

THE RATIONALITY OF NONCONFORMITY: THE UNITED STATES DECISION TO  
REFUSE RATIFICATION OF PROTOCOL I ADDITIONAL TO THE GENEVA  
CONVENTIONS OF 1949

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## ABSTRACT

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On December 12, 1977, the U.S. signed a treaty offered through the ICRC entitled *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977. This treaty drastically altered the relationship between individual behavior in warfare and combatant status. For the United States, the impact of domestic political tensions, the fresh and painful experience in Vietnam, and a continued emphasis on Détente all played parts in the decision to participate in the conference and sign the treaty. Signature during the Carter administration would not be followed by ratification, and would be rejected by subsequent administrations. Was this decision, continued through every administration to date, a simple outcome of a “rogue” nation exercising its sovereign right based upon its own ability to wage war, or is there more to the story? In this thesis, a new analysis of the political processes and environment surrounding the final treaty’s outcomes is offered. The global tensions between superpowers are examined, emphasizing the United States response, in the context of its perceptions of the treaty’s requirements. A broader coalition of actors, both state and non-state, would ultimately hold the key to the treaty’s significance to conventional warfare. The Global South engaged the issue of lawful behavior in war with a distinct set of outcomes in mind. Their ability to gain agency, build effective coalitions addressing inequities in the asymmetry of warfare that had historically disadvantaged them, and then alter the outcomes of international humanitarian law through democratic practices, are placed in the context of rational choice theory. The logical and methodical approach used by these actors to deconstruct the central premise of conventional

warfare distinctions between combatants and noncombatants, consistently the hallmark of advancing improvements in international humanitarian law, resulted in a treaty reversing advancements in civilian protections through a new set of dangerous behaviors made allowable for a new category of privileged combatants (organized resistance movements). The United States' options were limited, and a new and regressive standard for conventional warfare was instituted.

## DEDICATION

I would like to dedicate this work to my family, for their support and care throughout my life. For my parents, Bob and Helen Childers, who raised me to believe in the value of honest, hard work. The lessons they taught me, including the ones that took a little longer to sink in, are still stored in my memory, accessible in my daily life as I require them, even as I grieve at the loss of my father. I know he is still there, reminding me that the next day is a new beginning. For my wife, Amy, and my children, Hope and Jacob, there are few words to express the depth of my feelings. Our lives have been marked by blessings and tests, and their love and support during my military career and deployments is one of the tests that became a blessing. My decision to return to the University to complete a goal I had set aside for many years was a very personal one, and the sacrifices and costs that were required to complete this were borne by each of them. At the times when I considered that the costs were too great and the possibility of suspending my quest, they encouraged me to finish, and this work is theirs. Even during the time I spent away, researching, writing and obsessing over the outcome, they were with me. Their acceptance of the clutter of a work in progress, accumulating in illogical piles of books, articles, and drafts in our home, was just a small testament to the patience and love they have given to me. I am a lucky man.

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## **INTRODUCTION**

The dominant narrative in regard to the nature of 20<sup>th</sup> Century international legal institutions is that the evolution of international law has benefited the global community by regulating and limiting conflict between actors (states, corporations, etc.) through a rational approach to behavior. The United Nations, a restatement and emphatic institutionalization of the Westphalian principle of state-centered sovereignty, became the primary forum for the nation-state. At the same time, other forms of international agreements, based upon long-standing historical practices between states, were increasingly relied upon to minimize the impact of conflict. The United States, a progenitor of both the United Nations and the increased reliance on these alternative and specific institutions, acted in a determined manner to achieve a world order that might accomplish the goal of an international security framework that could avoid another catastrophic war on a global scale.

The leading institution of international order addressing practices in War since the middle of the 20<sup>th</sup> century has been the series of multilateral agreements generally referred to as “The Geneva Conventions”. Specifically, the series of conventions primarily referred to are the agreements of 1949, deposited with the Swiss government in the early years after the end of World War II. In this iteration, the voluntary nature of state-centered participation was central to its success in defining the standards for behavior in the conduct of warfare and the responsibility of states to minimize the impact of conflict across the spectrum of spheres (i.e. human, social, political, economic) that war affects. However, it quickly became apparent that the Geneva Conventions framework and specific articles lacked the ability to definitively restrict emerging practices. In addition, it failed to significantly address numerous issues that arose from the alternative viewpoints of non-industrialized or post-colonial states, who had not felt that their

representation at the initial conferences had served their interests. This counter-movement was energized by the growing influence of organizations and non-state actors who sought to claim status under the Geneva Conventions, and the 1949 structure left the majority of their activity in warfare outside of the rule of law. This imbalance in treatment, originally a design characteristic meant to restrain the actions of non-compliant individuals through the threat of severe punishment at the interpretation of their enemies, was increasingly viewed as inconsistent with advances in international standards regarding the rights of humanity. It was into this context of changing expectations and growing protests from the undeveloped world that the movement for a significant change to the Geneva Conventions was proposed. The response by the global community was a series of conference sessions under the heading “Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts” hosted in Geneva, Switzerland from 1974 to 1977. The resulting treaty on international conflict was the “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977”, hereafter referred to as Protocol I.

A common understanding of Protocol I is that it represents a progressive step in the development of universal human rights during conflict of an international character. It is commonly understood that since World War II, the Westphalian doctrine of state sovereignty represents the most important barrier to the expansion of universal human rights. However, Protocol I, specifically limited to conflicts of an international character, does not address this barrier, as it was a distinct and focused obligation that was not permitted to impact the sovereignty of the state in dealing with its own citizens, including those who opposed the state through violence and terrorism. Protocol I’s companion, “Protocol Additional to the Geneva



Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977” was a separate institution dealing with internal rebellion, negotiated through the same diplomatic conference process and committees that finalized Protocol I.

Protocol I’s significant expanded protections for the civilian population impacted by conflicts of an international nature are stated in numerous articles of the treaty. An example of increased protection would be Articles 69 and 70, which improved the possibility that the civilian noncombatants may receive additional access to supplies necessary for their survival, through the inclusion of articles that require the belligerent states or parties to a conflict to allow for “impartial humanitarian relief schemes”<sup>1</sup>. While this is an important expansion for victims of international conflict who are tragically harmed by conflict, this outcome did not represent the most significant changes in international humanitarian law (referred to as IHL in the balance of this work).

In this thesis, I shall argue, in contrast, that the negotiation of Protocol I had little to do with concerns about overcoming the Westphalian system’s limitations on human rights. I shall demonstrate that proponents of Protocol I were interested in improving the situation on the battlefield for forces representing less developed societies, facing the technologically more sophisticated armed forces of rich nations. Protocol I protects irregular combatants, who systematically violate the Geneva Conventions themselves. Supporters of Protocol I sought to introduce asymmetrical legal protections for irregular military forces engaged in struggle against the armies of developed nations. They had no interest in the expansion of international human

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<sup>1</sup> *International Humanitarian Law: Answers to your Questions*. International Committee of the Red Cross. Geneva, Switzerland, October 2002, p. 22, accessed May 26, 2008 at [www.icrc.org](http://www.icrc.org)

rights, and harbored no expectation that irregular military forces would embrace international norms concerning human rights. Their goals were based upon a realistic appraisal of the asymmetrical nature of modern warfare, and their approach was a rational response to the threats and capabilities they faced. Their use of existing international organizations and institutions in negotiating and achieving a series of reversals in the disadvantages they faced in conventional warfare through Protocol I was a sophisticated and determined effort that ultimately achieved much of their intent.

Opponents of Protocol I, including the US government, similarly, acted from self-interest. They saw no reason to extend legal protections to enemy combatants who could not be expected or compelled to extend analogous protections to US combatants. The presidential administrations that were responsible for negotiations, both in the preparatory processes, the resulting conferences, and the early decisions on signing and ratifying Protocol I, faced a wide range of foreign policy issues that obscured the central issues of the effort by proponents of Protocol I. The dominant issues that were occurring for the United States at the time of the negotiations (i.e. the Cold War, nuclear arms race, Vietnam, economic stagnation) combined with a lack of accurate or comprehensive public information about the conference's progress allowed the issue to move through the diplomatic process without substantial attention to its future impact on the United States. In addition, the reality of an international diplomatic process incorporating democratic principles in practice meant that the ability of the wealthy states (referred to hereafter as the Global North), including the United States, required a realistic set of expectations in the process of negotiation toward the more numerous political blocs that were populated by the world's poorer states (hereafter the Global South). The issue that faced the United States upon completion of the treaty was the realization that the endorsement and validation of the significant

premises incorporated in the treaty would alter the ability of the United States to conduct conventional warfare effectively within the confines of the treaty, without jeopardizing the safety of both its own forces and the wider noncombatant population in the area of operations.

The issue of Protocol I's evolution has received little or no treatment, in the sense of a historical interpretation of the process of the negotiations themselves. Those works that have been presented on the treaty and the key diplomatic treaty sessions at Geneva are written from the viewpoint of the international and military legal community, generally focusing on the legal processes and outcomes. The seminal work on the conference was presented by Howard S. Levie in his four volume work in 1980 entitled Protection of War Victims: Protocol I to the 1949 Geneva Conventions, an early publication of the majority of the conference's transcripts, in order to make the conference proceedings available to a wider audience. In the contemporary genre of the IHL legal community, the issue has garnered renewed interest, as a result of the "War on Terror". Professor Samuel V. Jones, a professor of law and U.S. military Judge Advocate General (JAG) attorney's article entitled *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict* (2006) re-examines the key issues of Protocol I as they impact the United States today. For this thesis, the author's interest in the topic is informed by over 9 years serving in the U.S. Army as a Military Police officer, the majority of which was spent as a Non-commissioned officer. The responsibility for the training and leadership of individual soldiers, including a real-world deployment that required the application of IHL practices to identify enemy combatants and protect noncombatants from harm, was an integral part of the experience. It is the dissonance between the U.S. military practice and the revised IHL of Protocol I that brought the political process of the conference,

viewed in a historical context, to the attention of the author. In the remainder of this chapter, several key definitions and methodologies will be reviewed, for the purpose of discussion.

The idea that individuals and states act from a basis of rational choice is not necessarily universally accepted as fact, including cases where it is apparent that they attempted to do so. Many factors impact the way policy is formulated by the state, including the philosophical, psychological, and ideological worldview of a state's leadership. These personal identities and worldviews shape the processes and outcomes in ways that cannot always be quantified in rational terms. As Fritz Scharpf notes in his work *Games Real Actors Play*, "public policies are the outcomes-under external constraints-of *intentional action*. Intentions, however, are subjective phenomena. They depend on the perceptions and prejudices of the individuals involved. People act not on the basis of objective reality but on the basis of *perceived reality*."<sup>2</sup> This complicates the process of determining the best course of action, particularly in cases where not only errors in analysis are possible, but also when the lack of perfect information available to one or more actors in an interaction is a factor (informational asymmetry). Informational asymmetry is a central dilemma in the rational choice model, and particularly in non-cooperative games (i.e. game theory) where the disclosure of perfect information to an opponent (enemy) is anathema to achieving the maximum outcome desired by each actor or group of allied actors. In the area of international relations, there are few issues where the stakes of the game are higher than in the tension that exists between War and Peace. The decision to go to war, including the methods a state may employ to achieve its preferred outcomes, are central to the existence, evolution, and effectiveness of IHL guidelines. IHL can be viewed as a "formal restraint", in the

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<sup>2</sup> Fritz Wilhelm Scharpf. *Games Real Actors Play: Actor-centered Institutionalism in Policy Research*. Westview Press: Boulder CO 1997, 19.

sense that it exists primarily as a “formal legal system” as defined by Douglass North’s *Institutions, Institutional Change, and Economic Performance*.<sup>3</sup> The concept of an institution (IHL) presupposes the dynamic of rational choice between actors and the analysis of the potential risks and rewards, when weighed against each other in both short and long-term time horizons. However, the effectiveness of the institution also depends on other factors that may not be central organizing principles of all actors assumed to be cooperating in a rational mode to achieve their own outcomes. As North notes, “Cooperation is difficult to sustain when the game is not repeated (or there is an end game), when information on the other players is lacking, and when there are large numbers of players.”<sup>4</sup>

While North’s focus was on the discrepancy between the economic performance of societies and the theoretical (neoclassical) explanations, his work ends with key points that place the constituency at the center of the debate over the effectiveness of formal institutions (e.g. IHL regulated by international treaties). “One gets *efficient* institutions by a polity that has built-in incentives to create and enforce efficient property rights.”<sup>5</sup> For the purpose of this work, the “polity” is the whole body of the actors involved in the negotiations and finalization of the conferences that resulted in Protocol I, and the assumption that even though each actor (state/non-state) may define their maximum (or minimum) outcome required from the negotiations, their goal was an “efficient” IHL. By substituting the term “efficient IHL” into North’s conclusion to apply to this process, this central question occurs: How did each actor or allied group of actors, operating in their own interests, define the key terms “efficient” and “humanitarian”?

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<sup>3</sup> Douglass C. North. *Institutions, Institutional Change, and Economic Performance*. Cambridge University Press: New York, 1990, 46.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid., 140.

The orthodox representation of the conference process has centered on a global outcome that expanded the privileged categories under IHL, without acknowledging the differing transaction costs each actor may have experienced with the implementation of Protocol I. While the application of a realist perspective toward the process may seem archaic, classic theorists on war may be helpful in illuminating the problem. “War is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means.”<sup>6</sup> The Prussian Carl Von Clausewitz, perhaps considered to be the pre-eminent classical realist authority on war, clearly saw the state’s use of its military ability to coerce allies and enemies. While the state (actor) may make use of both political pressure and violent means to achieve its goal, the successful outcome for a state that resorted to war was only possible if the military practices (strategic) were in furtherance of the political context and goals of the state.<sup>7</sup> The conventional view of a one-way relationship between war and the state neglects the possibility that Clausewitz’s theory can be reversed into a reciprocal and interactive relationship between politics and war. In the case of Protocol I, the statement could be revised into “political processes are war by other means”, if the outcome of the process is meant to change the symmetry between actors that existed prior to the institutional change. Critics of the use of Clausewitz may object to the cultural or historical viewpoints that may be attributed to an early 19<sup>th</sup> century Prussian officer as the manifestation of an imperialistic culture exercising its hegemony over others using the most barbaric form of control, war.

History is filled with other examples of classical theorists who have achieved status in the study and execution of war, including Sun Tzu, a Wu kingdom general from approximately 500 bc. Sun Tzu authored a manual consisting of 13 chapters (entitled *The Art of War*), focusing on

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<sup>6</sup> Carl Von Clausewitz. *On War*. Trans. and Ed. by Michael Howard and Peter Paret, Princeton University Press: Princeton NJ, 1976, 87.

<sup>7</sup> Ibid., 87.

both the strategic and tactical use of military forces. “The art of war is of vital importance to the state. It is a matter of life and death, a road either to safety or to ruin. Hence under no circumstances can it be neglected.”<sup>8</sup> Sun Tzu’s writings, like Clausewitz, were meant as comprehensive commentaries on the breadth of options for the state in the realm of war. A key ingredient in warfare is the intentional continuance of informational asymmetry between actors: each actor attempts to increase their own knowledge of their enemy while at the same time, decrease the ability of their opponents (often including their allies) to have knowledge of their own strengths or weaknesses.

All warfare is based on deception. Hence, when able to attack, we must seem unable; when using our forces, we must seem inactive; when we are near, we must make the enemy believe we are far away; when far away, we must make him believe we are near. Hold out baits to entice the enemy. Feign disorder, and crush him. If he is secure at all points, be prepared for him. If he is in superior strength, evade him. If your opponent is of choleric temper, seek to irritate him. Pretend to be weak, that he may grow arrogant. If he is taking his ease, give him no rest. If his forces are united, separate them. Attack him where he is unprepared, appear where you are not expected.<sup>9</sup>

Asymmetry of information is a vital aspect of both war and rational choice theory.

In the case of the use of a democratic process to reform an institution, when the deception (intentional informational asymmetry) serves the purpose of the majority of actors (when judged by their diverse expectations of outcomes), the deception can achieve the status of truth. The orthodox characterization of Protocol I as an example of a cooperative form of institutional success (multilateral treaty revision) is a distortion of the actual conference. While the process did involve levels of cooperation across the spectrum of issues, this cooperation was primarily a function of sovereign (state) actor interests that involved voting blocs with either coincidental or cooperative payoffs massing to outvote their opponents. Fritz Scharpf’s work on game theory

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<sup>8</sup> SunTzu. *The Art of War*. Ed. by James Clavell and Trans. by Lionel Giles, Delacorte Press: New York, 1983, 9.

<sup>9</sup> Ibid., 11.

will be applicable to this analysis, particularly in regard to his interpretation of the term “distributive justice.”<sup>10</sup>

*Equity* refers to the equivalence of efforts, contributions, or sacrifices on the one side and reward on the other side. Its criterion is proportionality, and its normative relevance is most obvious in all types of relationships involving exchange or collaboration toward a common goal. *Equality* is understood as formal equality- in the sense of the “one-person-one-vote” rule governing elections. Its relevance is most obvious in the relationship of citizens to the democratic state. *Need*, finally is defined by special disabilities or disadvantages that justify positive discrimination, or conversely, by special capabilities or an above-average “ability to pay” that justifies the imposition of unequal burdens.<sup>11</sup>

The predominant narrative and driving movement for the conference was based upon the perception of standing IHL(e.g. Geneva Conventions 1949) as a form of binding agreement designed by western industrialized states that advantaged some states at the expense of others. From the beginning, the expected payoffs that would occur in a redrafting of IHL for the majority of actors under a scheme of *Equality* (one vote- one state) heavily favored the global south, and allowed the conference to substitute another form of “distributive justice” (*Need*) as a mechanism to obscure the preferred outcome for these states and their non-state compatriots (international terrorist organizations and national liberation movements): the reversal of tactical asymmetry that existed between themselves and the industrialized militaries of the Global North. The ability of the Global South to act in the manner of Scharpf’s *coalition* (semi-permanent arrangements among actors pursuing separate but, by and large, convergent or compatible purposes and using their separate action resources in coordinated strategies)<sup>12</sup> brought them greater influence on the process than they had expected.

In a work focused on international law applying rational choice theory, Jack Landon Goldsmith and Eric A. Posner’s work *The Limits of International Law* is foundational in viewing

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<sup>10</sup> Scharpf, *Games Real Actors Play*, 91.

<sup>11</sup> Ibid., 91-92.

<sup>12</sup> Scharpf, *Games Real Actors Play*, 5.



the United State's position on Protocol I (even though their case studies did not include this event):

Our theory of international law assumes that states act rationally to maximize their interests. This assumption incorporates standard premises of rational choice theory: the preferences about outcomes embedded in the state interest are consistent, complete, and transitive.<sup>13</sup>

Goldsmith and Posner note that “No theory predicts all phenomena with perfect accuracy. And we do not deny that states sometimes act irrationally because their leaders make mistakes, because of institutional failures, and so forth.”<sup>14</sup> In approaching the questions posed earlier, the test of rationality, using preferences (preferred outcomes) in areas of national security will be applied, considering the possibility that irrational acts are possible due to incomplete information or judgment. It is important to note that “rationality” may be a subjective standard.

Goldsmith and Posner's assumption that “states act rationally to maximize their interests”<sup>15</sup> is appropriate in the context of the analysis of the conference and its actors. Goldsmith and Posner provide us with four examples of rational choice scenarios that may guide a state (or a group of states working to achieve their goals) in the international arena:

#### *1) Coincidence of Interest*

“Behavioral regularity among states occurs simply because each state obtains private advantages from a particular action (which happens to be the same action taken by the other state) irrespective of the action of the other.”<sup>16</sup> In this scenario, the actions of one state are irrelevant to another, carrying no weight of influence or impact. A state will comply with an agreement because it bears no relation to the actual outcome for the state; the desired outcome

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<sup>13</sup> Jack L. Goldsmith & Eric A. Posner. *The Limits of International Law*. Oxford University Press: Oxford, 2005, 7.

<sup>14</sup> Ibid., 7.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid., 27

would be achieved with or without the agreement. “States independently pursuing their own interests will engage in symmetrical or identical actions that do not harm anyone simply because they gain nothing by deviating from those actions.”<sup>17</sup>

## 2) *Coercion*

“One state, or a coalition of states with convergent interests, forces other states to engage in actions that serve the interest of the first state or states.”<sup>18</sup> As noted, this explanation of a state’s rational choice options assumes some form of asymmetrical power or influence. One state, possessing more power than another, may force a weaker state to consider its choices based upon the threat of a negative outcome for itself. Out of a range of possible outcomes, the weaker state is limited in its ability to achieve a maximum or positive payoff due to its inferior (real or perceived) position in relation to the stronger state. “The large state receives its highest payoff if the small state does not engage in X (any action). The small state receives a higher payoff if it does not engage in X and is not punished than if it does engage in X and is punished.”<sup>19</sup>

## 3) *Cooperation*

Where *Coincidence of Interest* does not serve the state’s interest and *Coercion* is not possible due to relative strengths, *Cooperation* may apply. What counts as *Cooperation* must be understood, actor states must value some payoff in the future, the game must be judged to be infinite (or nearly infinite), and the payoffs for defection must not be too high relative to the payoffs of *Cooperation*. This scenario is closest to a bilateral repeated prisoner’s dilemma.<sup>20</sup>

Laws of war (such as the prohibition on the use of poison gas) might exist because (1) belligerents foresee interaction ceasing at the end of the war but do not know when the war will end, and so refrain from cheating during the war (for example, by using poison gas) in the expectation that the enemy will do the same; or (2) belligerents foresee interaction continuing

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<sup>17</sup> Ibid., 28

<sup>18</sup> Ibid.

<sup>19</sup> Ibid., 28-29

<sup>20</sup> Ibid., 29-32

after the war ends and fear that cheating during the war might invite retaliation after the war.<sup>21</sup>

In this case, a state's compliance with the agreement not to use poison gas is not contingent upon the moral judgment of the use of the gas itself; instead, the state is considering the ultimate range of payoffs (preferred to undesirable) that will be likely in the long term. The short term gain of defeating the enemy by deploying this technology is not sufficient to justify its use, when judged against the potential (and likely) long term negatives. In any case, the basis for the compliance is state self-interest, not moral standards.

#### 4) *Coordination*

Each state is dependent upon the move of another state, and each state is attempting to maximize their own payoffs. There may be a known limited number of moves available to each state at any given time, but these options may change in interaction and response to the opposing state's actions. Real or perceived disequilibriums cause states to deviate, outcomes can vary widely between states, and the concept of new equilibriums in this repetitive game is vital.<sup>22</sup> As each state selects and makes its move, these new equilibriums may reformulate the rules, potentially making them less robust, and encouraging more violation. Repeated "plays" of the same or relatively similar moves will either reinforce or alter the rules (*institutions*) where compliance is judged. Asymmetry of information between states becomes a serious issue in this model. Regardless of the complexity of the game, this does not negate the self-interest model of the explanation for state action; rather, it reinforces it.

While it may be conventional opinion that international law is based upon an idea that, of these four models, *cooperation* is the highest expression of international agreement, it is apparent that there are instances in which the optimization of international will is limited to other forms of

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<sup>21</sup> Ibid., 31-32

<sup>22</sup> Ibid.

interaction. *Coincidence of Interest* does not consist of a state choosing a preferred outcome based upon the preferences or actions of another, but it can have the effect of appearing as cooperative in nature. *Coercion* does not rely on a multilateral agreement but instead upon international power politics, although this scenario may be employed by a state or group of states (either formally or informally associated) in the interest of serving a multilateral purpose. *Coordination*, a scenario in which forms of *Cooperation* can be integral, accepts the reality that individual state interests are distinct, and that they may be either congruent or opposed to fellow state interests. However, central to all of these scenarios is the concept of sovereign self-interest, defined as payoffs.

There are two distinct forms of asymmetry that will appear throughout the body of the analysis of the negotiations. One form, informational asymmetry, has been discussed extensively in the previous sections. Another version, the level at which the diplomatic interactions occurred between actors preceding and throughout the conferences held by the Swiss Government, could be referred to as *political-strategic* asymmetry, as Steven Metz and Douglas V. Johnson II, in their work of January 2001 for the U.S. Strategic Studies Institute of the Army War College, distinguish between forms of *asymmetry*:

In the realm of military affairs and national security, asymmetry is acting, organizing, and thinking differently than opponents in order to maximize one's own advantages, exploit an opponent's weakness, attain the initiative, or gain greater freedom of action. It can be political-strategic, military-strategic, operational, or a combination of both.<sup>23</sup>

It is the link in Metz and Johnson's definition between two spheres (*political-strategic* and *operational*) that the Global South understood and connected in its efforts to reverse the

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<sup>23</sup> Steven Metz and Douglas V. Johnson II. *Asymmetry and U.S. Military Strategy: Definition, Background and Strategic Concepts*. Carlisle, PA: U.S. Strategic Studies Institute, January 2001, 5

asymmetrical disadvantages it faced in war. The application of a legal standard of IHL at the theoretical level (*political-strategic*) has a much greater impact at the operational level of warfare than theoretical models may account for. This asymmetry is not simply a function of additional burdens shared by all military actors involved in an international conflict due to an advancement in IHL, but specifically in the case of the final version Protocol I, the asymmetry is institutionalized and applied directly opposed to militaries that attempt to operate within the parameters of the law.

## **IHL HISTORY PRE-PROTOCOL I**

The use of the term “asymmetry” in relation to warfare is applied in many contexts, whether referring to the theoretical or practical realms. There has always been a quest for asymmetry by military powers and their adversaries, and the examples of Sun Tzu and Clausewitz, offered previously, are meant for command behavior and leadership principles. The historical impact of asymmetry on the battlefield is well-documented; advances in tactics and technology from the beginning of ancient warfare are studied by military historians and others, and the rapid changes in modern warfare are equally important. Max Boot writes in his introduction to *War Made New: Technology, Warfare, and the Course of History, 1500 to Today* that “From one perspective, it might seem that in warfare, as in many other realms, change is slow and gradual: that it is characterized, in other words, by a process of continual evolution, not by a few wrenching revolutions.”<sup>1</sup> Boot tests this perspective by focusing on four distinct advances in technology and tactics, which he labels “revolutions”: Gunpowder, the First Industrial Revolution (Maxim Guns, Railroads), Second Industrial Revolution (Tanks, Aircraft Carriers), and Information Revolution (Computer enhanced war). In each of these “Revolutions”, the driving goal of the technological change was to gain asymmetry, and the advantages fell to the competitor that could fund and deploy the technology successfully. Boot’s groupings, when observed in their totality, support the argument put forth by the non-industrialized states when they claim that their inability to successfully defeat an industrialized military using symmetric tactics (guided by standardized tactical behavior in the form of IHL) justified a revision of IHL based upon Scharpf’s definition of *Need*, as discussed earlier, characterized by “special

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<sup>1</sup> Max Boot. *War Made New: Technology, Warfare, and the Course of History, 1500 to Today*. Gotham Books: New York, 2006, 7

disabilities or disadvantages that justify positive discrimination.”<sup>2</sup> Lacking the ability to internally develop a revolutionary form of technology that would shift the course of battle in their favor, these groups looked to the 20<sup>th</sup> century forms of democratic participation and institutional advances in IHL to create their own revolutionary asymmetry, in the institutionalization of tactical practices that disadvantaged their advanced enemies. How did the evolution of the theories of International Law and International Humanitarian Law assist their cause in Protocol I?

Various civilizations have long histories of domestic legal theory, often derived from religious or civil authority. These norms were generally imposed upon subjects at the discretion of the ruling structure. For the purpose of defining IHL this essay will focus on the concept as it developed at the beginning of the modern nation-state, as a method to ameliorate the impact of conflict upon “war victims” of wars between nations, particularly in Europe. The broader category, international law, presupposes the existence of conflict, the rationality of man (as evidenced by interest-based actions), and the linking of a natural law that transcended sovereign relationships. Hugo de Groot, more commonly known as Grotius, is considered “the father of international law.”<sup>3</sup> The Grotian school of thought:

posits that in the state of nature men are still bound by the law of nature... Sovereignty had indeed passed to different states, by social contracts, but the original unity of the human race survived... this was the original natural law, which was legally binding and not just a moral imperative.<sup>4</sup>

While this “natural law” is at the heart of international law theory, the evolution and practice of the modern nation-state and the principle of sovereignty, as enumerated in the Treaty of Westphalia in 1648, came into conflict with these natural relationships. However, the nation-

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<sup>2</sup> Scharpf, *Games Real Actors Play*, 91

<sup>3</sup> James P. Muldoon Jr. *The Architecture of Global Governance: An Introduction to the Study of International Organizations*. Westview Press: Boulder CO, 2004, 40

<sup>4</sup> Martin Wight. *International Theory, The Three Traditions*. Holmes & Meier: New York, 1992, 38

state interest in achieving stability -whether defined as control of territory, resources, or peace with its neighbors- fit the model of rationality. The exercise of effective sovereignty was a test of the rationality of the ruling. The state became the principle mechanism for rational discourse, and state interests took primary place in international relations. In the interest of the state's foreign relations, the development of the phenomenon of international law increasingly impacted the behavior of the state toward its neighbors.

*Treaty Law* signifies specific agreements that exist between states; bilateral treaties suppose two sovereign parties, and multilateral treaties involve two or more signatories. Treaties are often filed (deposited) with a third-party state to facilitate their execution, or as in the case of many modern multilateral treaties, an intergovernmental organization (IGO- i.e. United Nations) or a nongovernmental organization (NGO- i.e. International Committee of the Red Cross- ICRC). States must first make a positive decision to become signatories, and then their sovereign policies must be followed; for the modern democracy, a ratification process is often required involving some form of popular or representative concurrence. In the case of the United States, the Senate must achieve a two-thirds majority of those present to vote (67 if fully attend) in order to ratify the treaty. Without this constitutional process reaching completion, a treaty cannot be considered binding on the United States. However, in addition to this process, another form of "binding" international authority can be established through *Customary International Law*.

This second method of binding the actions of sovereign nations has a long history of debate around its origins and applicability to the state. Goldsmith and Posner write:

Customary international law is typically defined as the general and consistent practices of states that they follow from a sense of legal obligation. This definition contains two elements: there must be a widespread and uniform practice of states, and states must



engage in the practice out of a sense of legal obligation (*opinio juris*)”<sup>5</sup>

In the case of the event (Protocol I), it is the validity of *customary international law* as it evolves in theory from state practices of behavior and the existence of a multilateral treaty that must be considered in relation to the decision by the United States to remain a non-signator of the treaty. By its refusal to ratify, the United States is not bound by the revision under treaty law, but may be subject to violations of *customary international law*; this interpretation is highly subjective and impacted by geopolitical considerations.

A final distinction surrounding the Geneva Conventions of 1949, both in their historical context and in the case of Protocol I, is the differing categories of international law. The Geneva Conventions of August 12, 1949, a response to the brutality and destruction of the two world wars, are part of the category of IHL. IHL has a long historical basis, primarily in the arena of issues regarding international conflict. IHL is generally a form of international law that surrounds the issues of conflict between nations, and the normative development of rules that were meant to restrain states in their behavior towards each other; the relationships of victims of international conflict to their state were central to the issue. According to Samuel V. Jones, “IHL’s more realistic purpose is to produce “some amelioration of the circumstances which combatants and non-combatants will confront should war break out.”<sup>6</sup> An example of early IHL is The Law of The Hague (1907), which attempted to “regulate the methods and means of warfare.”<sup>7</sup> Another example of IHL, with a more specific goal of regulating the use of chemical

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<sup>5</sup> Goldsmith & Posner, *The Limits of International Law*, 23

<sup>6</sup> Samuel V. Jones. *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*. *Duke Journal of Comparative & International Law*, Vol. 16, 2006, 258

<sup>7</sup> United States Military Operational Law Handbook (2006). JA 422, International and Operational Law Department, The Judge Advocate General’s Legal Center and School, Charlottesville VA, Chapter 2, 15

weapons, is the Geneva Protocol of 1925.<sup>8</sup> The official International Committee of the Red Cross commentary of 1960 on Geneva Convention III (Relative to the Treatment of Prisoners of War) edited by Jean S. Pictet, (generally considered the international dean of IHL and the 1949 Conventions) notes: “In ancient times the concept of “prisoner of war” was unknown. Captives were the “chattels” of their victors who could kill them or reduce them to bondage.”<sup>9</sup> The concerns leading to the 1949 agreements were historically valid, and the Commentary notes that the 1949 agreement advanced the earlier work at the Hague (1899 and 1907) Peace conferences on the key question encapsulated in Article 4:

The lengthiest and most important discussions were centered around the provisions relating to *belligerent* status. The question is of the utmost significance. *Once one is accorded the status of belligerent, one is bound by the obligations of the laws of war,* [Italics added] and entitled to the rights which they confer.<sup>10</sup>

The Hague Conference in 1907 particularly impacted the formation of Geneva 1949, and the requirements to be considered a belligerent (which generally survived intact in the 1949 version to define a combatant) protected by international law *required* observance of the laws of war. Pictet further comments that “Article 4 is in a sense the key to the Convention, since it defines the people entitled to be treated as prisoners of war. It was therefore essential that the text should be explicit and easy to understand.”<sup>11</sup>

This key question of individual status rested on a series of behaviors, not simply recognition as a human being. In order to include the irregular militias (e.g. World War II *Partisans*) that had resisted military occupations, their behavior also was a pre-condition for privileged protections:

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<sup>8</sup> Ibid.

<sup>9</sup> International Committee of the Red Cross. *Commentary on Geneva Convention III Relative to the Treatment of Prisoners in War* (12 August 1949). ed. by Jean S. Pictet, International Committee of the Red Cross, Geneva, 1960, 45

<sup>10</sup> Ibid., 46

<sup>11</sup> Ibid., 49

At the Conference of Government Experts at the 1949 Diplomatic Conference, there was unanimous agreement about the necessity for partisans to fulfill the conditions laid down in Article 1 of the Hague Regulations and to have an adequate military organization so as to ensure that those conditions could be fulfilled.<sup>12</sup>

Historically, there was a duty of both the individual combatant and the commanding state to refrain from agreed upon non-normative behavior, in order to insure their own qualification to receive the privileged status consistent with each of the advances in IHL up to and including Geneva Convention III of 1949. This was not necessarily based upon a preferred moral motivation of humanitarian principles, but instead a realistic recognition of the most effective means to ensure the broadest possible compliance with the standards, a linking of personal outcomes to collective responsibility.

IHL has consistently been identified with issues of national security, and as a part of military practice, impacts the application of technology and tactics that are available to the state. The centrality of security as an issue to the state, as well as the common relationship of foreign relations and war, helped propel IHL in the early 20<sup>th</sup> century to the forefront of international law, providing it with a progressive growth that was encouraged by states who judged it as beneficial to their own interests.

The Geneva Conventions are a series of agreements between states in a multilateral treaty form of IHL constituting the basis for the identification of not only norms of behavior in war based in *Treaty law*, but also may form the conditions to delineate the much more subjective *customary international law*. As a treaty, it contains explicit conditions; as one of the global foundations for IHL, it aligns itself directly with state interest equations. However, IHL can suffer in its use as *customary international law* in that it becomes highly subjective and vulnerable to the political interpretations of various actors in the international scene. In the case

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<sup>12</sup> Ibid., 54

of the United States, it was a signatory to the original four Conventions of 1949, as well as nearly all of the subsequent revisions or specific treaties offered through the ICRC and classified in the Conventions.

The expansion of the idea of a universal standard for IHL (as well as International Human Rights Law, or IHRL) was advanced by the UN Declaration of Human Rights in 1948 as part of the Post-World War II United Nations agenda. This declaration, a non-binding resolution of the UN General Assembly, was passed unanimously (with abstentions only, primarily Soviet-Bloc nations).<sup>13</sup> Championed by Eleanor Roosevelt, the idea that humans possess universal rights that existed beyond the control of the state was a welcome narrative for the new world. This declaration, however, did not come without its own dangers; to suppose that the individual is the basic unit of sovereignty conflicted with history's reminder that powerful interests were often the determinant of individual freedoms. To the extent that IHRL did not interfere with the sovereign practices of the nation-state, it was a welcome idea. The tension over the idea of IHRL and the Declaration in 1948 played itself out in the geopolitical fault lines that developed between Cold War superpower ideologies. While both the United States and the Soviet Union were developed nations in the Global North, economic divisions between the developed nations (liberal, capitalist) and developing nations, some of whom identified with Marxist ideologies were important, as well as the internal tensions in nations occurring as the international order moved into the Post-Colonial period. As empires began to crack under the weight of their inability to manage their possessions, accelerated by the aspirations of their inhabitants to take advantage of these new forms of international norms, the realization that IHRL did not possess the same state-

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<sup>13</sup>*Adoption of the Universal Declaration of Human Rights, A/PV. 183. Verbatim Record of the Hundred and Eighty-third Plenary Meeting.* United Nations website, accessed May 30, 2008 at <http://www.un.org/Depts/dhl/landmark/pdf/a-pv183.pdf>

centered outcomes that IHL provided became clear. The convergence of IHRL and IHL in the General Assembly of the United Nations would alter the purpose and effectiveness of the Geneva Conventions immensely.

An explanation may be found in the turbulent international political borders of the Post-Colonial period, with the rising dissatisfaction of the developing nations struggling to navigate in a bipolar world, beset by powerful interests on the outside and the rise of internal threats or regional tensions. The rise of the Group of 77 (G-77) as a voting bloc in the General Assembly in the United Nations signaled a growing conflict between the Global North and the Global South:

After decolonization, voting majorities in the General Assembly started to run against the United States and its Western partners as the newly independent countries sought to shift UN attention to issues they considered critical. Developing countries after the Bandung Conference in 1955 sought to formalize their numerical advantage to press the General Assembly to focus on issues of decolonization and social and economic development... with regard to decolonization and the exploitation of their majority position in the General Assembly, the new nations in the UN were remarkably successful.<sup>14</sup>

The early rise of the Non-Aligned Movement (NAM) became a test of the two superpowers ability to apply their skills of diplomacy (primarily practiced in economic coercion and military transfers to a contested state's ruling elite) in the hope of gaining cooperation. The NAM was "founded in Belgrade in 1961 on the principles of self-determination, mutual economic assistance, and neutrality outlined in Bandung (Indonesia, April 1955). Twenty-five countries participated at the first conference, but by the second head-of-state meeting, in Cairo in 1964, that number had almost doubled."<sup>15</sup> While the initial influence of the NAM may not have been overwhelming, the effort to politically link these states together would lead to future, more

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<sup>14</sup> Donald James Puchala, Katie Verlin Laatikainen & Roger A. Coate. *United Nations Politics: International Organizations in a Divided World*. Pearson Prentice Hall: Upper Saddle River, NJ, 2007, 57-58

<sup>15</sup> Odd Arne Westad. *The Global Cold War*. Cambridge University Press: Cambridge, 2005, 107

successful forms of cooperation, including the increased effectiveness in the UN General Assembly, with the establishment of the Group of 77.

The development of Protocol I and its emphasis on leveling the possible outcomes in asymmetrical conflict was a significant achievement for the “war of national liberation” caucus. The political acumen involved in the use of international institutions (e.g. UN General Assembly, the ICRC through the Geneva Conventions) by the G-77 nations to restrain “racist, colonial powers” was on the rise well before Protocol I’s first official conference. During the Nixon administration, the warning signs of the political movement to reclassify the status of “freedom fighters”, change the meaning of “wars of aggression” and benefit “anti-colonial nationalism” appeared in 1971. A glimpse at the strategy the Nixon administration would use to address it was made in an Airgram from Secretary of State William P. Rogers:

Since the last UNGA (United Nations General Assembly), the International Committee of the Red Cross in Geneva has begun the process of updating and supplementing the rules of international humanitarian law applicable to armed conflicts. Since we consider that expert forum far preferable to the more political UNGA committees, *we hope to limit UN action at the 26<sup>th</sup> GA to endorsement of ICRC activities*, avoiding either the adoption of additional substantive resolutions, which could prejudice the work of the ICRC forum, or the institution of unnecessary and potentially damaging parallel activities in the UN.<sup>16</sup>

As this Nixon administration document notes, the activity in the General Assembly on amendments to the Geneva Conventions (the initial impetus for the eventual revisions that would become known as Protocol I and Protocol II) was a political process which was initiated by nations that had not had a historical impact on issues regarding IHL as it existed at the time. In his article reviewing the proposed changes of Protocol I and Protocol II, Commander Arthur John Armstrong, JAGC, USN, and Department of Defense advisor wrote:

The Group of 77 brought to the Diplomatic Conference and the Protocols the most political and controversial issues of the era; those issues which they were used to dealing with, day-to-

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<sup>16</sup> “Airgram From the Department of State to Certain Posts”. CA-3760, Washington DC, August 12, 1971, document 96 from Foreign Relations of the United States, 1969-1976, Volume V, US GPO, 2004, 187

day, at the United Nations: guerillas, freedom fighters, wars of liberation, mercenaries, self-determination... Combatants- those of the regular army of states, the guerilla forces of liberation movements, spies, mercenaries, and saboteurs- all became chessmen on a political chessboard.<sup>17</sup>

While Commander Armstrong was primarily dealing with the issue of mercenaries in warfare as combatants, his political observations are highly relevant to this discussion. As the issue of status (civilian, combatant) was being debated, the countries of the Global South saw an opportunity to address the asymmetry between themselves and those nations that may have posed a threat to their interests. Armstrong further notes, the subjectivity of the distinction between a “freedom fighter” and a “terrorist” became apparent quickly in the public statements of the delegates to the series of Diplomatic Conferences on International Humanitarian Law. He observes that:

The Third World had its own version of the rules of the game. Equality of the parties meant equal rights, but not necessarily equal duties. Equality is the placing of a captured member of a liberation movement on the same footing for privileges with that of a captured member of the armed forces of a state party to a conflict. In effect, this would have meant that while member's of a state's armed forces have to adhere to the criteria of the Hague Regulations, the guerilla forces of a liberation movement did not have to adhere to the similar criteria of the Third Geneva Convention... But equality is a sometimes thing... Not all guerrillas were to be protected under the Third World's scheme... Only those guerillas who were “freedom fighters”, who were fighting in conflicts with the majority of states (i.e. the Group of 77) considered to have a special anticolonial, antiracial, anti-alien character, were to have privileged status.<sup>18</sup>

The exigencies of subjective interpretation were not confined to the developing world itself. An example of the larger ideological battle was provided during the 1973 International Conference of the Red Cross in Tehran, preparing for the final pre-conference revisions for the proposed Protocols, where a distinction between wars of national liberation (just) and wars of aggression were offered. “... between just and unjust wars, between aggressors and victims of aggression,

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<sup>17</sup> Arthur John Armstrong, Cdr., JAGC, USN. *Mercenaries and Freedom Fighters: The Legal Regime of the Combatant Under Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. The JAG Journal, Volume 30/ Winter 1978, No.2, 127

<sup>18</sup> Ibid., 128

since the purpose of humanitarian law was to provide protection only to victims of acts of aggression...”<sup>19</sup> This interpretation of the “purpose of humanitarian law” and its relation to IHL by communist-aligned nations may have been ideologically consistent with their worldview, but it did not relate historically to the purpose or practice of IHL. One final example from Armstrong’s article, exhibiting the interpretation of IHL to conform within a particular nation’s preferred outcome in the negotiations, clearly highlights “the weakness of the third world’s argument.”<sup>20</sup> The Pakistani representative stated:

... my delegation makes a clear distinction between freedom fighters who, in the exercise of their right of self-determination are fighting against colonial and alien occupation and against racist regimes and situations where self-determination has already taken place and there is a rebel movement, by a handful of people, against the lawful authority of the State aimed at destroying the territorial integrity of that country. My country supports the granting of prisoner-of-war status in the former situation but in the latter situation we consider that the rebels are subject to the municipal law of the state and may be tried for crimes against the state.<sup>21</sup>

Mr. Hamid, of Pakistan, 22 Aug 1975

In each of the points made in favor of a revision in IHL, the key terms “alien occupation,” “racist,” and “colonialism” played a central role in the narrative of the political drive to amend the Geneva Conventions, a form of IHL that had been based upon the principles of sovereign and individual duties, regardless of ideology or state motivation. The global movement to criminalize these practices found their expression in the voices that emanated from the UN General Assembly, exemplified by UN General Assembly Resolution 3103 entitled “Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes” passed in the 2186<sup>th</sup> plenary meeting of November 30, 1973:

*Reaffirming* that the continuation of colonialism in all its forms and manifestations, as noted in General Assembly resolution 2621 (XXV) of 12 October 1970 is a crime and that colonial peoples have the inherent right to struggle by all necessary means at their disposal

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<sup>19</sup> Ibid., 138

<sup>20</sup> Ibid., 142

<sup>21</sup> Ibid.



against colonial Powers and alien domination in exercise of their right of self determination recognized in the Charter of the United Nations.. *Stressing* that the policy of *apartheid* and racial oppression has been condemned by all countries and peoples... *Recalling* the numerous appeals of the General Assembly to the colonial Powers and those occupying foreign territories as well as to the racist régimes... to ensure the application to the fighters for freedom and self-determination of the provisions of the Geneva Convention relative to the Treatment of Prisoners of War...<sup>22</sup>

A simple interpretation of this non-binding resolution's intent may be the expansion of protections and reciprocal duties upon those "fighters" referenced in this wording; it further stated "that the treatment of the combatants struggling against colonial and alien domination and racist régimes captured as prisoners still remains inhuman,"<sup>23</sup> but the resolution offered no recognition of the basic requirements in Geneva Convention III for these combatants to observe the law of war in their own behavior. This is a meaningful omission from the lengthy resolution.

Another example of the breadth of the assault from the Global South voting block in the UN General Assembly was the rise of international terrorism in the form of plane hijackings (a tactic the PLO chose to master) the bombings of civilian targets, and the Munich massacre of Israeli Olympic athletes. The latter prompted a call from the United States and other developed nations to condemn terrorism. U.S. Ambassador to the United Nations George H.W. Bush, in a statement to the committee, explained the US decision to vote against a resolution that did not define "terrorism" to include acts against the developed world, including Israel:

If acts are to be condemned then surely acts of the type which produced the atrocity of Munich, the killing and wounding of airline pilots and passengers on several continents in incidents which put the lives of hundreds of travelers in mortal danger...must be among those condemned. We would have also needed a resolution which established an objective process that could reasonably be expected to lead to concrete measures... The resolution before us fails to meet either of these basic criteria.<sup>24</sup>

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<sup>22</sup> United Nations General Assembly- Twenty-eighth Session, Resolution 3103. United Nations website, <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/281/75/IMG/NR028175.pdf?OpenElement>, accessed May 30, 2008

<sup>23</sup> Ibid.

<sup>24</sup> *Statement by US Ambassador George H.W. Bush to the UN December 18, 1972 Plenary session of the UN, Department of State Bulletin*, Volume LXVIII, No. 1752, January 22, 1973, 92

The voting bloc of the Global South was unconvinced by the future President's argument. The wording of the resolution that passed by a majority vote was, as Ambassador Bush described it, void of any measure that would have addressed the rising issue of "terrorism." This democratic rebuff of the developed community in the halls of the United Nations was not surprising, considering the fact that the asymmetrical nature of warfare favored the use of terror on behalf of the weaker nations or groups - a constituency the Global South could consider its base. However, the wording of the measure further solidified the differences between these two worlds of perception, as evidenced by the partial text below, which specifically excludes the definition of acts carried out against "colonial, repressive, racist regimes" as "terrorism":

3. *Reaffirms* the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations;

4. *Condemns* the continuation of repressive and terrorist acts by colonial racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms;

...

6. *Invites* States to take all appropriate measures at the national level, with a view to the speedy and final elimination of the problem, bearing in mind the provisions of paragraph 3 above<sup>25</sup>

In a final example of the distance between the G-77 (Global South) dominated UN General Assembly and the Global North, the Palestine Liberation Organization (PLO) gained its first international political victories in the autumn of 1974, transforming it from a terrorist organization into a legitimate actor. In UN General Assembly Resolution 3210 (Invitation to the

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<sup>25</sup> *UN doc A/RES/3034 (XXVII) draft resolution contained in A/8969 (as amended in plenary), Department of State Bulletin*, Vol. LXVIII, No. 1752, January 22, 1973, 94

Palestine Liberation Organization), the PLO is anointed as the sole recognized representative of the Palestinians:

*The General Assembly, Considering that the Palestinian people is the principal party to the question of Palestine, Invites the Palestine Liberation Organization, the representative of the Palestinian people, to participate in the deliberations of the General Assembly on the question of Palestine in plenary meetings.*<sup>26</sup>

This non-binding establishment was swiftly followed with UN GA resolution 3237 of November 22, 1974 granting full Observer status for the PLO to the UN General Assembly. As part of the “evidence” for the PLO’s legitimacy for this status, the following is offered:

*Noting that the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, the World Population Conference and the World Food Conference have in effect invited the Palestine Liberation Organization to participate in their respective deliberations... Invites the Palestine Liberation Organization to participate in the sessions and work of the General Assembly in the capacity of observer.*<sup>27</sup>

In a series of non-binding and political processes, the global south established the PLO into a legitimate international actor. First, the UN General Assembly excluded any other Palestinian group as the representative of the “Palestinian people”, then the UN recognized the PLO based upon its invitation to be an “observer” to the Geneva conferences that would be rewriting IHL, and finally presented a seat to the PLO as an “observer” in the full General Assembly. This progression of events mirrored the origination and eventual outcome of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts that drastically revised the intent and effect of IHL.

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<sup>26</sup> *United Nations General Assembly- Twenty-ninth Session, Resolution 3210*, United Nations website <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/738/12/IMG/NR073812.pdf?OpenElement>, accessed May 30, 2008

<sup>27</sup> *United Nations General Assembly- Twenty-ninth Session, Resolution 3237*, United Nations website <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/738/39/IMG/NR073839.pdf?OpenElement>, accessed May 30, 2008

From the first plenary meeting on February 20, 1974, the assault on the substantial progress in IHL that had been made in 1949 with the Geneva Conventions was consistent and overwhelming, beginning with the invitation to Ould Dada, the President of the Islamic Republic of Mauritania, to open the first session, who observed:

The countries of the third world, which were the victims of crying injustice, hoped that there would be an understanding of their sufferings and that account would be taken of their legitimate rights... Millions of men were still under colonial oppression in the African continent, while international Zionism had placed the Palestinian population in an impossible situation... True, the Conference had before it a clear agenda, but effects could not be considered if their causes were ignored. It was undeniable that there were such things as just wars. When a nation was driven to the wall, it could not forget its right to self-determination... indeed, the countries of the third world were asking for very little: only that the Conference should not exclude freedom fighters from protection... If for some reason the Conference did not grant freedom fighters the same protection as the oppressors, it would be making a serious mistake.<sup>28</sup>

The encoded narrative of “just wars” against “oppression” was further complicated by questions on the participation of some states that were considered by a large number of attendees as criminal (Israel) and illegitimate (Republic of South Vietnam). In addition, states that had chosen not to participate (as in the case of South Africa) in the early sessions were subject to the votes of the attendees calling upon them to make “an assurance that, although it was not participating in the current session of the Conference, it undertook to observe the principles and provisions of the four Geneva Conventions of 1949.”<sup>29</sup>

The technical process of gaining a new form of asymmetry in the *political-strategic*<sup>30</sup> strata was engaged, and the minutia required to obfuscate the goals of the Global South to transfer this

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<sup>28</sup> Switzerland, Federal Political Department. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva. 1974-1977*, Bern, 1978, vol. V, CDDH/SR.1, February 27, 1974, 13-14

<sup>29</sup> Switzerland, Federal Political Department. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva. 1974-1977*, Bern, 1978, vol. V, CDDH/SR. 27, February 5, 1975, 313

<sup>30</sup> Metz and Johnson, *Asymmetry and U.S. Military Strategy*, 5

payoff to the practical level of warfare, the *operational*,<sup>31</sup> would require the intricacy of lengthy and detailed debate. The concentrated efforts of the Global South, working in various forms of actor interactions (coordination, coincidence of interest, cooperation, coordination)<sup>32</sup> would achieve much of its desired outcomes over the course of the next 3 years. For the Global North, and particularly the United States and the Soviet Union, the distraction of a changing relationship focused on the specter of nuclear war dominated their concerns. Each side wished to preserve its technological advantages without impact by the conference, and their significantly different worldviews were not always an impediment to agreement; in the spirit of Realpolitik and Détente, these adversaries found greater *coincidence of interests* that would be incorrectly characterized as *cooperation*, exempting their own major issues from the conference's control. Unfortunately, their parochial behavior toward significant issues that did not initially present themselves as threats to their goals would alter the status of their states, especially in the case of the United States, in the most basic requirements of conventional warfare, the application of force and identification of combatants. Neither the United States nor its allies were ultimately powerful enough to enforce the principle, consistently held throughout IHL advancements, that the identification and behavior of belligerents, or as they became known in Geneva 1949, combatants (privileged or unlawful), was the centerpiece of IHL, as noted in Pictet's commentary of 1960 on Geneva III.<sup>33</sup>

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<sup>31</sup> Ibid.

<sup>32</sup> Goldsmith & Posner, *The Limits of International Law*, 27-35

<sup>33</sup> International Committee of the Red Cross. *Commentary on Geneva Convention III Relative to the Treatment of Prisoners in War (12 August 1949)*, ed. by Jean S. Pictet, International Committee of the Red Cross, Geneva, 1960, 46

## **THE COLD WAR, VIETNAM, AND THE GLOBAL SOUTH**

Warren Cohen notes in his *America in the Age of Soviet Power, 1945-1991*, that many factors, foreign and domestic to both nations, drove the two powers into a “Cold War.” As the suspicions and interpretations of one another’s actions and capabilities mounted, the divide between the two allies of convenience against the Axis powers found themselves squaring off over territory, sovereignty, economic interests in the Post-World War II international order. The increase in presidential authority granted on the basis of NSC-68 was predicated upon the assumption of “an aggressively expansionist Soviet Union.”<sup>1</sup> Warren Cohen writes that “the leaders of the world’s most powerful nation were constantly constrained by domestic groups and the reins given to Congress by the Constitution. Roosevelt and Truman evaded those constraints in pursuit of their conceptions of the national interest.”<sup>2</sup> Roosevelt and Truman were consistent with the historical practices of prior wartime Presidencies (i.e. Lincoln, Wilson), who tested the limits of their authority as they confronted threats to the nation.

For Stalin, the perils of representative democracy as exercised in a free society were not a factor in his decision-making process; fortunately for him, he was unencumbered by such annoyances. It was also apparent that Stalin was not easily swayed from controversial actions based upon the advice or influence from the West. As John Lewis Gaddis notes in *Strategies of Containment*:

Whatever Stalin’s motives in authorizing the Czech coup, the Berlin blockade, the campaign to eradicate Western influences inside the U.S.S.R., the purge of suspected “Titoist” elements in Eastern Europe, and a long series of vituperative tirades by Soviet representatives in the United Nations, the effect was not to produce the atmosphere conducive to negotiations.<sup>3</sup>

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<sup>1</sup> Warren I. Cohen. *America in the Age of Soviet Power, 1945-1991*. Cambridge University Press: Cambridge, Vol. IV of The Cambridge History of American Foreign Relations, 1993, 55

<sup>2</sup> *Ibid.*, 57

<sup>3</sup> John Lewis Gaddis. *Strategies of Containment: A Critical Appraisal of American National Security Policy During the Cold War*. Oxford University Press: Oxford, Rev. and Expanded Ed., 2005, . 83-84

At the outset of the Cold War, the tensions between the superpowers reflected a series of actions and attitudes that evidenced the primary concerns of each state; the role of the new United Nations at this time was not a replacement of sovereign authority, but a restatement of its centrality to an orderly world. As the Soviet-American relationship developed over subsequent decades, the changing fortunes of the two states and the attitudes of their leadership evolved into a bi-polar agreement that would reinstate the primacy of state-to-state relations, seemingly bypassing the international community in determining the fate of the global order.

Upon inauguration in 1969, Richard M. Nixon's administration, influenced by National Security Adviser Henry Kissinger, devised a comprehensive strategy to re-emphasize the centrality of the bilateral Soviet-American relationship. A series of agreements and understandings constituted the strategy known as "détente", which as Gaddis notes, reformulated the established "containment" doctrine:

Nixon and Kissinger were clear about the meaning they attached to "détente," though: they viewed it as yet another in a long series of attempts to "contain" the power and influence of the U.S.S.R., but one based on a new combination of pressures and inducements that would, if successful, convince Kremlin leaders that it was in their country's interest to be "contained."<sup>4</sup>

A central tenet of détente was the concept of "linkage" in negotiations with the Soviets- in order to receive assurances and benefits, the Soviets would be required to provide the West, and the United States in particular, with a benefit also:

They offered the Soviets recognition of their strategic parity, tolerance of the aberrant political philosophies and human rights abuses of which the Soviets and their satellites were guilty, and a promise of access to Western capital and technology. In exchange they asked Moscow to recognize the mutuality of superpower interest in stability, especially in maintaining order in the Third World.<sup>5</sup>

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<sup>4</sup> Ibid., 287

<sup>5</sup> Cohen, *America in the Age of Soviet Power*, 183

Under the leadership of Nixon, the United States attempted to remove itself from the peripheral trap that had become the Vietnam War, and sought to shift the responsibilities for expansions of military commitments away from the United States. In 1979, Henry Kissinger wrote that “the United States could not afford indefinitely to proliferate foreign commitments, and then undertake to honor them on a timetable and in a manner set by its adversaries.”<sup>6</sup> This new strategy would solve a series of problems (military, economic, political) for the United States in the short term, but it would also encourage the Global South to view its issues in the context of perpetual empire- transferred from the previous European powers to a contest between the Soviet Union and the United States.

As part of détente, one of the central issues in U.S. foreign policy towards the U.S.S.R. that Kissinger focused upon was the nuclear arms race. The buildup and maintenance of a nuclear force had cost both nations substantial amounts of capital, and the use of this ability now to provide protection for the two superpowers was a key to the relationship. As Gaddis notes, Kissinger valued the ability to know when “superiority” (asymmetry of capability) became a liability. “The beginning of wisdom in human as well as international affairs was knowing when to stop.”<sup>7</sup> The United States and the Soviet Union both had adequate motivation to consider a strategic change in their attitude towards each other, and the significance of the differences in the reliance upon nuclear weapons to replace a necessary contraction in U.S. conventional commitments, especially in the periphery, became evident as the early series of Geneva Convention conferences to revise IHL began.

One assurance that Kissinger wanted from the IHL conference was a clear understanding that no section of the treaty was addressed to the issue of nuclear warfare. As the conference

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<sup>6</sup> Henry A. Kissinger. *White House Years*. Little, Brown: Boston, 1979, 232

<sup>7</sup> Gaddis, *Strategies of Containment*, 277



progressed, issues arose that brought the question to his attention, and in a State department cablegram of May 7, 1975, Kissinger responded to the concerns of the Federal Republic of Germany's representative over the applicability of the conference provisions:

FRG Rep Andreae at April 8-9 NATO Disarmament Experts meeting publicly and privately raised question of possible applicability to nuclear weapons of article 46 of Protocol I to 1949 Geneva Conventions being drafted at Geneva diplomatic conference on international humanitarian law. U.S. del voted for text of article 46 when it was adopted by committee III (CDDH/III/272) on understanding that it would not repeat not be applicable to nuclear warfare. If draft Protocol were applicable to nuclear warfare, other provisions of Protocol would pose similar problems. However, the Protocol is intended only to deal with conventional warfare. This is reflected in introduction to ICRD basic texts, where it is noted that ICRC did not intend to broach problems of atomic warfare.... Embassy is requested to assure Andreae that article 46 deals with the problem of indiscriminate attacks against civilians by conventional means and in our view does not cover nuclear weapons.<sup>8</sup>

In Kissinger's plan to balance strength between the two superpowers, it was critical that those European allies dependent upon American nuclear capabilities for defense from the Soviets could still rely on the U.S., even as separate discussions around nuclear disarmament or parity occurred. The doctrine of reduced American conventional capability in the post-Vietnam period was clearly a concern for European nations, even as Kissinger reaffirmed the commitment to Western Europe as the center of U.S. foreign interests. It was this realignment of strategy away from confronting peripheral threats with the use of conventional forces that drove the U.S. State Department to engage in the upcoming series of conferences with limited expectations for outcomes that benefited the United States. The necessity of gaining political cooperation with ideologically or interest-based allies in blocs throughout the conference remained a key strategy of both the United States and the Soviet Union.

Throughout the series of conferences occurring from 1974 to 1977, the consistent ideological alignment of actors, separated between the Soviet bloc and the American-led west, were a

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<sup>8</sup> *FRG Question on Protocol to Geneva Conventions*, 07MAY75, *State Department Telegrams*, National Archives, at <http://aad.archives.gov/aad>

dependable predictor of the course of debates that occurred in each committee. An early analysis of the conference proceedings was offered by Howard S. Levie, one of the U.S. military's pre-eminent legal scholars, in his multi-volume work *Protection of War Victims: Protocol I to the 1949 Conventions*:

Committee I spent much of the first session (8 of 13 substantive meetings) in the discussion of what was basically a politically motivated proposal aimed at giving the members of so-called “national liberation movements” all of the protections accorded to members of national armed forces engaged in true international armed conflict—and, as it later became evident, without all of the obligations and responsibilities to which the latter are subject<sup>9</sup>

The first order of business in the official democratic process was to gain as much ideological and voting advantage as possible in the committee and plenary process; states that aligned their interests similarly rarely differed in their interpretation of the proceedings, and when a critical issue arose, it would not surprise any diplomatic veteran that each state attempted to influence other actors through the application of reasoned arguments stating their position, and each of Posner and Goldsmith's modes of rational interaction between states (*cooperation, coincidence of interest, coordination, and coercion*) could be employed by the states to achieve their goals. The United States and the Soviet Union possessed great leverage, and the contest was waged through proxies primarily located in the underdeveloped world. In what George Kennan would have referred to as “the periphery”, the battle for additional influence in the United Nations emerged with the Global South's efforts to gain control over issues that affected them, both in cooperation with, and in defiance of the two superpowers. This political emergence organized itself into a number of manifestations in the interest of the underdeveloped states, and the practices of the superpower adversaries would pull them further from their central interests.

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<sup>9</sup> Howard S. Levie. *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*. Oceana Publications: Dobbs Ferry, NY, 1980, vol. I, xvi

One of the first issues that the United States representatives to the conference had to deal with was the political makeup of the conference. At the initial series of plenary sessions of the conference in 1974, arguments for full representation and voting rights for the Provisional Revolutionary Government (PRG) of South Vietnam, formerly the National Liberation Front, were presented to the body for discussion and vote. The Democratic Republic of Vietnam's (North Vietnam) representative, Nguyen Van Luu, addressed the second plenary meeting on February 27, 1974, objecting to the omission of the PRG as an invitee by the host government, Switzerland:

The Provisional Revolutionary Government of the Republic of South Viet-nam should therefore have been invited to attend the conference as a full participant, especially since the series of abominable crimes committed by the United States imperialist aggressors in Viet-nam, which had been universally condemned, had given rise to so many humanitarian problems.<sup>10</sup>

Mr. Van Luu's case rested on the status of the PRG that had been enhanced as a result of the group's participation at the 1973 Paris Peace conference. Based upon this, he insisted that the PRG should have the same right as the "State of Saigon... a creature of United States neo-colonialism"<sup>11</sup> as the Paris Agreement "recognized the existence of two governments in South Viet-nam, each with its own territory and army."<sup>12</sup> After making his speech and calling for more debate on the subject of the PRG, the entire delegation of the Democratic Republic of Vietnam walked out of the second session in protest.<sup>13</sup>

The question of the legitimacy of the PRG to participate in the conference became a central opening issue between the Cold War opponents and their allies. For the United States, the idea that the PRG would attain the traditional rights of a state (voting to amend an international

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<sup>10</sup> Switzerland, Federal Political Department. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*. Geneva, 1974-1977, 17 vols., Bern, 1978, Volume V, 15

<sup>11</sup> Ibid., 16

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

humanitarian law treaty) was inconceivable; the PRG had only been granted a political status in South Vietnam as a concession for a peace agreement, not as a state. However, in the context of the process by which the conference had been established, it was a natural progression of the political goals of the coalition that had pushed for and ultimately been rewarded with the opportunity to revise IHL. Once the North Vietnamese withdrew, the ensuing discussion became an exercise in which the Soviet Bloc and Global South, operating in a spirit of cooperation against the interests of the United States and its allies, called for the full recognition of the PRG as a state. The Soviet representative, Mr. Griбанov, argued that the PRG should be included on the basis that the PRG “had diplomatic relations with over 40 states.”<sup>14</sup> The representatives of Cuba, Algeria, Tanzania, Romania, Albania, all made statements in support of the PRG’s full participation at the conference. On the opposite side of the dispute, the United State’s head representative, George Aldrich, responded that “The question of the invitation to the Provisional Revolutionary Government of the Republic of South Viet-nam, however, would need considerable discussion.”<sup>15</sup> The expansion of sovereignty to a wider group of actors as exercised in the course of the conference was central to the argument of the Global South in its attempt to dilute the political power of the industrialized states, and the PRG, in its non-state status, was an example of this conflict with the additional benefit of a direct challenge to the United States itself.

As an early indication of the importance of the issue of the PRG’s participation in the conference, Aldrich sent a cable by State department channels on February 8, 1974 to all posts:

Conference has much difficult work to do if humanitarian aims of 1949 Conventions are to be advanced, but several recent developments have created serious risk that political issues will delay or even prevent conference from getting down to substance. Most serious problems are demands that Provisional Revolutionary Government of South Vietnam be invited as party

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<sup>14</sup> Ibid., 17

<sup>15</sup> Ibid., 20

to Geneva Conventions, and insistence of Africans that liberation movements be invited as “full participants”. USG considers quick and satisfactory disposal of these issues important for success of conference... PRG is nothing but a front created by North Vietnam. PRG is not a state and has no valid claim to legitimacy.<sup>16</sup>

As the United States delegation prepared to make its case against the PRG, the importance of the issue was magnified by the fact that the government of South Vietnam (Republic of South Vietnam) was under internal and external pressures threatening its existence. After the withdrawal of U.S. combat forces, the fate of the nation was in doubt, and it was clear that the effort to legitimize the PRG through admission to the Conference was also a means to weaken the South Vietnamese government. Following the logic of the case to its conclusion, on February 28, 1974, the representative of Czechoslovakia argued that “The Provisional Revolutionary Government was entitled to speak on behalf of the people of South Viet-nam; not so, however, the Government of Saigon.”<sup>17</sup> Alignments of support for the U.S. position in advance of the first vote on the PRG’s admission generally followed the global coalitions that formed along the ideological fault-lines of the Cold War, although the swing votes in the conference often fell on the edges of the alliances. These were the critical votes, and each state was free to decide, subject to their own interpretations of the history of international relations. Mr. de la Pradelle of Monaco stated his country’s position early in the debate on February 27, 1974, at the third session of the Plenary, where the voting procedure that was being proposed to solve the problem was being discussed:

For him, it (the conference) was a diplomatic conference like those that had preceded it since 1864. In accordance with international law, those conferences had been gatherings of States represented by delegates who, once the discussions had come to a close, had

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<sup>16</sup> “Attendance of PRG and Various National Liberation Movements at February 1974 Geneva Conference on the Law of War”, 02/08/74, State Department Telegrams, National Archives, at <http://aad.archives.gov/aad>

<sup>17</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, 17 vols., Bern, 1978, Volume V, 41

committed their governments through their signatures... He disapproved of comprehensive invitations of any kind. Observer status, as described in the provisional rules of procedure, permitted international organizations and other groups to express their views.<sup>18</sup>

In recognition of the special status of the traditional nation-state, Monaco and a number of other states proposed that the determining vote should require a two-third majority to seat the PRG as a full participant with voting rights, an equal to a state.<sup>19</sup>

The United States sensed that the vote on the PRG would be close, particularly due to the clear cooperation and shared goals of the Soviet Bloc and the Global South. In preparation for the initial vote, Aldrich and the State Department exercised its influence with a wide range of nations to sway votes in its favor, or at least to abstain from voting for the PRG:

At USG (US Government) urging, Paraguay ambassador to Bonn attended sessions of subject conference during consideration of issues concerning invitation to PRG and National Liberation Movements to participate in work of conference. Ambassador cooperated closely with USG rep to conference George Aldrich, and Aldrich promised to keep him informed of progress of work and to indicate when it would be useful for him to return to Geneva to help out on important issues.<sup>20</sup>

In the meeting of February 28, 1974, the representative of Paraguay, near the end of the discussion on the resolution to allow the PRG to participate, stated that “his delegation would vote against the draft resolution, since the government of Paraguay recognized the government of the Republic of Viet-nam as the sole legitimate representative of South Viet-nam.”<sup>21</sup> The official vote count to allow the PRG full participation was 38 against, 37 for, and 33 abstentions (a simple majority was required), and the blocs were aligned consistently matching the pre-

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<sup>18</sup> Ibid., 23-24

<sup>19</sup> Ibid., 24

<sup>20</sup> “Geneva Conference on the Law of War- Feb 20-March 29, 1974”, 03/14/74, State Department Telegrams, National Archives, at <http://aad.archives.gov/aad>

<sup>21</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, 17 vols., Bern, 1978, Volume V, 52

conference coalitions; Paraguay's vote made the difference, and allowed a number of nations the political cover of abstention on the issue (i.e. Finland, France, Sweden, Switzerland).<sup>22</sup>

Although the vote seemed conclusive, the issue of the PRG's participation was not resolved at this first conference, and it resurfaced through political maneuvers at the second conference series, held beginning in early February in 1975. Another attempt to gain access for the PRG was made, this time by a group of states aligned with the Soviet Union, using a novel approach. After defeat at replacing the Republic of Vietnam as the legitimate representative with the PRG in 1974, the proposal at this session was to seat both the PRG and the Republic of Vietnam. The basis for the reintroduction of the issue appeared to be a dispute over the difference in the rules for decision-making at the conference; those that wished to have the PRG seated argued for a simple majority basis (Conference rule 35, paragraph 4), while those opposed wished for a 2/3 majority (rule 32).<sup>23</sup> If the applicable rule could be changed by a simple vote, the PRG would stand a greater chance of gaining full-participant status. For the United States, this vote was much more troubling, particularly in light of the fact that it had recently been informed that the Government of France was planning on voting for the PRG's acceptance.<sup>24</sup> However, when the final vote occurred, France remained in the abstention column, with a tie in votes over which rule should apply (41 to 41), finally settling the issue of the PRG's status (although Sweden, represented by Hans Blix, changed its 1974 abstention to a vote against the American position).<sup>25</sup>

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<sup>22</sup> Ibid., 52-53

<sup>23</sup> Ibid., 272-284

<sup>24</sup> "GOF decides to vote in Favor of PRG", 1/31/75, State Department Telegrams, National Archives, at <http://aad.archives.gov/aad>

<sup>25</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, 17 vols., Bern, 1978, Volume V, 293-294

The U.S. was ultimately successful in blocking the PRG from gaining a seat at the conference, either as a full participant, or as an observer group (the status awarded the PLO). This was due to the alignment of interests between the attending states, acting in their own calculus of varied goals. The PRG's prominence as an issue at the first two conference sessions had little to do with any single actor's commitment to the concept of the PRG's participation, but instead this was a significant example of the Cold War blocs positioning themselves in continued opposition to each other. In addition, it evidenced the interest of the Global South in making its case for the broadest interpretation of what constituted an actor eligible for protections under IHL. This issue became a moot point by the time of the third series of conferences in 1976, when South Vietnam no longer existed, and the PRG was an unnecessary political entity in the unified Vietnam.

As discussed previously, the tensions between the United States and the Soviet Union influenced the actions of not only their own policies, but also the behavior of the Global South. While each non-superpower state was operating in its own interests, their relationships as clients, allies or ideological opponents of the U.S. and U.S.S.R. were significant factors in many of their positions. However, these relationships were not always the central concern for the individual states of the Global South. It is the primacy of the Global South's experience with colonialism that Odd Arne Westad focuses on in his 2005 work *The Global Cold War: Third World Interventions and the Making of Our Times*. The crumbling ability of European colonial powers, both in attempting to hold on to their possessions or to transfer administration to the native population, influenced the opportunity for outside ideologies to bring together groups that had been historically divided along ethnic or tribal divisions. In his analysis of the impact of decolonization in South Africa in the 1960's, Westad notes that:

As we shall see, it was not easy for liberation leaders in Southern Africa to force a Marxist



analysis on their understanding of the societies in which they operated. But Marxism- especially in its Leninist form – had one great advantage in countries where the authorities increasingly used different forms of racist ethnic categories to split the population and perpetuate their own rule. By subdividing people into their productive roles, as peasants, workers, or intellectuals, rather than into Zulu, Xhosa, Ndebele, Shona, or Ovambo, Marxism helped create at least the perspective of a united front against the regimes.<sup>26</sup>

As Westad states, the rise of the nationalist movements into internationally recognized political forces did not occur due to a natural relationship with Marxism; however, the acceptance and usage of the ideology had a number of advantages for those seeking to gain political power, both internally and internationally. On the domestic side, the allure of gaining a larger base of support by bringing together people-groups that had not previously identified with each other, or in some cases, not trusted each other, was politically and militarily necessary in order to provide the perception of a cohesive movement. From the international institutional viewpoint, the conglomeration of recognized nationalist movements would provide a reciprocal benefit to the Global South (at least when a particular nationalist movement did not find itself at odds with a Third-world post-colonial regime) as this recognition would further increase the ability of allied states to exercise their political power in the global order. In the case of the genesis and evolution of the process that became Protocol I, the identification of a global movement for “social justice” in relation to IHL masked itself inside a revolutionary ideology (Marxism) that brought together numerous actors in opposition to the capitalist and primarily western states as they exercised influence or control over the regions that were in contest.

A primary example of the battleground of the 1960’s and 1970’s was the state of South Africa:

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<sup>26</sup> Westad, *The Global Cold War*, 207-208

South Africa was the main arena in the conflict for power in Southern Africa. It's racist regime, established under the Afrikaaner-dominated national Party from 1948 onwards, used a policy of segregation- apartheid in Afrikaans – to split the country along ethnic lines and to allow the European minority of around 13 percent to control the economy, the military, education, and politics.<sup>27</sup>

The issue of nationalist movements that opposed regimes in Angola and Mozambique, at that time under the colonial possession of the Portuguese, were equally important in the narrative of the anti-colonial movement occurring in the Global South. Not only were the movements fighting to gain freedom from colonial powers, they were also considered by many as part of the broader international movement against the west, and at least in the opinion in 1965 of one of their leaders, Amilcar Cabral, “directly in conflict with the United States.”<sup>28</sup>

our hearts [beat] in unison with those of our brothers from Viet Nam who give us a unique example in fighting the most scandalous, the most unjustifiable imperialist aggression of the United States of America against the peaceful Vietnamese people... We are with the Blacks from America, we are with them in the streets of Los Angeles, and when they are denied any possibility of a decent life, we suffer with them.<sup>29</sup>

While these movements had domestic grievances and motivations, the sources of assistance to achieve their independence were hardly organically-sustained capabilities. In the case of Africa, the introduction of Cuban troops into the Congo to train and fight in Angola, as early as 1965, marked an important international expansion of Castro's efforts. “By 1967 most of the Cuban attention had passed from Angola to another Portuguese colony, Guinea-Bissau.”<sup>30</sup>

Guinea-Bissau, a small colonial holding of Portugal, would be another key issue at the opening of the Protocol I conference in 1974. The first of the final three colonial holdings of Portugal to gain independence in Africa, Guinea-Bissau would achieve its recognition as a state after the formal invitations to the conference had been sent out by Switzerland, the host nation.

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<sup>27</sup> Ibid., 208

<sup>28</sup> Ibid., 211

<sup>29</sup> Ibid.

<sup>30</sup> Ibid., 213

The importance of international recognition for Guinea-Bissau, like the dispute over the PRG of South Vietnam, was argued forcefully by numerous state representatives, beginning formally at the second plenary meeting on February 27, 1974. On the question of full participation for Guinea-Bissau, the representative of the United States, George Aldrich, made it clear that the case of non-voting participation of national liberation movements and the prospect of Guinea-Bissau's recognition as a state and voting member needed to be considered separately from the case of the PRG of South Vietnam:

He hoped that the question of invitations to the Republic of Guinea-Bissau and the national liberation movements could be settled speedily. It was important to find a way of enabling governments which did not agree with the solutions adopted to state briefly their reservations. The question of the invitation to the Provisional Revolutionary Government of the Republic of South Viet-Nam, however, would need considerable discussion.<sup>31</sup>

This distinction between the two entities (Guinea-Bissau as a state and the PRG as a non-recognized entity in any official sense), along with the separation between other nationalist movements clearly met the goals of the United States, considering the political makeup of the conference attendees who would ultimately decide the question. While the United States may not have had any particular wish to provide nationalist movements with any form of status, it was clear that the best outcome it could hope for was to restrict them from full recognition (which some Global South and Soviet Bloc states proposed), and by separating them from the PRG, the U.S. may avoid an all-or-nothing vote that tied these groups together, gaining votes for the PRG from states that ultimately were not committed to their inclusion beyond the rhetoric. In addition, the issue of Guinea-Bissau's recognition as a state was not a pressing political problem for the United States, nor was it in great dispute that a state had emerged that would

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<sup>31</sup>Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, 17 vols., Bern, 1978, vol. V, 20

gain sovereign status. The representative of Senegal, Mr. Cisse, made the case for Guinea-Bissau at the fourth Plenary meeting on February 28, 1974:

On behalf of the African countries, some 75 States members of the United Nations had already recognized the sovereign Republic of Guinea-Bissau. The African countries were confident that almost the entire world community would have followed their example by the time of the Twenty-Ninth Session of the United Nations General Assembly. It would be a logical corollary to the adoption of General Assembly resolution 3061 (XXVIII) for the Republic of Guinea-Bissau to be invited to participate in the Conference with the same rights as all other participating States. He was sure that the inviting Government, which was noted for its fairmindedness, had not excluded it by deliberate design. The time had come to make good the omission by extending the necessary invitation to Guinea-Bissau.<sup>32</sup>

Cisse's political forecast for the formal recognition of Guinea Bissau would prove prescient (although it may have been a simple case of tabulating the votes that would be cast for Guinea-Bissau) as the state gained formal international recognition under UN Security Council approval and General Assembly Resolution 3205 of September 17, 1974.<sup>33</sup>

In the course of conference discussions, several methods to resolve the issue were proposed; Mr. Rechetnjak, of the Ukrainian Soviet Socialist Republic, argued that "the question of inviting Guinea-Bissau and the Provisional Revolutionary Government of the Republic of South Vietnam should undoubtedly have been settled by the Swiss government."<sup>34</sup> This proposal, offered as a statement but not as a draft resolution, which tied the fate of the two entities together to be decided by an "impartial" state, did not generate any substantial discussion or proposal on its merits.

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<sup>32</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, 17 vols., Bern, 1978, vol. V, 33

<sup>33</sup> United Nations General Assembly Resolution 3205, (XXIX), 17 Sep 1974, United Nations website, <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/738/07/IMG/NR073807.pdf?OpenElement>

<sup>34</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, 17 vols., Bern, 1978, vol. V, 25

In the case of “national liberation movements”, the conference adopted a draft resolution (CDDH/22 and Corr. 1) that grew out of a series of informal and formal discussions.<sup>35</sup> The determinant factor in proposing that a “national liberation movement” should participate in the conference with observer status (non-voting only) rested on the recognition of the particular movement by its corresponding intergovernmental regional organizations. The two regional organizations that were allowed to certify these movements were the League of Arab States, and the Organization of African Unity:

Recognized by the League of Arab States: the Palestine Liberation Organization (PLO);  
 Recognized by the Organization of African Unity: the Mozambique Liberation Front (FRELIMO); the Angolan People’s Liberation Movement (MPLA); the Angolan National Liberation Front (ANLF); the African National Congress (ANC); the Pan-Africanist Congress (PAC); the Zimbabwe African People’s Union (ZAPU); the Zimbabwe African National Union (ZANU); the South-West African People’s Organization (SWAPO); the Somali Coast Liberation Front (FLCS); the Djibouti Liberation Movement (MLD); the Seychelles People’s United Party (SPUP); the Sao Tome and Principe Liberation Movement (MLSTP); and the Comoro National Liberation Movement (MOLINACO).<sup>36</sup>

The fact that these organizations gained access to the political process, with the ability to observe, comment, and lobby for their interests throughout the conference was no small victory; however, this did not assuage all of the proponents of full participation. Mr. Kasasa, Zaire’s representative, stated that “he regretted that the national liberation movements were represented only by observers. That anomaly should be remedied, and Zaire had therefore submitted an amendment to the provisional rules of procedure of the Conference.”<sup>37</sup> This amendment would not result in a vote by the committee, and the status of the national liberation movements would remain as originally proposed by the final consensus, with a motion for cloture resulting in a vote

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<sup>35</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, 17 vols., Bern, 1978, vol. V, 56

<sup>36</sup> Ibid., 56

<sup>37</sup> Ibid., 195

of 75 for giving these specific national liberation movements their observer status, 24 abstentions, and 2 votes against.<sup>38</sup>

The inclusion of these groups in the conference conflicted directly with the interests of two states (comprising “no” votes in the sixth plenary session), South Africa and Israel. In his statement to the seventh plenary meeting, the representative of South Africa, Mr. Taswell:

there could be no question of it recognizing movements operating in the southern and other parts of the African continent with the help of foreign Governments and organizations outside the countries concerned. Those movements spread terror among the populations which they falsely claimed to represent, did not observe the Geneva Conventions and therefore had no place in the conference.<sup>39</sup>

For the South Africans, the inclusion of terrorist groups actively engaged in violence inside their state (the ANC and SWAPO), operating from safe havens in neighboring states, was unacceptable. For Israel, it was the invitation of the PLO that justified their negative vote.

According to Mr. Kidron, Israel’s representative at the sixth plenary meeting:

The present Conference was a Diplomatic conference, which meant that it was a conference of plenipotentiary representatives of States empowered to undertake commitments on behalf of their Governments...One of the organizations asking to participate in the Conference was the Palestine Liberation Organization, a body whose members and agents had, over the past few years, perpetrated a series of atrocious acts of terrorism, the vast majority of whose victims had been men, women and children who had not the remotest connection with the cause which the terrorists claimed to be fighting. Under every system of law such acts of terrorism were crimes, and those who planned and committed them had no place at a conference on humanitarian law. It was tragically true that in many quarters the theory and practice of terrorism had been invested with an aura of romance, and the view was put forward that a claim to fight for national liberation conferred absolution from the laws and dictates of humanity. That was an utter distortion of the humanitarian law which the conference was asked to reaffirm and develop. The Geneva Conventions of 1949 and the draft Protocols were not a license to murder, to sabotage, to hijack or to subvert constitutional authority: they were not a device for the attainment of political advantage, or recognition, or legitimacy. They deliberately did not characterize as “just” or “unjust” and did not make different rules for one or the other. They were concerned exclusively with the protection and succour of the individual victims of armed conflicts, soldiers and civilians, irrespective of race, colour, creed or political belief. That was what humanitarian law was about and those who professed and practiced terrorism had no place in the making of it.<sup>40</sup>

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<sup>38</sup> Ibid., 64

<sup>39</sup> Ibid., 67

<sup>40</sup> Ibid., 57-58

In a less direct statement, the representative of France, Mr. Girard, addressed the issue also.

While France did not object to the motion for cloture, the issue of their recent influence in the area of Somalia and Djibouti, and their ongoing national interests warranted this response, also at the sixth plenary meeting:

Referring to the list of national liberation movements read out by the Secretary-General, the Mouvement de liberation nationale des Comores (MOLINACO), the Front de liberation de la Cote de Somalis (FLCS), and the Mouvement de liberation de Djibouti (MLD) could not claim to represent the peoples of the French territory of the Comoro Islands and the French territory of the Afars and Issas.<sup>41</sup>

With the final decisions made on the status of participants at the conference, the issues moved to intent and substance. The conflict between the Global North and the Global South over the future of IHL had been set in motion. For the United States, the term “Reaffirmation and Development of International Humanitarian Law applicable in Armed conflicts”, the ostensible purpose of the conference, would be distorted into an exercise in geo-political power relationships. The ideological and theoretical tests which occurred over the course of the four sessions spanning three years prior to finalization would drastically alter the United State’s relationship to the global community in its application of conventional warfare into the future.

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<sup>41</sup> Ibid., 61

### **SPECIFIC PRE-TREATY ARTICLE DEBATES**

After resolving the initial major disputes of the conference over the seating of participants, as well as their status (voting member or non-voting observer), debate turned to the detailed work of the conference to make the most significant revision to IHL since 1949. The nations of the Global South, in promoting their primary opening issue of the intent for the conference, argued forcefully for a new standard of “distributive justice” to be applied in international conflict, where one or more parties were fighting against “racist, colonial, or imperial oppression” by a foreign invader (or hostile colonizing state). On March 7, 1974, an early amendment to Article 1 was offered by several states, including Algeria, the German Democratic Republic, and the U.S.S.R, which began the process of deconstructing the purpose of IHL as an impartial institution, with the addition of a paragraph:

2. The international armed conflicts referred to in Article 2 common to the Conventions include also armed conflicts where peoples fight against colonial and alien domination against racist regimes.<sup>1</sup>

A larger contingent of states, including the Republic of Egypt, Australia, Libyan Arab Republic, Norway and Pakistan, asked for an additional paragraph:

The situations referred to in the preceding paragraphs include armed struggles waged by peoples in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and defined by the Declarations on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.<sup>2</sup>

These amendments were not viewed with widespread acceptance, as the representative of the United Kingdom, Mr. Draper, would argue:

The 1949 Geneva Conventions had been carefully drafted on the basis of a distinction between international and non-international armed conflicts. If the systems of those Conventions were to be disrupted, all the Conventions would have to be revised. Protocols

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<sup>1</sup> Howard S. Levie. *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*. Vol. I, Oceana Publications: Dobbs Ferry, NY, 1980, 1

<sup>2</sup> Ibid., 1



I and II assumed a clear distinction between the two classes of armed conflict, and struggles for national liberation fell within the ambit of Protocol II. 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.<sup>3</sup>

Similar to prior versions of “just war theory”, these calls for Protocol I’s adoption rested on the belief that “war victims” (the original intent and scope of the 1949 Geneva Conventions) were to be treated humanely; however, the classic distinctions that were used to differentiate between civilians and combatants was subject to a new and dangerous interpretation. The reciprocal nature of IHL, where combatant behavior preceding their own change in capability (the inability to defend themselves due to wounds, illness, or capture) had historically been the basis for increasing the odds that humane standards would be applied to them in these situations, was discounted and replaced with a new norm. Under the new proposals, it was the politically and militarily disadvantaged combatant that required protections, even during their conduct of operations.

In the course of this chapter, several specific key articles, and the debates that surrounded their eventual adoption, will be discussed. Throughout the section, the methodologies and definitions offered in chapter 2 will be useful in the analysis of the progression in the debate. In particular, those of Fritz Scharpf’s “distributive justice” definitions of *Equity*, *Equality*, and *Need*,<sup>4</sup> the classic role of *asymmetry* in warfare noted by Sun Tzu<sup>5</sup> and Clausewitz<sup>6</sup>, and Metz

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<sup>3</sup> Ibid., 7

<sup>4</sup> Scharpf, *Games Real Actors Play*, 91-92

<sup>5</sup> Sun Tzu, *The Art of War*, 9

<sup>6</sup> Von Clausewitz, *On War*, 87

and Johnson's observations *on political-strategic asymmetry* and *operational asymmetry*<sup>7</sup> are important to keep in mind when viewing the progression of the treaty.

It is significant that the work in debating and amending these articles was primarily handled by committee III, which was given the task of dealing with "Methods and Means of Warfare" and "Combatant and Prisoner-of-War Status" issues. It was this committee that addressed the most contentious issues of the conference (with the exception of the political seating issues, discussed previously, which were overseen by committee I in preparation for plenary session final votes). Much of the unexpected length of the conference, beginning in 1974 and lasting through three additional annual sessions, can be attributed to the conflict over issues in committee III. Three articles, draft Article 46 (Protection of the civilian population – Article 51 final), draft Article 39 (Aircraft occupants- Article 42 final), and Article 42 quater (Mercenaries- Article 47 final) will be reviewed to place the committee dynamics into historical perspective and considered in the context of the methodologies in Chapter 2. An additional article, Article 35 (Prohibition of Perfidy- Article 37 final) will be discussed, and its relationship to the key article in contention, Article 42 (New Category of Prisoners of War- Article 44 final). It is this article that dominated the discussions and debates in committee III over the course of the conference, and the article's importance in extending protections to individuals that had not previously been considered "lawful combatants" under IHL (Geneva 1949) will be reviewed in the context of the methodology described previously. As each of these articles are discussed, they will be referred to by their draft article number, not the final treaty number. It will be helpful to note that the distinctions in classifications (e.g. civilian, combatant, mercenary) become the basis for differences in required behavior and protections according to the intent of

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<sup>7</sup> Metz and Johnson, *Asymmetry and U.S. Military Strategy*, 5

the Protocol, and as Article 1 of the Protocol (e.g. justification for positive discrimination benefiting the Global South) was enshrined from the beginning of the conference, the progress of the committee's work became a test of Article 1's ability to influence the outcome.

Article 46 (Protection of the civilian population) was argued primarily around the issue of a complete ban on reprisals against the civilian population as enumerated in the draft article's proposed paragraph 4 stating "Attacks against the civilian population or civilians by way of reprisals are prohibited."<sup>8</sup> This seemingly straightforward text merited comment and proposed amendment from several states. The experience of World War II, with its widespread aerial bombing campaigns that did not always discriminate in effect between military objectives and civilian objects or areas (often due to the placement of legitimate military targets in close proximity to civilian zones) focused several amendments on the impact of this article on aerial bombing. Those states that had experienced this form of attack, or that considered it as a legitimate tactic (but limited by the existing IHL concept of proportionality), joined the debate. Czechoslovakia, the German Democratic Republic, Hungary, and Poland, offered an amendment to paragraph 3:

The employment of means of combat, and any methods which indiscriminately strike or affect the civilian population and combatants or civilian objects and military objectives, are prohibited. In particular it is forbidden to attack without distinction, as a single objective, by bombardment or any other method, a zone containing several military objectives in populated areas and situated at some distance from each other.<sup>9</sup>

The consequences of this amendment on military planning would be the inability of attack against legitimate military objectives should they be located in close proximity to civilian areas, unless the attacking force could virtually guarantee no collateral damage. Had this wording

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<sup>8</sup> Howard S. Levie. *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*. Oceana Publications: Dobbs Ferry, NY, 1980, vol. III, 123

<sup>9</sup> Ibid., 124

survived the debate intact, this could have been an incentive to locate valuable military targets into the civilian population, to make attacks impossible. The reply of George Aldrich, the head U.S. representative to the Conference (and the rapporteur at most of committee III's sessions) was based upon the concept of proportionality in military action, a principle in IHL that was critical to Geneva III of 1949:

The rule of proportionality set out in the amendment in document CDDH/III/27 was based on existing international law, and it was important to record and interpret that rule in article 46. Collateral damage to civilians and civilian objects was often unavoidable and it was unrealistic to attempt to make all such damage unlawful: the rule of proportionality was as far as the law could reasonably go. If the element of intent was omitted, the provision might be used to justify trials for accidents or for unavoidable damage. His delegation agreed that attacks on the civilian population intended to spread terror should be prohibited, but considered that the prohibition of the free flow of information was unacceptable.<sup>10</sup>

The effects of Article 46 and the attempt to remove the rule of proportionality also had an impact on military operations in ground combat. The wording of the original article presented to the committee, and the amendments offered, were not limited to aerial bombing. The impact of the loss of “proportionality” was clearly understood by representatives of the Global South, and the representative of Iraq (Mr. Al-Adhami) made a statement on the topic, but without offering an amendment:

Article 46 as drafted by the ICRC had several drawbacks. The idea of intention in the second part of the first paragraph was subjective and vague. The words “intended to spread terror” should be replaced by the words “which spread terror”. With regard to the idea of proportionality in paragraph 3 (b), it would be impossible to prove that the military advantage expected was in fact disproportionate. That idea should be dropped.<sup>11</sup>

TIEN Chin, representing China, continued the assault on the rule of “proportionality” and included the moral terminology that had been inserted by vote as Article 1:

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<sup>10</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, 17 vols., Bern, 1978, vol. XIV, 67

<sup>11</sup> Ibid., 54

the criminal acts committed in many parts of the world by imperialist, colonialist, and neo-colonialist forces constituted a serious infringement of the fundamental rights of oppressed nations...Attempts to confine the meaning of “civilian population” within narrower limits was tantamount to providing the imperialists and colonialists with a pretext for attacking the civilian population during their wars of aggression.<sup>12</sup>

In response, the French representative, Mr. Girard, replied to the issues of intent and proportionality by stating that “in traditional wars attacks could not fail to spread terror among the civilian population: what should be prohibited in paragraph 1 was the intention to do so. The principal of proportionality should be retained in sub-paragraph 3 (b).”<sup>13</sup> Beyond “proportionality” and “terror”, France had specific concerns and objections to the insertion of paragraph 6 of draft article 46, “Attacks against the civilian population or civilians by way of reprisals are prohibited.”<sup>14</sup> Girard argued that:

Grave violations of draft Protocol I would undoubtedly provoke a reaction on the part of victims, whose Governments could hardly forbid them to take reprisals with a view to ending such violations. The provisions of paragraph 4 might, in certain circumstances, favour a party which violated the Protocol and penalized a party which observed it. His delegation would like the paragraph to be deleted, but if it was retained it should be amended to allow for the possibility of reprisals in the circumstances he had indicated, but subject to three conditions. In the first place, the decision to resort to reprisals should be taken by the Government alleging the violation of the Protocol, not by the military commander; secondly, the adverse party should be given advance warning that reprisals would be taken if the violation was continued or renewed; and thirdly, the reprisals should be proportionate to the violation they were designed to end.<sup>15</sup>

France, realizing that the probable outcome of the draft article would restrict its ability to practice reprisals against a civilian population, argued that the age-old practice be retained, but with their civilized version containing three conditions. In the end, the final version of Article 46 would retain paragraph 6 (contrary to France’s objections and without their conditions), and

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<sup>12</sup> Ibid., 57

<sup>13</sup> Ibid., 65

<sup>14</sup> Howard S. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, Oceana Publications: Dobbs Ferry, NY, 1980, vol. III, 175

<sup>15</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, 17 vols., Bern, 1978, vol. XIV, 65

add paragraph 8 that reaffirmed that a party to a conflict, having been the victim of any violation of the article, could not justify their own reciprocal response. Article 51, paragraph 8 states that “Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.”<sup>16</sup> Ultimately, France’s response in acceding to the Protocol (officially in 2001) included a specific reservation on its interpretation of Article 46 that notified the international community that France would consider the issue of reprisals as its sovereign interests demanded:

The Government of the French Republic declares that it will apply the provisions of paragraph 8 of article 51 insofar as the interpretation of them is not an obstacle to employment, in accordance with international law, means that it deems necessary to protect its civilian population due to serious violations of the Geneva Conventions, either obvious or deliberate, by the enemy.<sup>17</sup>

Having lost the argument in the *political-strategic* sphere, France declared its sovereign ability to exercise a form of *operational* asymmetry, regardless of the final outcome of the revision to IHL on this article. In this exercise, the possibility that in some future conflict, France would ignore the spirit of this article based upon its own national security interest, was clearly stated.

Another example of the differing interests of the Global North and the Global South was the issue of the protection of aircraft occupants as “war victims”, covered under Article 39 (Aircraft occupants). The proposed article offered at the beginning of the conference was relatively straightforward, with only two paragraphs:

1. The occupants of aircraft in distress shall never be attacked when they are obviously hors

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<sup>16</sup> International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977, accessed at [www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument](http://www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument)

<sup>17</sup> International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977, <http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument>

de combat, whether or not they have abandoned the aircraft in distress. An aircraft is not considered to be in distress solely on account of the fact that its means of combat are out of commission. 2. The use of misleading signals and messages of distress is forbidden.<sup>18</sup>

The question of aircraft occupants, unlike many of the other articles, was a recent phenomenon in IHL debate. As Mr. de Preux of the ICRC counseled the participants:

Article 39 had no equivalent in the Hague Regulations annexed to the Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, since air warfare had been unknown when the latter had been drawn up. An airman in distress could, strictly speaking, be covered by paragraph 1(a) of Article 38, but the importance of aviation in modern conflicts warranted the adoption of special provisions to ensure the normal functioning of air operations and protection of airmen. Certain states had already published military manuals, prohibiting attacks on disabled aircraft and on their crew in distress; that prohibition obviously excluded airborne troops.<sup>19</sup>

On this issue, the divergence between the Global North, which possessed advanced air capabilities and had adopted the technology to both their strategic and operational military planning, and the Global South, which relied on outdated technology transferred from the developed nations, or in many cases, had no airwar capabilities of their own, would be relatively straightforward in the debate. As de Preux noted, the practice of distinguishing an enemy hors de combat characterized as a “war victim” had been addressed by states (i.e. the United States, Great Britain) in their manuals to standardize their military’s behavior toward parachutists who were clearly not part of an airborne infantry assault, even though there were no IHL precedents. These were both moral and practical considerations, and the attempt to enshrine them into IHL in Protocol I would develop into an interesting series of debates.

For the Global South, the moral issues were heavily outweighed by the reality of technological asymmetry, and on this issue, contrary to the attempt to shield military targets (as in article 46), the calculations were simple. Leading the objections to Article 39, the

<sup>18</sup> Howard S. Levie. *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*. 4 Volumes, Oceana Publications: Dobbs Ferry, NY, 1980, vol. II, 345

<sup>19</sup> Ibid., 345-346

representative of Egypt, Mr. El Ghonemy, argued that the wording of the draft article was too vague:

...while draft Article 39 contained the phrase “the occupants of aircraft in distress shall never be attacked”, the latter provision was open to question, since an airman hors de combat was still a combatant and could not be protected in all circumstances. The only way of capturing such an airman was often to attack him. The ICRC text therefore went too far, no doubt unwittingly. Since the occupants of an aircraft in distress might have hostile intentions, article 39 should not go beyond the provisions of article 38.<sup>20</sup>

The Global South would make its case for expanded opportunities to attack the airmen of the Global North in numerous ways. Referring back to the terminology of Article 1 as a moral distinction, and importing his own nation’s recent history against an advanced air capability, the representative of the Democratic Republic of Vietnam would argue on March 13, 1975 that:

During the war waged in Viet-Nam by aggressive imperialist Powers, enemy airmen had been found to carry two revolvers and two radio transmitters, which proved they had no intention of surrendering when they reached the ground and that the adversary was prepared to use any means to ensure their rescue, without the least regard for the civilian population. Machine guns, dive bombing, pellet bombs and other means had been used during rescue operations. Even CS smoke had been used, particularly in the province of Thanh Hoa, as a screen between the civilian population and the airman. The suffering inflicted on civilian populations and the damage caused to civilian objects were particularly serious when the airman landed near a village or town. The conditions in which peoples struggling against colonial domination, foreign occupation or racist regimes had to fight were identical with those of peoples who had to struggle against imperialism. Accordingly, the occupants of an aircraft in distress, whether or not they had left the aircraft, should not be considered as being hors de combat in the following four cases: if they did not fulfill the conditions stated in paragraph 1 of article 38; if they sent signals of distress to their armed forces; if a rescue operation was undertaken on their behalf; and if they moved off in the direction of the lines occupied by their own troops.<sup>21</sup>

As the issue progressed to the next annual session of the conference, another interpretation of the role of the individual airman’s behavior was offered by another state that identified with the Global South, Iraq. On May 31, 1976, Mr. Al-Karagoli, in addressing the idea of what constituted “moving off in the direction of the lines occupied by their own troops”, offered that

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<sup>20</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977*, 17 vols., Bern, 1978, vol. XIV, 288

<sup>21</sup> *Ibid.*, 289-290



“It was obvious to his delegation and to any lover of fair play that by directing his descent in the direction of territories controlled by the party to which he belonged, or by an ally of that party, a parachutist was in effect deliberately making his escape.”<sup>22</sup> The behavior of the individual airman, in attempting to evade capture either in the air or on the ground, could be considered a “hostile act” and would negate his eligibility to be considered protected under Article 39. In addition, the impact of natural forces (i.e. wind) would also justify the targeting of the airman while floating to the ground; if it appeared to the adversary that the airman would land in territory that was friendly to him, he was a legitimate target, even though he had lost the means to defend himself at the moment in question. If there was any doubt as to the intent of the argument, Mr. Al-Karagoli removed it with his final statement on this issue:

It was difficult to imagine that a combatant on the battlefield could be content to stand idly by while a parachutist directed his descent towards other territories, and to wait to become himself a target for the same parachutist returning in another aircraft. The combatant’s position would be such that he could not apply a humanitarian law obliging him to act in that way.<sup>23</sup>

The substantive debate over Article 39 continued right up to the final session of the Conference in 1977, and in the process of discussions, the Global South’s attempts were led primarily by the states of the Arab League. On June 1, 1976, Mr. Shaaban, representing Egypt stated the intent of an amendment that would drastically alter the ability of ground forces to shoot at aircrews parachuting from disabled planes, and the argument replaced humanitarian principles with calculations of “military effectiveness”:

As far as military interests were concerned, a pilot was of great value and worth hundreds of ordinary combatants; in many cases of combat, the number of pilots would determine the outcome of hostilities. A combatant of such military value was therefore, in terms of law, a legitimate target of attack, the only exception being if he had been disabled by wounds or sickness or was in a position to surrender as a prisoner of war...One could look at the situation

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<sup>22</sup> Howard S. Levie. *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*. Oceana Publications: Dobbs Ferry, NY, 1980, vol. II, 351

<sup>23</sup> Ibid., 351

from the standpoint of chivalry, but that would be rather strained and exaggerated, because chivalry presupposed equality of opportunity in fighting, it implied giving the adversary the opportunity to fight for his life, to kill or be killed. To adopt that concept of chivalry in the situation under discussion would be pushing it too far, because infantrymen were by no means equal in armament to a pilot.<sup>24</sup>

The proposed amendments by these nations, to allow shooting aircrew who were unable to defend themselves while drifting to earth, were based upon the military effectiveness of killing a high value target who could be a future threat. Given the recent history of the Middle East, where the Israeli air force had proven its superiority over its Arab adversaries, this interpretation was understandable. However, this practice would be considered contrary to *customary international law* as it had developed, not strictly based upon a humanitarian principle, but a calculated proposal to address an imbalance in military capability. The asymmetrical nature of the Global North's technological advantage was the justification for the proposed revision, and the method to achieve "distributive justice" required a positive form of discrimination at the expense of a practice that had been evolving from military doctrine and manuals into the status of *customary international law*.

Another practice in warfare had been the employment of professional soldiers for hire (mercenaries) by states to provide for advanced military capabilities, both in domestic and international conflict. The topic of mercenaries was an outcome of the discussion over Article 42, and became its own Article in Committee III (Art. 42 qater), and developed as the distinctions between different types of combatant (i.e. regular armed forces, national liberation movements, and mercenaries) were being debated. Just as the Global South wished to use Protocol I to advantage its preferred combatants at the expense of regular armed forces, the opportunity to exclude a class of combatant that had been used against its members, often successfully, was a development that could not be ignored. At the March 20, 1975 meeting of

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<sup>24</sup> Ibid., 356

committee III, Mr. Belousov of the Ukrainian Soviet Socialist Republic made the argument for separating mercenaries distinctly from the protections being debated under Article 42:

Although most governments were against such a practice, mercenaries were recruited in Western Europe, the United States of America, and Canada with the promise of cash rewards for each combatant against colonialism killed...It was now established in the draft Protocols that there were three main categories of combatant, namely regular armed forces, national liberation movements and mercenaries. To accord mercenaries the safeguards offered to the other categories would be contrary to the rules of existing international law and also to the resolutions of the United Nations General Assembly and the Security Council.<sup>25</sup>

The movement against protecting mercenaries under the new category also precipitated a rare agreement between the representatives of the Democratic Republic of Vietnam and the Republic of Vietnam at the same meeting (although the distinction between these two governments would end within the next 40 days), when the Republic of Vietnam's representative stated that:

The draft of article 42 was intended to cover resistance movements and the movements of armed struggle for self-determination of peoples fighting against racist regimes or foreign domination... He agreed with the representatives of the Ukrainian Soviet Socialist Republic, Lesotho, and the Democratic Republic of Viet-nam, that mercenaries and war criminals should in no case enjoy such protection.<sup>26</sup>

In an example of the opinion of the non-state observer groups that had been granted status in the conference, the representative of the Zimbabwe African People's Union (ZAPU), weighed in on the issue of mercenaries on March 24, 1975:

We have some reservations on conditions contained in the ICRC draft of article 42, paragraphs 1 and 2. The purpose of this article is to extend the category of persons, who, in the event of capture, are entitled to benefit from prisoner-of-war status as laid down in the third Geneva Convention of 1949. This article should, therefore, be taken, besides those at present mentioned in article 4 of the third Convention, to refer to the category of peoples struggling for self-determination against colonial domination, alien occupation, and racist regimes. Any other interpretation of this article is bound to produce the opposite of what we all sincerely wish to achieve...our delegation will find it very difficult to agree with amendments that tend to be vague or discriminatory. For example, we do not understand what is meant by "irregular forces." Does it mean those who are occasionally mobilized and demobilized? Does it mean that a group of mercenaries under a commander could claim protection as prisoners of war? But, as we all know, mercenaries are mere soldiers of fortune, fighting for the ignoble cause of

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<sup>25</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977*, 17 vols., Bern, 1978, vol. XIV, 343-344

<sup>26</sup> Ibid., 348

selfishness and greed. They deserve arrest and punishment as ordinary criminals.<sup>27</sup>

The argument to separate combatants in terms of their rights and duties is clearly engaged here.

It is interesting to note in the preceding statement by ZAPU that, in their role as an observer group (non-voting and unable to offer direct amendments) the terminology used by Nyathi indicates a belief that ZAPU's delegation must "agree" with the amendment outcomes. The first version of the article, not developed by the ICRC prior to the conference but as a result of negotiations primarily managed in committee III, read:

1. The status of combatant or prisoner of war shall not be accorded to any mercenary who takes part in armed conflicts referred to in the Conventions and the present Protocol.
2. A mercenary includes any person not a member of the armed forces of a party to the conflict who is specially recruited abroad and who is motivated to fight or take part in armed conflict essentially for monetary payment, reward, or other private gain.<sup>28</sup>

The interest in detaching mercenaries from the privileged status of prisoner-of-war was a significant victory for the Global South, and it resonated throughout the community. Mr. Abdul El Aziz representing Libyan Arab Jamahiriya, in his closing statement on the subject of April 28, 1977:

The refusal to mercenaries of the status of combatant or prisoner of war was based on the view that mercenaries were criminals guilty of crimes against humanity...The problem of mercenaries had occupied many minds during recent years. In his report on the third session of the Diplomatic Conference (document A/31/163) the Secretary-General of the United Nations had emphasized the question of mercenaries to the great satisfaction of the delegations of peace-loving peoples.<sup>29</sup>

In the *political-strategic* realm of debate over the status of mercenaries, the fact that much of the Global North was distancing itself from the use of these forces helped this distinction move through the committee with relatively minimal contentious debate. However, the criminality of

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<sup>27</sup> Ibid., 552-553

<sup>28</sup> Howard S. Levie. *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*. Oceana Publications: Dobbs Ferry, NY, 1980, vol. III, 27

<sup>29</sup> Ibid., 39

merely being a mercenary, as opposed to the behavior-based distinction of a criminal act committed by an individual during an international conflict, appeared to separate the Global North and the Global South. The Global North did not press the issue, and instead allowed the final version of the article to be passed by consensus out of the committee. Switzerland's representative, Mr. Denereaz, stated that:

His delegation condemned unequivocally the use of mercenaries as a military system... While condemning the system, it would, however, have been more indulgent, with regard to mercenaries themselves, in view of the principles of humanitarian law which were the sole concern of the Conference.<sup>30</sup>

The Global South was successful on this issue in establishing a new level of operational asymmetry, by institutionalizing the criminality of the status of mercenary in international conflicts. The final and critical assault on the Global North's advantages in conventional warfare was also engaged, in the three years of debate that surrounded Article 42, and the coordination of efforts on related articles would yield important returns.

The Global South's understanding of the importance in achieving a new interpretation of qualifications for privileged treatment under IHL was central to the conference's discussions. In order to expand the interpretation, a specific article would require attention and amendment before finalization, as its wording and focus were linked with the key issue in contention in Committee III. Article 35 (Prohibition of Perfidy) was critical in defining behaviors and classifications in conjunction with the key issue for the conference, Article 42 (New Category of Prisoners of War).

The discussion over Article 37 (Prohibition of Perfidy) centered on the regulation of a behavior (Perfidy) used to gain tactical (asymmetry) advantage in warfare. The original proposed article at the opening of the conference in March 1974:

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<sup>30</sup> Ibid.

1. It is forbidden to kill, injure, or capture an adversary by resort to perfidy. Acts inviting the confidence of the adversary with the intent to betray that confidence are deemed to constitute perfidy. Such acts, when carried out in order to commit or resume hostilities, include the following: (a) the feigning of a situation of distress, notably through the misuse of an internationally recognized protective sign; (b) the feigning of a cease-fire, of a humanitarian negotiation or of a surrender; (c) the disguising of combatants in civilian clothing.
2. On the other hand, those acts which, without inviting the confidence of the adversary, are intended to mislead him or to induce him to act recklessly, such as camouflage, traps, mock operations and misinformation, are ruses of war and are lawful.<sup>31</sup>

The issue of prohibited perfidy centered on subsection c of paragraph 1- “the disguising of combatants in civilian clothing”. An early proposed amendment by the Democratic Republic of Vietnam (North Vietnam) offered February 25, 1975 asked for the entire removal of this wording as a prohibited act, making attacks upon enemy forces by combatants dressed in civilian clothing permissible if approved.<sup>32</sup> In his explanation, Mr. Nguyen Van Huong argued that existing IHL was outdated, and the proposed article “should reflect the conditions of modern warfare.”<sup>33</sup> Referring to the premise of Article 1 of Protocol I, he continued that “since 1945, most international armed conflicts had taken place between aggressive imperialism and the impoverished, ill-armed peoples of Asia, Africa, and Latin America... Those peoples lacked the necessary means to provide uniforms for members of their national forces or their rural and urban militia.”<sup>34</sup> The response by the ICRC committee representative (de Preux) on the same date was consistent with the historical stance of the organization (and existing IHL) on the importance of behavior in making distinction between the civilian population (who were not meant to become the object of an attack) and combatants (legal objects of attack):

Article 35 was based on Article 23(b) of the Hague Regulations annexed to the Hague Convention No. IV of 1907 concerning the Laws of Customs of War on Land, which referred to treachery, and on Article 24, which dealt with ruses of war... The rule in question was most easily explained through examples: if it were stated that civilians as such should not be attacked, there was an evident advantage in disguising combatants as civilians, so that they

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<sup>31</sup> Ibid., 290

<sup>32</sup> Ibid., 291

<sup>33</sup> Ibid., 297

<sup>34</sup> Ibid.

would not be attacked while the subterfuge remained undiscovered; discovery would often come too late, after the subterfuge had succeeded.<sup>35</sup>

Reading the North Vietnamese representative's argument presented above, the validity of his logic suffers from a basic misunderstanding of the Geneva Conventions of 1949, the standing IHL at the time of his statement. The argument that it would be an unfair requirement upon those states or peoples who were too 'impoverished ... to provide uniforms for members of their national forces or their rural and urban militia,'<sup>36</sup> as justification to strike out the prohibition of disguise as a civilian in attack (perfidy), was a standard canard for the Global South. The applicable customary law IHL reference to the status required to be considered a lawful combatant, taken from Article 4 of Geneva Convention III (1949) relative to the Treatment of Prisoners of War, had not been the requirement for a combatant to wear a "uniform". The requirement had been amended in 1949 to extend Prisoner of War status to include both members of the armed forces and militias who met several conditions, and the relevant section (Art. 4, paragraph 2, section b) did not mention "uniforms" as a condition, but instead only required that the combatant met the requirement of "... having a fixed distinctive sign recognizable at a distance."<sup>37</sup> This "fixed distinctive sign" was not a uniform, it could be as simple as the practice by a militia of wearing an armband of any standard color on either arm, and making this distinction known through the IHL community (ICRC) or to the parties to the conflict in question. The North Vietnamese were not alone in their attempt to gain advantage in warfare by blurring the line between civilians and combatants; Algeria's representative argued also for the deletion of subsection c of paragraph 1. "However, the case referred to in paragraph

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<sup>35</sup> Ibid., 293

<sup>36</sup> Ibid., 297

<sup>37</sup> International Committee of the Red Cross, Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, accessed at [www.icrc.org/ihl.nsf/WebPrint/375-FULL?OpenDocument](http://www.icrc.org/ihl.nsf/WebPrint/375-FULL?OpenDocument)

1(c), “the disguising of combatants in civilian clothing”, seemed to be difficult to accept, since it did not take into account certain situations, particularly guerrilla operations.”<sup>38</sup>

While the ICRC representative, de Preux, noted that there could be an advantage gained by combatants operating in disguise, he was not making an argument as a state representative, but a practical observation on the effect of adopting the North Vietnamese and Algerian proposals.

The U.S. Representative at this session, Brigadier General Walter Reed, USAF Judge Advocate General, replied to the proposals diplomatically but to the point:

The ICRC text of Article 35 represented a proper attempt to affirm, develop and clarify the provisions of Article 23(b) and Article 24 of the Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land. Whether that article would make one of the most significant contributions to the protection of innocent civilians, or would be reduced to ineffective words incapable of practical application would depend on the Committee’s decision. The ICRC text of Article 35 was presented in a form which would allow for practical instruction to combatants, easy application by them and understanding by all others. It was conceived and presented with much logic...Experience showed that there was no uniform standard of morality in the world in general and still less in time of war. His delegation was convinced that the notion of perfidy should relate solely to legal obligations recognized in international law...The principle expressed in paragraph 1(c) lay at the very heart of the problem of protection against the effects of hostilities... There was, in fact, no rule in draft Protocol I which required combatants to wear uniforms, nor did he know of any recognized definition of what constituted a uniform. What was important for the protection of civilians was that all combatants, whether members of regular or irregular forces, whether from developed or under-developed countries, whether fighting to put down a liberation movement or fighting to seek true freedom, should distinguish themselves from civilians by some means.<sup>39</sup>

In the version of Article 35 approved, Subsection c of paragraph 1 was revised into the following wording (making no reference to civilian clothing as prohibited under the category of perfidy):

“the feigning of civilian, non-combatant status.”<sup>40</sup> The adopted compromise meant that the issue of clothing was not specifically mentioned, but the specification of what constituted perfidious acts would now rely on draft Article 45 (Article 50 final) to determine what constituted a “civilian”. For the Global South, there were no direct references to “civilian clothing” in the

<sup>38</sup> Howard S. Levie. *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*. Oceana Publications: Dobbs Ferry, NY, 1980, vol. II, 298

<sup>39</sup> Ibid., 299-300

<sup>40</sup> Ibid., 312



prohibition of perfidy, retaining the possibility of operational and tactical confusion on the part of their opponents at time of contact. For the Global North, the reference to a behavior (feigning) retained some standard of distinction between combatant and civilian, but, as General Reed noted, would require additional training and leadership responsibilities which would “allow for practical instruction to combatants, easy application by them and understanding by all others.”<sup>41</sup> In terms of Scharpf’s “distributive justice”, the Global South would receive an advantage, primarily based upon the additional burdens placed upon the Global North in the costs and practices in training and maintaining a military that would be prepared to comply with IHL, as well as the possibility that the perception of an advanced military attacking “civilians” would become a powerful signifier as propaganda.

In relative terms, the single most contested section of the Conference revolved around Article 42 (New category of prisoners of war). While the opening discussions and votes related to *political-strategic* issues (invitations and status of state and non-state actors) and *military-strategic* spheres (i.e. the exclusion of nuclear weapons technology from any article’s control), the central prize for the Global South would surround the asymmetry of conventional warfare. The opportunity to revise IHL in their favor, or at least to reduce the distance between the Global North’s technological, economic and professional advantages had arrived, after years of international political efforts.

In preparation for the discussion of the process surrounding debate over Article 42 offered during the diplomatic conferences, some background on relevant IHL that existed prior to the conference will be instructive. The applicable Geneva Convention, Convention III, relative to the Treatment of Prisoners of War, of 12 August 1949 provides the context for the extensive

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<sup>41</sup> Ibid., 299-300

debate that occurred at the Diplomatic Conferences from 1974 to 1977. The central article of Geneva III on this issue is article 4:

- Art. 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces
  - (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
    - (a) that of being commanded by a person responsible for his subordinates;
    - (b) that of having a fixed distinctive sign recognizable at a distance;
    - (c) that of carrying arms openly;
    - (d) that of conducting their operations in accordance with the laws and customs of war<sup>42</sup>

These distinctions on the determination of a person's status to provide for their protection were an important part of the normative strength of the Conventions, and they served both an individual and a state purpose. For the individual combatants, it delineated the differences that separated them from civilians. It acknowledged their role in the conflict, as well as their responsibility to submit to authority (in either status of 1 or 2 above); to be recognizable on the field of battle; to carry arms openly, and to agree to abide by laws and customs of war (including those that had existed prior to the 1949 Conventions, e.g. Hague of 1907). An individual who disregarded these requirements risked the possibility of being considered outside the protections for prisoners of war (POW) and could be subject to excessive punishment, up to and including the classification as a spy (potentially a death sentence).

For the state, the responsibility to command under the rules followed the chain of command, and the conduct of tactical and strategic operations also fell under these laws. Those nations which chose not to become signatories risked the chance that their own forces would not receive

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<sup>42</sup> International Committee of the Red Cross. Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, at [www.icrc.org/ihl.nsf/WebPrint/375-FULL?OpenDocument](http://www.icrc.org/ihl.nsf/WebPrint/375-FULL?OpenDocument)

the protections expanded under the conventions, and this included the command structure. From a rational choice perspective, compliance was generally preferable to an automatic disqualification from POW status, and the range of outcomes for the actors (individual combatants, commanders) based upon their behavior helped to impact the effectiveness of the rules.

In order to contrast the distinctions between Geneva III article 4 and Protocol I, below is the final version of Article 42 that was ultimately passed out of committee III for final votes in plenary session in 1977 (for purposes of reference, Article 43 is included as it defines “Armed Forces”). This section does not match in article form, but the distinction should be clear:

## Section II Combatants and Prisoners of War

### Art. 43 Armed Forces

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 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.

### Art. 44 Combatants and prisoners of War

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
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.
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 the attack or in a military operation preparatory to the 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.<sup>43</sup>

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<sup>43</sup> International Committee of the Red Cross. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977, at [www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument](http://www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument)

If the two sections listed above are compared, several interesting developments in the revision of 1977 (Protocol I) can be found. The change in the behavioral requirements placed on the combatant is striking: under pre-Protocol I IHL, it was assumed that the ability to claim a preferred status as a combatant and potential prisoner-of-war followed the logic that the combatant would remain identifiable at *all times* as a combatant, and not cross into an “other than combatant” status. In the case of Protocol I, this permanent behavioral connection to status was not required; section 3 and subsections a) and b) made this a temporary requirement. In the case of a Protocol I combatant, it is possible to revert to the status of civilian simply by avoiding capture or contact during these limited periods of military activity. According to Samuel V. Jones:

The civilian immunity provisions of Protocol I do not explicitly require that the civilian refrain from engaging in hostile conduct. The literal text of Protocol I permits a finding that civilian immunity evaporates only “for such time” as the person takes a “direct part in the hostilities”, and, according to at least one international body, immunity reattaches once the person has ceased direct participation in the hostilities.<sup>44</sup>

While this is problematic, another feature of the change may have been more troublesome. In the distinction enumerated in Protocol I listed above as Article 44, section 2, the language “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”<sup>45</sup> could be considered a blanket authorization to ignore applicable IHL on an individual basis, a situation that would drastically alter the environment in a war zone. The

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<sup>44</sup> Samuel V. Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, Duke Journal of Comparative & International Law, Vol. 16, 2006, 261

<sup>45</sup> International Committee of the Red Cross. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977, at [www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument](http://www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument)

importance of this revision to the balance of conventional war powers may be found in the democratic processes of committee III.

At the March 19, 1975 committee III session, the ICRC representative (Mr. Veuthey) explained the reason that the ICRC had included this new article for consideration:

Since Article 4.A(2) [Geneva III of 1949] no longer appeared to protect effectively a large number of present-day combatants, the ICRC had considered it necessary to include in draft Protocol I a provision extending the categories of combatants entitled to prisoner-of-war status, if captured. The title and wording of article 42 had resulted from the sessions of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Conflicts held at Geneva in 1971 and 1972.<sup>46</sup>

The problem, according to his opening statement, was that IHL did not “appear to protect effectively a large number of present-day combatants,”<sup>47</sup> not that the existing IHL was morally dysfunctional. The arguments of the Global South would be more direct in their justification for the revision, as well as their application of new standards for behavior based upon political or military capability. The representative of Ghana offered his opinion on the distinction between “liberation movements” and “resistance movements” (the term used in Geneva III, Art. 4[2]):

In view, however, of the conditions under which liberation movements operated, it might not be practicable for them to comply with all of the conditions with which resistance movements could comply. His delegation had therefore proposed the insertion in that paragraph (paragraph 3 of Art. 2) of the words “so far as is practicable” [CDDH/III/28]... Once the liberation movements were organized and subject to an appropriate internal disciplinary system, they should be able to comply with the conditions laid down in paragraphs 1 and 2 as far as possible.<sup>48</sup>

This argument could be characterized as an inventive attempt to apply a positive discrimination (distributive justice) to separate the responsibilities of the group for the behavior of its members, based upon an inability to comply with IHL due to command disorganization until some future

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<sup>46</sup> Switzerland, Federal Political Department. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977*, 17 vols., Bern, 1978, vol. XIV, 318-319

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., 321

date. This standard of compliance with traditional IHL was not defensible for the state, only for the disadvantaged groups.

The operational impact on the Global North in relation to Article 42 clearly revolved around the ability to distinguish combatants from civilians. The United States delegation, led by General Reed, argued for some form of clear distinction of individual combatants, whether by “carrying arms openly or a distinctive sign or any other effective means”<sup>49</sup> that would be retained from Geneva III Art. 4:

It was vital that the Protocol should deny a privileged status to combatants who violated the requirements to distinguish themselves in some way from civilians in their military operations...Lawful combatants could not be punished for acts of violence against the adversary's military objectives. Unlawful combatants did not enjoy such immunity.<sup>50</sup>

While General Reed argued for the retention of a consistent standard of behavior that would allow both sides in a conflict the reasonable ability to identify the enemy (a legal military target) and avoid non-combatants (never to be targeted), the Global South consistently argued for goals that would, in fact, make it virtually impossible to separate combatants from non-combatants.

The Democratic Republic of Vietnam's representative, Nguyen van Huong, did not obscure his argument in the terms offered by Ghana (a “temporary” relaxation on IHL standards based upon command and control deficiencies); rather, he offered a direct statement that laid bare the Global South's grievances and goals, after first suggesting that “liberation movements” should be separated from “organized resistance movements”:

International humanitarian law additional to the Geneva Conventions of 1949 should be conscious that the question concerns combatants of the ill-armed and aggressed party who must use all their bravery and intelligence in the place of weapons in order to at least to escape or defend themselves, or to hold in check the fire-power of the adversary equipped with the most modern and most cruel means of combat... In these new unequal war situations, to demand similar conditions to those of equal war situations of which we spoke earlier, would manifestly result in injustice in the case of ill-armed and weak peoples who are attacked in their own territory...All the world knows that in guerrilla warfare a combatant must operate

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<sup>49</sup> Ibid., 330

<sup>50</sup> ibid., 331

under the cover of night in order not to be a target for the modern weapons of the adversary. In such circumstances, does the spirit of humanity compel them to wear emblems or uniforms in order to “distinguish themselves from the civilian population” in military operations? To do so would expose the combatant to the infernal fire-power of the imperialist aggressors who monopolize modern weapon techniques.<sup>51</sup>

The narrative of a moral distinction between forces, combined with the call for unequal protections and tactical behavior could not have been argued more forcefully by Clausewitz himself.

The United States was not alone in offering proposals to require combatants to provide some form of identifiable sign that they were operating as combatants. Spain offered an amendment requiring combatants to “distinguish themselves from the civilian population by means of fixed, permanent, and clearly visible emblems.”<sup>52</sup> However, Hans Blix of Sweden, felt that the imbalance between forces, particularly when a guerrilla movement was involved, made this requirement unrealistic:

It was of the essence of guerrilla operations, however, that the guerrillero merged into the anonymity of the civilian population before and after his hostile act. The crucial problem was to define the moment at which he should disclose his identity as a combatant. He considered that the amendment submitted by Spain, which made the wearing of “permanent ... emblems” obligatory, went too far.<sup>53</sup>

It was apparent that the Global South had convinced at least a few developed states that the asymmetry of warfare in the favor of the Global North required IHL to be reformulated in the spirit of “distributive justice” and designed to provide positive discrimination for the disadvantaged.

For the non-state observers admitted to the Conference, the opportunity to address their own issues on operational asymmetry in the course of drafting amendments to the final version of

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<sup>51</sup> Howard S. Levie. *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*. Oceana Publications: Dobbs Ferry, NY, 1980, vol. II, 397-399

<sup>52</sup> Ibid., 382

<sup>53</sup> Switzerland, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977*, 17 vols., Bern, 1978, vol. XIV, 361

Article 42 was a verification of their legitimacy. Mr. Masangomai, observer for the Zimbabwe African National Union (ZANU) argued that the fundamental nature of resistance movements precluded their separation from the civilian population, and any effort by the developed world to require them to identify themselves was “totally unrealistic and revealed a failure to understand the positive nature of wars of national liberation.”<sup>54</sup> For good measure, he included another common justification for positive discrimination, the fact that “popular freedom fighters were poorly armed and equipped- they could not afford the luxury of uniforms and emblems.”<sup>55</sup>

In the end, the article (as presented above) was approved, with the flexible identification rules for combatants that made the requirement to “carry his arms openly: a) during each 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 in which he is to participate (Art. 44 paragraph 3)”<sup>56</sup>. For the United States, the only possible avenue to register its position on the final article came in its explanation of its vote. “It was the United States view that paragraph 3...was designed to ensure that combatants while engaged in a military operation preparatory to an attack, even a guerilla attack in an occupied territory, could not use their failure to distinguish themselves from civilians as an element of surprise in an attack.”<sup>57</sup> For the Global South, the emphasis on paragraph 3 would be interpreted significantly differently. The representative of the Syrian Arab Republic focused on the interpretation that:

a member of a resistance or liberation movement need meet only one condition, and that was to carry his arms openly (a) during each military engagement, and (b) during such time as he was visible to the adversary while he was engaged in a military deployment “immediately”

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<sup>54</sup> Ibid., 384

<sup>55</sup> Ibid.

<sup>56</sup> International Committee of the Red Cross. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977, accessed at [www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument](http://www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument)

<sup>57</sup> Switzerland, Federal Political Department. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977*. 17 vols., Bern, 1978, vol. XV, 179



preceding the launching of an attack in which he was to participate. There was no other condition. In other words, what was required of regular armies to distinguish them from the civilian population did not apply to a member of a resistance or liberation movement.<sup>58</sup>

Mr. Armaly, the Palestinian Liberation Organization's official observer, improved on the Syrian interpretation in the interest of the Global South. In applying the rule of visibility, the PLO took the position that "contrary to the suggestions of certain delegations, his own delegation interpreted those words (visible to the adversary) 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."<sup>59</sup> The Global North could be interpreted as illegally targeting "resistance fighters" if it used advanced optics (night vision, infrared, etc.) to identify combatants, including using this technology to protect noncombatants.

In the context of the discussions on Article 42 and applying these interpretations to the final product, it would be difficult to analyze the negotiations and outcome without recognizing the goals of the actors in the conference. This article had not been developed and debated in a space or context devoid of rational interest-based outcomes. The entire process had been an exercise in adapting IHL to fit the *distributive justice* model that Scharpf presented, and the democratic process had resulted in the reduction of the Global North's asymmetrical advantages (e.g. wealth, technology) through an increased burden in operational compliance to compensate for the needs of the Global South. Any state contemplating exercising its conventional military capabilities would need to consider its ability to prosecute a campaign in hostile territory while facing the possibility that any incentive for the opponent to comply with IHL may be inadequate in regulating the behavior within the framework of either pre-existing IHL or the new standards in Protocol I.

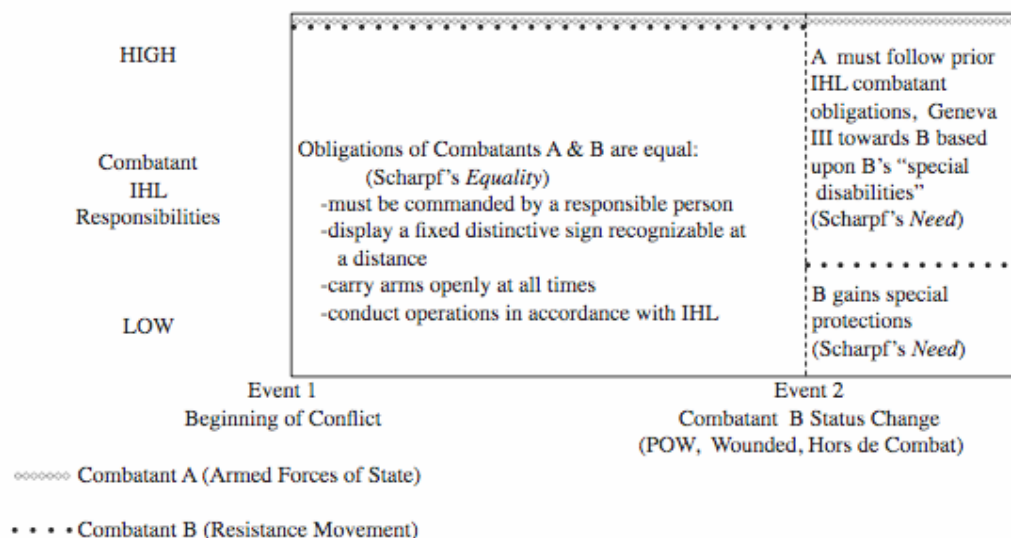
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<sup>58</sup> Ibid., 161

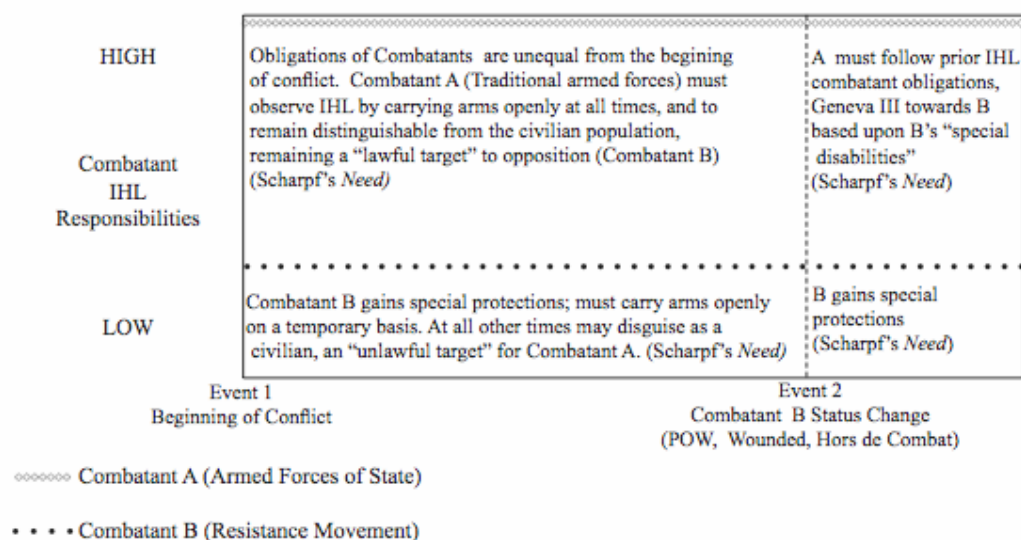
<sup>59</sup> Ibid., 184

To illustrate the impact of article 42 and the related article on Perfidy (article 35), two illustrations are offered on the following pages to highlight the operational importance of the change. Applying Scharpf's "distributive justice" definitions of *Equality* and *Need*, the outcome of Protocol I as it compares to the original IHL, Geneva III article 4, is provided. Illustration 1 represents the relationship of combatants to each other, in comparison of their responsibilities. They are considered "Equal" in rights and responsibilities throughout the conflict until a status change (limited to the definitions of wounded, shipwrecked, prisoner of war, hors de combat) places one of them in an unequal position (victim) at event 2. At that instant, combatant (A) remains a functioning fighter and now must extend the protections of IHL to the victim, combatant B. There is no distinction made based upon combatant capabilities until the change in status. Further, the treatment requirements and protections extended to the victim are not based upon the moral motivations ascribed to his cause, either by a third-party or even more importantly, left to the subjective judgments of his captor. Only his own actions (unless he is in a command position) can be considered to allow his captor to deny the privileged status provided for lawful combatants. Illustration 2, based upon Protocol I, extends the IHL victim status and decreased responsibilities from the beginning of the conflict to combatant B (based upon *Need*, the result of a political determination as a resistance fighter and assumed inferiority in operational capabilities). Combatant B is no longer required to permanently distinguish himself from the noncombatant population, and combatant A must now operate in a vastly different manner to comply with IHL. A perverse incentive system is in place, as there are now no incentives for B to operate within IHL. To identify himself as a civilian offers B the best chance for survival and tactical success, and while his operation in civilian appearance endangers true noncombatants, there are no significant normative individual penalties for his behavior.

***Scharpf's "Distributive Justice" applied to Combatant Status Requirements under Geneva Conventions III (1949) Article 4. A. Prisoners of War Pre-Protocol I (Illustration 1)***



***Scharpf's "Distributive Justice" applied to Combatant Status Requirements under Geneva Conventions Protocol Additional I (1977) Article 44 (Illustration 2)***



## **PRESIDENTIAL DECISIONS AND PUBLIC INFORMATION**

Beginning with the Carter administration, each president had a variety of options in relation to Protocol I. A distinction between the actions of Presidents Jimmy Carter and his successor, Ronald Reagan, will be reviewed, considered in the context of the public information on the conference sessions proceedings based on coverage by *The New York Times*, and of the four policy options available to the presidents.

Option 1 would be an unqualified endorsement of Protocol I, with both a signature and dedicated support for ratification (indicated by an official treaty transmittal to the Senate from the President). This option would include no conditional reservations to the treaty, and would be exemplified by presidential promotion through the use of speeches and other means. This option would signify the highest possible confidence in the Treaty. Option 2 would be characterized by presidential support for the treaty with both a signature and conditional support for senate ratification, subject to the inclusion of reservations applied to the treaty that address issues or clarify the national position in regard to the impact of the obligations on the nation. The use of the president's "bully pulpit" may be tempered by conditional language, but generally in support of the principles and impact of the treaty. Option 3 would indicate a substantial opposition to the treaty, judged by the reluctance to direct representatives to sign the treaty, followed by a refusal to submit the treaty to the senate for ratification. The public position of the administration would be clearly opposed, but would indicate a willingness to implement those articles that did not conflict with its judgment of the national interests. Option 4 would be described as a complete refusal of the treaty, with neither signature nor a ratification offered, and the public statements from the administration would be clear and non-conditional. There would be no implementation of any sections of the treaty.

In consideration of the details on the Conference's actual negotiations as highlighted in Chapter IV, the role of the domestic press in providing information to the public on the progress of this significant revision in IHL is relevant. Even though the protracted negotiations at the Geneva Diplomatic Conferences on Protocol I beginning in the spring of 1974 were by their nature obscured from the public's view, it would be expected that the leading national paper, the *New York Times*, would provide the public with a reasonably detailed synopsis of the events. On February 21, 1974, the headline "117 Nations Meet In Geneva to Plan New Rules of War" appeared in an article on page 9, and the stated goals of the conference were "aimed at protecting civilian non-combatants and insuring civilized treatment of captured guerilla fighters and other rebels."<sup>1</sup> The most interesting detail in this short article was that "The ceremonial opening meeting was marked by a walkout of the Israeli delegates to protest against denunciation of their country by Moktar Ould Daddah, President of Mauritania,"<sup>2</sup> who "accused Israel of "continuous aggression" and of "killing indiscriminately women, children, and the aged" in the Arab lands she had occupied."<sup>3</sup> The only other reference in the *New York Times* to the conference's opening sessions in 1974 came after the close of the first session entitled "WAR-RULES TALKS CLOSE IN GENEVA- U.S. Delegates Regret Lack of Progress at Session."<sup>4</sup> This article, on page 17 of the March 31, 1974 edition, quoted George H. Aldrich (lead Ambassador for the U.S.):

that the conference, which lasted nearly six weeks, wasted a great deal of time on political issues...but a serious interest in cooperation shown in the final meeting by African and non-aligned delegations had raised the hopes for the success of the second session to be held next year at the same time.<sup>5</sup>

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<sup>1</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 2/21/74, 9

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 3/31/74, 17

<sup>5</sup> Ibid.

In addition, the article reviewed the key issues that had plagued progress; Article 1 (the “Just” or “Good War” clause favoring resistance movements), and the rejection of the PRG of South Vietnam’s admission to the conference as a full member.<sup>6</sup> This was only the second article on the opening sessions and followup processes that occurred through 1974, and there would be no more mention of the conferences in the *New York Times* until the third session in the spring of 1976 (completely skipping the second sessions in 1975).

For the 1976 session, which began officially April 21, the *New York Times* allocated space for 89 words located on page 80 under the caption “Geneva Parley to Revise Code of War Opens Today.”<sup>7</sup> The narrative included the optimistic line that “The conference, the third and final in a series begun in 1974,”<sup>8</sup> but provided no significant details on the prior progress achieved, the key issues, or quotes of any delegation member from the United States. Since the beginning of the conference series, the IHL revision had not warranted coverage by the foreign policy reporters of America’s “paper of record.”

The next reference to the Conference appeared in the “World News Briefs” on page 8 of the May 27, 1977 edition.<sup>9</sup> Under the heading “Geneva Meeting Gives Guerrillas P.O.W. Rights,”<sup>10</sup> the short article notes the approval of the Protocol, and cites as the significant change that “underground and other guerrilla forces operating inside enemy-occupied territory are to be treated as prisoners of war when captured- even though they are not wearing regular uniforms – under a new rule of war approved today by a 109-nation conference here.”<sup>11</sup> While the *Times* reporter correctly noted that this was a significant revision, the phrase “even though they are not

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<sup>6</sup> Ibid.

<sup>7</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 4/21/76, 80

<sup>8</sup> Ibid.

<sup>9</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 5/27/77, 8

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

wearing regular uniforms”<sup>12</sup> signifies a miscommunication by the reporter on IHL that existed prior to the Protocol I change (as noted in chapter IV). A more substantive article appeared on page 5 of the June 11, 1977 edition, where George Aldrich, who had served as the head of the delegation for the entire span of the exhaustive conference process, summed up the results of the conference in the most positive light he could. Viewed from the standpoint of the United States’ interests, Aldrich “cited as possibly the most important contribution a provision calling for immunity against attack for helicopters and other aircraft engaged in evacuating the wounded from a battlefield.”<sup>13</sup> While this certainly may have been important to the United States, the world’s most committed military to airmobile (helicopter assault and extraction) operations, it could hardly qualify as a significant step forward, if the goal of the conference was to extend significant protections to civilians. Ambassador Aldrich did acknowledge that:

“the most troubling provision” was an article that recognized as an international war any conflict in which “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”...this introduced the concept of a “just war in a way that we did not like.” He added, however, that the provision would be harmless because he was “quite confident it will never be applied. No state is ever going to admit it is a racist regime or exercising alien or colonial domination”... Mr. Aldrich said he did “not expect any difficulty in the Senate” on ratification of the protocols.<sup>14</sup>

The contrast between the transcripts of the conference and the ambassador’s description of the close of the Protocol, as represented by the *Times* reporter, is striking. The case that the provision (Article 1 authorizing just war against racist, alien or colonial domination) mentioned above would be “harmless” does not accurately represent how IHL functions in the international community; while Aldrich’s assertion that states do not self-accuse to be sanctioned for behavior may be true, the accusations come from other states or groups of states. An example of such an accusation could be UN General Assembly resolution 3092 Report of the Special Committee to

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<sup>12</sup> Ibid.

<sup>13</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 6/11/77, 5

<sup>14</sup> Ibid.

Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied

Territories of December 7, 1973, which “calls upon Israel to desist immediately from the

annexation and colonization of the occupied territories.”<sup>15</sup> In addition, it appears that

Ambassador Aldrich did not expect that the political process in the senate would require a more

in-depth analysis of the impact of the revision of IHL, and at the direction of President Carter,

Aldrich signed Protocol I on December 12, 1977.<sup>16</sup> The entire negotiation process had occurred,

beginning with the Nixon administration, through the Ford presidency, and into the Carter years

with an extremely limited amount of press coverage. The *New York Times* had chosen to

relegate the story to its back pages, allotted only a minimal amount of space, and apparently did

not feel that the story deserved a reporter of significant stature that required a byline.

In Gaddis Smith’s *Morality, Reason, and Power*, the presidency of James Earl Carter Jr. is

described as “among the most significant in the history of American foreign policy in the

twentieth century.”<sup>17</sup> Smith, writing in 1986, explained that Carter failed in numerous ways;

however one of the most interesting reasons offered is that “Carter failed because he asked the

American people to think as citizens of the world with an obligation toward future generations.

He offered a morally responsible and farsighted vision.”<sup>18</sup> The moral questions that Jimmy

Carter championed were expressed throughout his race for the presidency in 1976. His campaign

platforms on issues regarding foreign policy were replete with references to “Human Rights”, by

which he meant to differentiate himself from his Republican opponent, Gerald R. Ford, by

emphasizing morality as an important component of national security policy. The idea of an

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<sup>15</sup> United Nations. *Resolution 3092, United Nations General Assembly Twenty-Eight Session*, 28-30, <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/281/64/IMG/NR028164.pdf?OpenElement> accessed on June 4, 2008

<sup>16</sup> George H. Aldrich. *Prospects for United States Ratification of Additional Protocol I to the Geneva Conventions*. *The American Journal of International Law*, Vol. 85, No. 1 (Jan. 1991), 2

<sup>17</sup> Gaddis Smith, *Morality, Reason and Power: American Diplomacy in the Carter Years*, Hill and Wang: New York, New York: 1986, 3

<sup>18</sup> *Ibid.*, 247



international policy guided by a moral sense, had an appeal to the American populace. The electorate, disillusioned with the results of the Vietnam war and the scandal of Watergate, desired a change, and Carter promised to deliver. Carter argued for a vision in foreign policy that would break with recent practices, and place what had been considered secondary issues in the Realpolitik of the Nixon/Kissinger and Ford/Kissinger administrations into the forefront of US policy. In the closing days of the campaign in 1976, Cyrus Vance, the likely Secretary of State in the potential Carter Administration, placed his thoughts on the future focus of America in a memorandum:

- 2) The new Administration will bring a new sensitivity, awareness and priority to the vast complex of issues clustering around the relationships between the industrialized and the unindustrialized world, and the new set of global issues that are emerging, such as energy, population, environment, and nuclear proliferation.
- 3) The United States will continue in international forums its unwavering stand in favor of the rights of free men and, without unrealistically inserting itself into the internal operations of other governments, to give important weight to those considerations in selecting foreign policy positions in the interests of the United States.<sup>19</sup>

In a key symbolic act, the newly elected President walked the parade route to his own inauguration, emphasizing his relation to the “common” people; the man from Plains was the narrative, and the world hoped for a United States that would alter the recent course of actions. In his inaugural speech of January 20<sup>th</sup>, 1977:

Our moral sense dictates a clearcut preference for these societies which share with us an abiding respect for individual human rights. We do not seek to intimidate, but it is clear that a world which others can dominate with impunity would be inhospitable to decency and a threat to the well-being of all people.<sup>20</sup>

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<sup>19</sup> Cyrus Vance. *Hard Choices: Critical Years in America's Foreign Policy*. Simon and Shuster: New York, 1983, 441 (Appendix I)

<sup>20</sup> Jimmy Carter. "Inaugural Speech of January 20, 1977," [Jimmy Carter Library and Museum](http://www.jimmycarterlibrary.gov/documents/speeches/inaugadd.phtml), accessed 12/15/07 at <http://www.jimmycarterlibrary.gov/documents/speeches/inaugadd.phtml>

As President Carter soon learned, the international audience had little patience for empty promises of future action, even as his domestic audience was warming up to his pledge to “make the United States once more a beacon of light for human rights throughout the world.”<sup>21</sup> One of the critical relationships that the United States possessed in the volatile Middle East was linked to the Shah of Iran, a rare friendship in the region, but one that came with complications; although the Shah had enacted some western reforms in an attempt to stabilize his control, he relied heavily on the work of his secret state police, the Savak, to limit dissent. Candidate Carter had been critical of the relationship between Nixon, Ford and the Shah, and his protestations had found their way to the leader of the Iranian opposition. Ayatollah Khomeini, exiled in Paris, viewed Carter’s public statements on human rights in general and Iran in particular with the hope that support for the Shah would weaken in the United States, and allow the fundamentalist Shi’a cleric back into his country as a potential ruler.

However, for President Carter, the reality of foreign policy soon replaced the low-risk for high-reward position he had occupied as a candidate. Sitting in the Oval office, his responsibility to achieve outcomes in the national interest were no longer theoretical, and there would be no opportunity to transfer the blame for failure to others (although his foreign policy team of Brzezinski and Vance would offer a dysfunctional dynamic that certainly contributed to his ineffectiveness). Within the course of his first year in office, strategic interests would force President Carter to reverse his public statements on the Shah, and he would go so far as personally attending a state dinner in Tehran on New Years Eve of 1977, where he offered praise to his host: “Iran, because of the great leadership of the Shah, is an island of stability in one of the more troubled areas of the world...The cause of human rights is one that...is shared

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<sup>21</sup> Burton I. Kaufman and Scott Kaufman. *The Presidency of James Earl Carter, Jr.* University Press of Kansas, Lawrence KS, 2<sup>nd</sup> Ed. Revised, 2006, 45

deeply by our people and by the leaders of our two nations.”<sup>22</sup> This turn of events would earn him the wrath of Ayatollah Khomeini. “This Carter fooled people for a time, and they said he would do all kinds of things if he came to power...first he says human rights are inalienable, and then he says he does not want to hear about human rights.”<sup>23</sup> To Khomeini, as well as other world leaders, Carter seemed to be inconsistent, hypocritical, or worse. This did not appear to seriously impede President Carter’s continued proclamations on the issue of human rights. In fact, it seemed to accelerate his pronouncements. In an early January 1978 Department of State Bulletin:

The President has strengthened our human rights policy, and we are letting it be known clearly that the United States stands with the victims of repression. We are also working to advance the full range of human rights- economic and social as well as civil and political.<sup>24</sup>

For the domestic audience, the message continues in the January 19, 1978 State of the Union address: “The very heart of our identity as a nation is our firm commitment to human rights...the world must know that in support of human rights, the United States will stand firm.”<sup>25</sup> On May 25, 1978, Carter focused on his political party’s audience, while addressing a fundraising event in Chicago: “And as long as I’m President, we will never back down on our struggle for human rights around the world.”<sup>26</sup> In addition, President Carter championed several other international agreements during his administration dealing with IHRL. In a message to the senate on February 23, 1978, President Carter transmitted the following four treaties for consideration: three were UN- based, including the *International Convention on the Elimination*

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<sup>22</sup> Michael H. Hunt. *Crises in US Foreign Policy: An International History Reader*. Yale University Press: New Haven, CT, 1996, 400

<sup>23</sup> Ibid., 401

<sup>24</sup> Department of State Bulletin, January 1978, Volume 78, Number 2010, US GPO:Washington, DC, 15

<sup>25</sup> *State of the Union, January 19, 1978*. Weekly Compilation of Presidential Documents, Volume 14- Number 3, National Archives and Records Service, GSA:Washington DC, 90

<sup>26</sup> Weekly Compilation of Presidential Documents. Volume 14- Number 21, National Archives and Records Service, GSA:Washington DC, 1978 Weekly, addressing Democratic Party Fundraiser in Chicago/Cook County, May 25, 1978, 986

*of All Forms of Racial Discrimination* – signed on behalf of the United States on 9/28/66 by President Johnson’s Administration; the *International Covenant on Economic, Social, and Cultural Rights*, signed on behalf of the United States on 10/5/77 by President Carter; the *International Covenant on Civil and Political Rights*, signed on behalf of the United States on 10/5/77 (Carter); Finally, the Organization of American States (OAS) based *American Convention on Human Rights*, signed on behalf of the United States (Carter).<sup>27</sup> These were clearly the actions of a president who believed the role of the United States was to lead in any area that could enhance its moral standing, although these were truly forms of IHRL, comprising a small risk (low on the national security/national interest spectrum).

On the issue of Protocol I, however, Carter did not provide public statements as evidence of his feelings; he was uncharacteristically mute on this matter. In comparison, on the death of Elvis Presley on August 17, 1977, he did provide a public statement that was 86 words in length – apparently 86 words longer than a specific personal policy on Protocol I.<sup>28</sup>

Had President Carter chosen to make a public policy announcement on his position, it may not have provided him with adequate domestic political incentive. As a form of IHL, dealing with military matters and direct military capabilities on the battlefield, the decision to publicly endorse the change would have left him open to the criticism that he had weakened the nation’s military capabilities. Had Carter chosen to lobby for the ratification, it would have probably failed to achieve even a small minority of senate votes, further jeopardizing his domestic situation, allowing him to be portrayed as a “weak” influence in foreign policy in the government. Given the fact that this change could have been represented by his political

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<sup>27</sup> Weekly Compilation of Presidential Documents, Volume 14- Number 8 , National Archives and Records Service, GSA:Washington DC, 395-396

<sup>28</sup> “President Carter statement of August 17, 1977”, Weekly Compilation of Presidential Documents, Volume 13- Number 34, National Archives and Records Service, GSA:Washington DC, 1232

opponents as a direct threat to national interests, perhaps President Carter recognized this fact and chose to allow the bureaucratic pace to shelter him from making public statements on Protocol I (unlike his policy pronouncements on less controversial treaties). Instead of pressing for the earliest possible ratification, his administration benefited from the prior work of the Nixon and Ford administration in dealing with the issue, while not being required to acknowledge the consistency between his decision and those of his Republican predecessors. In this scenario, President Carter made a rational choice to achieve his best possible outcome without risking valuable political capital, while preserving the national interests of the nation. It should be noted that Carter was engaged in several other significant foreign policy objectives that certainly required a great deal of effort and attention on his part. He had made a commitment to attempt to bring together Egyptian President Anwar Sadat and Israeli Prime Minister Menachim Begin to discuss the possibility of a negotiated peace treaty between the two nations, which developed into a series of meetings characterized by “shuttle diplomacy,” the Camp David summit, and a historic treaty in the Middle East.<sup>29</sup> Also, President Carter had personally invested his political capital in completing the Panama Canal treaty process, which had been negotiated earlier by Henry Kissinger. This process required significant revisions and the attention of Carter, both in assembling the team to finalize the treaties (the Panama Canal Treaty, and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal)<sup>30</sup> and in gathering the necessary senate votes to ratify. This was especially difficult, as it required a majority of senators to vote against the general public sentiment, and Carter was successful in shepherding this through with an intense national campaign.<sup>31</sup> On the important

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<sup>29</sup> Robert A. Strong. *Working in the World: Jimmy Carter and the Making of American Foreign Policy*. Louisiana State University Press: Baton Rouge, LA, 2000, 183

<sup>30</sup> Ibid., 155

<sup>31</sup> Ibid., 156-157

issue of Protocol I and its impact on the United States, Carter may have opted for a different strategy.

To categorize President Carter's behavior using the hypothetical policy options provided earlier in the chapter, the allowance of a signature in December of 1977, as well as the lack of any negative statements from either his senior policy advisers or by the President himself, makes it reasonable to conclude that his administration was not operating under either negative option (3 or 4). However, It is also not clear that his policy behavior indicates an unqualified support for the treaty (Option 1), considering the lack of positive public statements by his administration on its completion of the complex negotiations, as well as the decision to delay transmittal to the senate for ratification at any time during his term in office. The indication that his policy judgment falls into option 2 (a qualified official support) would also constitute an assumption, but cannot be complete discounted, again due to the lack of direct comment.

The differences between IHL, central to the power of the state in applying military force, and IHRL, the premise of a universal but voluntary standard for human rights that almost never involves issues of national security, are key to the apparent dissonance between President Carter, the vocal human rights champion, and President Carter, the commander-in-chief. There were many images that were offered on President Carter's inauguration day. Contrary to the picture of the confident Georgian walking into power, perhaps it is more fitting to recall another image: The giant helium-filled peanut floating up Pennsylvania, restrained by volunteers holding ropes to keep it from being blown away from its destination. Much like the Presidency, what seemed like a good idea at the time often turns out to require a series of restraints that protect the interests of the group, at the expense of the intentions.

With the inauguration of Ronald Reagan as President in 1981, the status of Protocol I would become an issue as the bureaucratic processes of the State Department and the input from the affected agencies (primarily the Department of Defense) moved forward to the critical decision on the treaty. Reagan had been elected after a campaign that promised a renewed vigor in US foreign policy, and informed by a fervent belief in the sovereign rights of the United States in dealing with the forces of communism around the world. The centerpiece of his strategy would be a military that would regain its capability to take on threats on a global scale, and the focus on the conventional capabilities would include an effort to retain the asymmetrical advantages that had favored the Global North.

President Reagan cultivated his image as a “cowboy” for his domestic audience, and this was no less significant for the international community. The idea that a conservative Republican would take office in 1981 and become responsible for U.S. foreign policy was, in some quarters, alarming. John Lewis Gaddis writes in his *Strategies of Containment: A Critical Appraisal of American National Security Policy During the Cold War*, “For years intellectuals, journalists, and political opponents derided Reagan as a telegenic lightweight, too simple-minded to know what containment had been about, much less to have had constructive ideas about how to ensure its success.”<sup>32</sup> In an early critique of Reagan’s foreign policies compiled in 1983, it was apparent to the contributors and editors that:

The administrations of the 1970’s adapted to the secular decline of American economic and military power... Their rhetoric was attuned to the politics of “limits” and “complexity”... The Reagan administration sought to defy constraints that earlier administrations had accepted. The initial foreign defense policies of the Reagan administration constituted an indictment of both the need to adjust and the methods of adjustment.<sup>33</sup>

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<sup>32</sup> Gaddis, *Strategies of Containment*, 350

<sup>33</sup> Kenneth A. Oye, Robert J. Lieber, and Donald Rothchild, Ed. *Eagle Defiant: United States Foreign Policy in the 1980’s*. Little, Brown & Co.: Boston, 1983, v

While the public image of President Reagan's foreign policy elicited ongoing criticism, Reagan held strong personal convictions on issues of international affairs, which he expressed through written communications to friends, policymakers, critics, and individual citizens. In an early letter during his first year in office, he replied to a citizen of Massachusetts (Quentin R. Dawkins) who wrote critically to him about his concern over the issue of apartheid in South Africa, and in general support of the nationalist movement SWAPO (South West Africa's Peoples Organization- one of the liberation movements that had been admitted as an observer into the Geneva Protocol I Conference):

Dear Mr. Dawkins: Thank you for writing me and telling me of your concern about South Africa and our policies. Let measure you of one thing: I am as opposed to apartheid as I know you are. I know there are many people in South Africa who want to change that. It is my belief that in working with them we can bring about that change just as we brought about a very necessary change in our own country. May I offer a different view about some of the points you raised with regard to the recent invasion. Angola has Cuban troops based there in great numbers and those troops have a number of Soviet advisers, technicians and other people with them. SWAPO, I don't think can be compared to our American Revolution. It has been retreating into Angola for shelter and then crossing the border into Southwest Africa (Namibia) where it commits terrorist acts against men, women, and children.<sup>34</sup>

The combination of Reagan's strong convictions on the necessity of standing up to the threat of global communism, his identification with the personal stories of victims of oppression, and the link between communist movements in the Global South, as in the case of SWAPO's direct support from the Cuban-backed Angolan government in their cross-border raids into South Africa, may have informed the President's views on the issue of "national liberation movements", one of the primary beneficiaries of the proposed Protocols. In addition, Reagan's use of the president's "bully pulpit" to challenge the narratives that had developed around the issue of IHL would set his policies in contrast to his predecessor, and as the decision on Protocol

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<sup>34</sup> Kiron K. Skinner, Annelise Anderson & Martin Anderson, eds. *Reagan: A Life in Letters*. Free Press: New York, 2003, 517-518



I to advance or reject the treaty had been left to his administration, the public debate was joined by commentators and reporters, including the *New York Times*.

On November 15, 1984, William Safire, writing a column for the *New York Times*, made an early case for the Reagan policy that would be directed at Protocol I, immediately following Reagan's landslide re-election:

Down in the murky depths of the Reagan bureaucracy, where the light of landslides never penetrates and the sound of Cabinet voices cannot be heard, a move is afoot that would enhance the international status of terrorist organizations and give individual terrorists new rights in war. This anti-humanitarian step bears the imprimatur of the International Red Cross.... President Carter signed this treaty, negotiated by détentenik Republicans, in 1977, but the United States Senate has never ratified it... Now the State Department Legal Adviser, Davis R. Robinson, has urged in a secret memo that the Reagan Administration "move toward effective international humanitarian protection, consistent with Western military interests," by submitting the Protocols to the Senate for ratification... These protocols treat as a soldier the guerrilla who masquerades as a civilian... Once the line between civilian and soldier is blurred, no civilian is safe... Mr. Robinson... proposes to festoon the treaty with "reservations" reflecting objections... Ratification munchkins think that our reservations satisfy our legal position, missing the point: As the crisis of terror worsens, the PLO and SWAPO will achieve their treaty, with world approval, while the U.S. will be yes-butting its head into the propaganda wall.<sup>35</sup>

Safire's column would elicit a response from the Swiss Permanent Observer to the United Nations, F. Pometta, on December 2, 1984 in the *New York Times*:

The two protocols, particularly the blurred definition of international armed conflicts in Protocol I, reflect a complex political and military reality... Article 44 of Protocol I, for example, on combatants and prisoners of war, referred to by Mr. Safire, has been strongly supported by the United States because of its Vietnam experience... Every compromise, of course, has its weaknesses, but what is at stake in the two protocols is the protection without discrimination of the victims of wars- of the weakest against the strongest- on as universal a basis as possible.<sup>36</sup>

In one of the few examples of an actual news story on Protocol I with an identified writer responsible for the work (no prior example on the details of the conference carried a by-line), *New York Times* foreign policy expert Leslie Gelb (a member of the State Department during the

<sup>35</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 11/15/84, A31

<sup>36</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 12/2/84, E24

Carter administration) offered his thoughts on the progress of the ratification on July 22, 1985 on the front page (another first for the issue) under the title “War Law Pact Faces Objection of Joint Chiefs”:

The Joint Chiefs of Staff have recommended against United States ratification of internationally agreed revisions of the 1949 Geneva Conventions on treatment of combatants and war victims, according to Administration officials. The intent of the revisions is to enhance humane treatment of combatants and civilians during war. But the main concern of the Joint Chiefs is that the revisions, or protocols, as they are known, would have the effect of legitimizing national liberation movements and terrorists, granting them combatant and prisoner-of-war status... The Carter administration signed the two Protocols in 1977 with the understanding that a decision on ratification would await a formal study by the Joint Chiefs... Critics contend that other provisions in Protocol I defining what is combat and what is a soldier are worded so vaguely that the distinctions between guerrillas and regular soldiers would be blurred... Officials said the Joint Chiefs had delayed coming to grips with the protocols because of the lengthy and complicated legal text, the cumbersome military bureaucracy and the fact that until the most recent encounters with terrorists, the issue was low on the list of Administration priorities... Perhaps the most powerful argument against ratification on any terms comes from a commentary to be published soon by Douglas J. Feith, Deputy Assistant Secretary of Defense for Negotiations Policy and the key official in the Pentagon on this issue. He writes of Protocol I, “It amounted to an endorsement, in the politically potent form of a legal instrument, of both the rhetoric and the anticivilian practices of terrorist organizations that fly the banner of self-determination.” He calls it “a proterrorist treaty masquerading as humanitarian law.”<sup>37</sup>

Gelb adds that “one reason the Carter Administration agreed to sign in 1977 before these issues were fully discussed was that the protocols would also strengthen the right to search for and be given information about Americans missing in action in Vietnam.”<sup>38</sup> While Gelb asserts this without naming the source on this statement, it is possible an unnamed official offered this, although it is puzzling that such a politically beneficial justification for President Carter’s authorization of the signature by George Aldrich was not previously provided, either by President Carter or Ambassador Aldrich (the most obvious example in his post-conference *Times* interview of 6/11/77 offered earlier in this chapter).

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<sup>37</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 7/22/85, A1

<sup>38</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 7/22/85, A7

After relegating all stories related to the conferences and Protocol I to various back pages and sections during the period of negotiations, the *New York Times*, after the Gelb story in 1985, once again placed the issue prominently on page 1, this time to announce that the Reagan administration had made its decision. “Reagan Shelving Treaty to Revise Law on Captives”, by Judith Miller, reports that:

Notice of Mr. Reagan’s decision was sent to the Senate Foreign Relations Committee without announcement two weeks ago. In his letter, the President said he would not submit Protocol I, as the revision dealing with international armed conflicts is known, because it was “fundamentally and irreconcilably flawed”... The notice contains an unusual request that the Senate support his judgment in a non-binding vote. At the same time, Mr. Reagan urged that Protocol II, which deals with internal conflicts, receive the consent of the Senate to ratification... “It is unfortunate that Protocol I must be rejected,” the President wrote. But, he added, “we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.”... Protocol I first encountered political opposition when the Joint Chiefs opposed its ratification in July 1985. The Joint Chiefs determined, according to a memorandum from Secretary of Defense Caspar W. Weinberger to Secretary of State George P. Shultz, that the protocol would “politicize international humanitarian law and, inter alia, afford legal protections to terrorist and “national liberation movements” at the expense of noncombatants.<sup>39</sup>

Once again, the Vietnam POW justification on Carter’s signature surfaces in the story, this time as an unnamed “former official” (in nearly identical prose to the Gelb story of 1985), although all quoted Reagan administration sources are identified.<sup>40</sup>

In an editorial the following day, the *New York Times* sympathized with President Reagan’s dilemma on Protocol I:

President Reagan has faced more important but probably no tougher decisions than whether to seek ratification of revisions to the 1949 Geneva Conventions. If he said yes, that would improve protection for prisoners of war and civilians in wartime, but at the price of new legal protection for guerillas and possible terrorists. He decided to say no, a judgment that deserves support... The President could have asked the Senate to ratify with reservations. But that would have opened the door to all signatories to pick and choose what to obey. Nations might also have read that as legitimizing terrorists. So Mr. Reagan made the sound choice... Apparently many nations are having second thoughts. Only about 40 signatories have ratified

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<sup>39</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 2/16/87, 1, 5

<sup>40</sup> *Ibid.*, 5

the protocol, not including the Soviet Union, France, and Israel.<sup>41</sup>

Even though the Reagan administration's decisions on Protocol I received more coverage than the Carter period in the *New York Times*, as well as more prominent placement, the differences could be characterized as minimal. While the front page stories, commentary, and opinion pages certainly brought the story into the public debate, the details on the actual facts of the story were limited. The story timelines begin after Reagan was re-elected in a convincing victory, and were generally overshadowed by the relationship between the Soviet Union (now upgraded to an "Evil Empire") and the United States. While Reagan attempted to force the Soviet Union to the negotiation table on nuclear arms by driving up their costs to maintain their military's ability to keep up with the rapid investments in the U.S. conventional capabilities, many were alarmed by his determination. Reagan's decision to forego signature of Protocol I, and his general attitude towards both international restrictions and the Soviet Union, could not have made his critics more comfortable. A few years before the official announcement, as the 1984 campaign for re-election was under way, Averell Harriman commented on Reagan's policies in the *New York Times* that "if permitted to continue, we could face not the risk but the reality of nuclear war."<sup>42</sup> In addition to the general fear that Reagan seemed to elicit from his political critics, he also had the annoying habit of actually believing in his own ability to communicate directly with the American people on issues that he felt were important, and he exercised it regularly. At the time of his announcement of the refusal to ratify Protocol I, his administration had been suffering from the effects of the Iran-Contra affair, and that issue

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<sup>41</sup> *New York Times* (1857-Current file). ProQuest Historical Newspapers, The New York Times (1857-2004), 2/17/87, A22

<sup>42</sup> W. Averell Harriman. *If the Reagan Pattern Continues, America May Face Nuclear War*, *New York Times* (1857-Current file), ProQuest Historical Newspapers, The New York Times (1857-2004), January 1, 1984

remained a point of contention for his domestic political enemies for the rest of his presidency (and beyond).

Over the course of the years following President Reagan's declaration to refuse supporting ratification of Protocol I, numerous commentators made statements on the decision. George Aldrich, the U.S. delegation head for the conference, particularly felt that Reagan's argument that the Protocol was "fundamentally and irreconcilably flawed"<sup>43</sup> made it "apparent that President Reagan's decision resulted from misguided advice that exaggerated certain flaws in the Protocol, ignored the statements of understanding that would have remedied them, and misconstrued a humanitarian and anti-terrorist instrument as one that could give aid and comfort to "terrorists".<sup>44</sup>

Considering Reagan's policy decision in the context of the four scenarios offered earlier, it is clear that his policy decision did not contemplate either of the supportive positions (Options 1 or 2) that would have attempted at least ratification with reservations. This leaves either Option 3 (public opposition to the treaty but the voluntary implementation of those articles that are acceptable to the military), or Option 4 (public opposition to the treaty and refusal to implement any portion of the treaty voluntarily). While Reagan publicly opposed ratification, the Defense Department reviewed and implemented selected articles that did not conflict with U.S. national interests or impact military capabilities. As an example, the United States military's "Operational Law Handbook" (2006 ed.) section covering "Bombardments, assaults, and protected areas and property" notes that Protocol I Article 52 applies to its regulations (even

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<sup>43</sup> Letter of Transmittal from President Ronald Reagan. "PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS," S. Treaty Doc. No. 2, 100<sup>th</sup> Cong., 1<sup>st</sup> Session at III (1987)

<sup>44</sup> George H. Aldrich. *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*. The American Journal of International Law, Vol. 85, No. 1 (Jan. 1991), 1

though the U.S. is not a party to Protocol I).<sup>45</sup> In another example, the Hague Regulation on weapons, weapons systems, and munitions (Hague, art. 22), which is a binding commitment requiring legal review of these technologies before use, was enhanced by Protocol I in its article 36. The United States abides by the Hague regulation, and affirms the principle of legal review requirements in practice as mentioned in Protocol I.<sup>46</sup>

The policy processes and decisions that Presidents Carter and Reagan applied to Protocol I at first glance appear vastly different. For Carter, the lack of public presidential commentary during the entire period of his administration is not a convincing case for Option 1, the most aggressive support of the treaty; conversely, Reagan's public behavior, combined with the practical effect of accepting those articles that the military felt did not conflict with its capabilities, may not have constituted an entire rejection of the treaty, and in effect, resulted in an outcome that resembled Option 3 (a reservation based agreement). Analyzed in this light, the images of the internationalist Carter and the unilateralist Reagan may not seem so far apart in their approach to Protocol I.

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<sup>45</sup> *United States Military Operational Law Handbook* (2006). JA 422, International and Operational Law Department, The Judge Advocate General's Legal Center and School, Charlottesville VA, 20

<sup>46</sup> *Ibid.*, 17

## **CONCLUSION**

The diplomatic processes that are involved in the negotiations of international humanitarian law are complex and do not easily fit into explanatory frameworks. The conflicts between state interests and culturally diverse ideas of morality, as well as the ideological worldviews of the actors themselves, often are resolved in the practical sense through intense negotiations and difficult compromises that can be problematic for one or more of the actors involved. In this thesis, the application of theoretical methodologies to the behavior of both state and non-state actors involved in the last major revision to IHL as it applies to international conflicts is offered, in the interest of providing a new interpretation of the event. The examination of the impact of Protocol I on IHL, particularly from the viewpoint of the United States, is premised on the concept that the United States, as well as each of the participants, behaved in rational processes to achieve their maximum outcomes possible.

The centrality of rational choice theory to the thesis acknowledges that each actor viewed the conference and each contested article debated with the goal of either improving their position, maintaining their advantage, or at the least, minimizing the damage to their strengths. In the complexity of political behavior, each actor (state/non-state) sought to achieve their goals through the application of various means (cooperation, coordination, coincidence of interest, coercion) and in conjunction with others, sought either to address injustices in the asymmetry of warfare that existed prior to Protocol I (Global South), or to retain advantages that had been enshrined previously in IHL and amplified by virtue of wealth and technology (Global North). The driving force for the redress of grievances on behalf of the Global South, an effort to use the democratic process through the application of its worldview to the existing and customary mode of “distributive justice” towards combatants engaged in combat, *Equality*, was replaced by

majority vote with a new standard, *Need*. Once this paradigm was instituted in the opening article of the treaty's draft text, the standard for compliant behavior by militarily-advanced states toward disadvantaged states or their allied military groups (resistance movements, freedom fighters) was systematically revised through the most contentious articles in order to achieve the most important and dangerous change to IHL, the intentional codification of the right of "freedom fighters" and members of "organized resistance movements" to operate virtually non-distinguishable from non-combatants or civilians. The distinction between who is a combatant (a lawful target in nearly every circumstance) and who is a non-combatant (never a lawful intentional target) was erased in a straightforward assault on the principle, as evidenced by the conference transcripts. The actors who called for this change did so in their own interests, contrary to the interests of the protection of non-combatants, the declared purpose of the Protocol. It is an inconvenient and inelegant fact that the Global South's committed voting bloc outnumbered the Global North, which allowed this regressive outcome to occur.

For the United States, the timing of the conferences played an important role in its limited ability to influence the negotiations. While the U.S. still exercised a great deal of power with its allies, the Cold War, nuclear arms, the process of withdrawal from Vietnam, and many other foreign policy issues forced each involved administration to make choices regarding the amount of effort or political capital to invest. Domestic political issues, including an economy that required a significant reduction in conventional warfare capabilities, focused the goals of the negotiations for the United States to a limited set of outcomes, including the exclusion of its nuclear capabilities from discussion, as well as attempting to derail the political legitimization of a new group of international actors who were gaining unprecedented access and influence in institutions that had historically been the realm of sovereign states. The lengthy processes of the



conference and the lack of accurate information available to the domestic American public were significant factors in allowing the U.S. delegation to represent the results of the conference in a positive light. The United States and the Global North had achieved very little in advancing the interests of the United States, and the increased burdens in conventional warfare that would be realized were not the result of an improvement in protections for the noncombatant “civilian”, but instead the best possible outcome given the makeup and processes of the conference.

If the results of this change in IHL were to be represented by the game-theoretical strain of rational choice theory, acknowledged as a series of non-cooperative negotiations (games) in a *multiactor constellation*,<sup>1</sup> the processes and results of the change in IHL could be describe most accurately as a “collective action problem”: Ultimately an unsolvable puzzle that encourages multiple defections from agreements, encouraged by the inability of the institution (IHL) to restrain actors (state/non-state) from failure to comply. The punishments for compliance are maximized, while the reward for defection is also maximized- an inoperable framework for the long-term normative value of IHL as an institution, rendering Protocol I not only meaningless but ultimately dangerous for its supposed beneficiaries- noncombatant “victims” of international conflict.

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<sup>1</sup> Scharpf, *Games Real Actors Play*, 76

**Appendix A**  
**Related Excerpts**  
**from Protocol I**

Selected excerpts from Protocol I, (...) denotes gaps in text. To reference the entire treaty, see International Committee of the Red Cross website at [www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument](http://www.icrc.org/ihl.nsf/WebPrint/470-FULL?OpenDocument)

*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*

**PREAMBLE.**

The High Contracting Parties, *Proclaiming* their earnest wish to see peace prevail among peoples, *Recalling* that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, *Believing* it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

*Expressing* their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

*Reaffirming* further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict, have agreed on the following:

**PART I. GENERAL PROVISIONS**

**Art 1. General principles and scope of application**

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.
3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to

those Conventions.

4. The situations referred to in the preceding paragraph 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 on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

...

### Part III. Methods and Means of Warfare Combatant and Prisoners-Of-War

#### Section I. Methods and Means of Warfare

...

#### Art 37. Prohibition of Perfidy

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

...

#### Art 41. Safeguard of an enemy hors de combat

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

2. A person is hors de combat if:

- (a) he is in the power of an adverse Party;

- (b) he clearly expresses an intention to surrender; or
- (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

#### Article 42 - Occupants of aircraft

- 1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
- 2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
- 3. Airborne troops are not protected by this Article.

#### Section II. Combatants and Prisoners of War

##### Art 43. Armed forces

- 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 or 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.
- 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
- 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

##### Art 44. Combatants and prisoners of war

- 1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

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.

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.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

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 Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

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 prior activities .

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Art 45. Protection of persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

#### Art 46. Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

#### Art 47. Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

### Part IV. Civilian Population

#### Section I. General Protection Against Effects of Hostilities

##### Chapter I. Basic rule and field of application

#### Art 48. Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

#### Art 49. Definition of attacks and scope of application

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.

2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.

3. The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

4. The provisions of this section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

## Chapter II. Civilians and civilian population

### Art 50. Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

### Art 51. - Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

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



and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

### Chapter III. Civilian objects

#### Art 52. General Protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

### Art 53. Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.

### Art 54. Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
  - (a) as sustenance solely for the members of its armed forces; or
  - (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
4. These objects shall not be made the object of reprisals.
5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

### Art 55. Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

...

#### Art 57. Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

#### Art 58. Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

- (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

....

#### Art 69. Basic needs in occupied territories

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

#### Art 70. Relief actions

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.

3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:

- (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
- (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
- (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

#### Art 71. Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

**APPENDIX B**  
**Abbreviations**

|          |   |
|----------|---|
| ANC      | African National Congress   |
| ANLF     | Angolan National Liberation Front   |
| FLCS     | Front de liberation de la Cote de Somalis/Somali Coast Liberation Front                       |
| FRELIMO  | Mozambique Liberation Front   |
| ICRC     | International Committee of the Red Cross  |
| IHL      | International Humanitarian Law  |
| IHRL     | International Human Rights Law  |
| MLSTP    | Sao Tome and Principe Liberation Movement   |
| MLD      | Mouvement de liberation de Djibouti/Djibouti Liberation Movement                              |
| MOLINACO | Mouvement de liberation nationale des Comores/Comoro National Liberation Movement             |
| MPLA     | Angolan People's Liberation Movement  |
| PAC      | Pan-Africanist Congress   |
| PLO      | Palestine Liberation Organization   |
| POW      | Prisoner of War   |
| PRG      | Provisional Revolutionary Government of South Vietnam<br>(formerly National Liberation Front) |
| SPUP     | Seychelles People's United Party  |
| SWAPO    | South-West African People's Organization  |
| ZANU     | Zimbabwe African National Union   |
| ZAPU     | Zimbabwe African People's Union   |

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