently under discussion within the administration. It will hinge on whether the unacceptable elements are remediable through U.S. reservations and clarifications.