Message from the President of the United States

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: *Message from the President of the United States*, US Government Printing Office, 100th Congress, 1st Session, Treaty doc. 100-2, Washington, 1987]

A Message from the President of the United States regarding Protocol II
Additional to the 1949 Geneva Conventions, and Relating to the Protection
of Victims of Non-international Armed Conflicts

[...]

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *January 29, 1987*

To the Senate of the United States:

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

The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict, with the objective of giving the greatest possible protection to victims of such conflicts, consistent with legitimate military requirements. The agreement that I am transmitting today is,

with certain exceptions, a positive step toward this goal.

Its ratification by the United States will assist us in continuing to exercise leadership in the international community in these matters.

[…]

While I recommend that the Senate grant advice and consent to this agreement, I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. […]

RONALD REAGAN

Letter of submittal

DEPARTMENT OF STATE,

Washington, December 13, 1986

THE PRESIDENT,

The White House.

THE PRESIDENT:

I have the honor to submit to you, with a view to transmission to the Senate for its advice and consent to ratification, Protocol II Additional to the Geneva Conventions of August 12, 1949, concluded at Geneva on June 10, 1977.

PROTOCOL II

[…] This Protocol was designed to expand and refine the basic humanitarian provisions contained in Article 3 common to the four 1949 Geneva Conventions with respect to non-international conflicts. While the Protocol does not (and should not) attempt to apply to such conflicts all the protections prescribed by the Conventions for international armed conflicts, such as prisoner-of-war treatment for captured combatants, it does attempt to guarantee that certain fundamental protections be observed, including: (1) humane treatment for detained persons, such as protection from violence, torture, and collective punishment; (2) protection from intentional attack, hostage-taking and acts of terrorism of persons who take no part in hostilities; (3) special protection for children to provide for their safety and education and to preclude their participation in hostilities; (4)

fundamental due process for persons against whom sentences are to be passed or penalties executed; (5) protection and appropriate care for the sick and wounded, and medical units which assist them; and (6) protection of the civilian population from military attack, acts of terror, deliberate starvation, and attacks against installations containing dangerous forces. In each case, Protocol II expands and makes more specific the basic guarantees of common Article 3 of the 1949 Conventions. […]

The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence). This understanding will also have the effect of treating as non-international these so-called "wars of national liberation" described in Article 1(4) of Protocol I which fail to meet the traditional test of an international conflict.

[…]

[T]he obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency. These obligations are not uniformly observed by other States, however, and their universal observance would mitigate many of the worst human tragedies of the type that have occurred in internal conflicts of the present and recent past. I therefore strongly recommend that the United States ratify Protocol II and urge all other States to do likewise. With our support, I expect that in due course the Protocol will be ratified by the great majority of our friends, as well as a substantial preponderance of other States.

PROTOCOL I

The Departments of State, Defense, and Justice have also conducted a thorough review of a second law of war agreement negotiated during the same period – Protocol I Additional to the Geneva Conventions of August 12, 1949. This Protocol was the main object of the work of the 1973-77 Geneva diplomatic conference, and represented an attempt to revise and update in a comprehensive manner the 1949 Geneva Conventions on the protection of war victims the 1907 Hague Conventions on means and methods of warfare, and customary international law on the same subjects.

Our extensive interagency review of the Protocol has, however, led us to conclude that Protocol I suffers

from fundamental shortcomings that cannot be remedied through reservations or understandings. We therefore must recommend that Protocol I not be forwarded to the Senate. The following is a brief summary of the reasons for our conclusion.

In key respects Protocol I would undermine humanitarian law and endanger civilians in war. Certain provisions such as Article 1(4), which gives special status to “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”, would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law. Protocol I also elevates the international legal status of self-described “national liberation” groups that make a practice of terrorism. This would undermine the principle that the rights and duties of international law attach principally to entities that have those elements of sovereignty that allow them to be held accountable for their actions, and the resources to fulfill their obligations.

Equally troubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to “national liberation” movements in general, but in particular to the inhumane tactics of many of them. Article 44 (3), in a single subordinate clause, sweeps away years of law by “recognizing” that an armed irregular, “cannot” always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States announced policy of combatting [sic] terrorism.

The Joint Chiefs of Staff have conducted a detailed review of the Protocol, and have concluded that it is militarily unacceptable for many reasons. Among these are that the Protocol grants guerrillas a legal status that often is superior to that accorded to regular forces. It also unreasonably restricts attacks against certain objects that traditionally have been considered legitimate military targets. It fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions. Weighing all aspects of the Protocol, the Joint Chiefs of Staff found it to be too ambiguous and complicated to use as a practical guide for military operations, and recommended against ratification by the United States.

We recognize that certain provisions of Protocol I reflect customary international law, and other appear to be positive new developments. We therefore intend to consult with our allies to develop appropriate methods for incorporating these provisions into rules that govern our military operations, with the intention that they shall in time win recognition as customary international law separate from their presence in Protocol I. This measure would constitute an appropriate remedy for attempts by nations to impose unacceptable conditions on the acceptance of improvements in international humanitarian law. I will report the results of this effort to you as soon as possible, so that the Senate may be advised of our progress in this respect.

CONCLUSION

I believe that U.S. ratification of the agreement which I am submitting to you for transmission to the Senate, Protocol II to the 1949 Geneva Conventions, will advance the development of reasonable standards of international humanitarian law that are consistent with essential military requirements. The same is not true with respect to Protocol I to the 1949 Geneva Conventions, and this agreement should not be transmitted to the Senate for advice and consent to ratification. We will attempt in our consultations with allies and through other means, however, to press forward with the improvement of the rules of international humanitarian law in international armed conflict, without accepting as the price for such improvements a debasement of our values and of humanitarian law itself.

The effort to politicize humanitarian law in support of terrorist organizations have [sic] been a sorry develo[p]ment. Our action in rejecting Protocol I should be recognized as a reaffirmation of individual rights in international law and a repudiation of the collectivist apology for attacks on non-combatants.

Taken as a whole, these actions will demonstrate that the United States strongly supports humanitarian principles, is eager to improve on existing international law consistent with those principles, and will reject revisions of international law that undermine those principles. The Departments of State and Justice support these recommendations.

Respectfully submitted.

George P. Shultz

Discussion

1. a. Do you agree with the criticism that Art. 1(4) of Protocol I introduced political objectives into humanitarian law? Are the determinations necessary for application of Art. 1(4) really subjective? [See South Africa, S. v. Petane]

b. Is Art. 1(4) a recognition of terrorists? Are groups fighting national liberation wars necessarily committing more terrorist acts than their opponents? Than those fighting in classic wars? Even if Protocol I “elevate[d] the international legal status” of such groups, is that equivalent to legitimizing any and all conduct during hostilities? If Protocol I applies to them, are they not also bound by the provisions of the Protocol, e.g. those laying down the protected status of civilians? Would they not also be accountable for their actions? Does Protocol I prohibit terrorist acts? (P I, Preamble, para. 5; Arts 1(4), 51(2) and 85(3))

c. If Protocol I had not “elevated” national liberation wars to international armed conflicts, how would such conflicts have been qualified? Would the applicable IHL then set stronger or weaker requirements in terms of the prohibition of terrorist acts and the obligation of combatants to distinguish themselves from the civilian population? (See P II)

d. Are “guerrillas” or “terrorists” truly granted a legal status often superior to that accorded to regular forces? Does Art. 1(4), in particular, lead to a situation where both sides of an armed conflict are not equal before IHL? Which protections does IHL grant guerrillas? Regular forces? Which obligations are imposed on each?

2. Which provisions in Protocol I reflect customary international law, and which are new developments? Is e.g. Art. 1(4) of Protocol I an innovative development in the law of war, or is it merely a reflection of existing international law? [See South Africa, S. v. Petane]

3. a. Can it really be said that Protocol I (Art. 44(3)) “sweeps away years of law”? Does Art. 44(3) grant combatant status to those who do not distinguish themselves from non-combatants? Does not this article specifically stipulate how they must distinguish themselves? Why do you think that the exception in the second sentence of Art. 44(3) was included in the Protocol? What kind of hostilities did the drafters of the Protocol have in mind? Would respect for IHL have improved in guerrilla wars if Art. 44(3) had not been included in Protocol I?

b. Why is the principle of distinction so important? Who does it protect? Does the exception in Art. 44(3) diminish this protection? [See Malaysia, Osman v. Prosecutor]

c. Which consequences do combatants who fail to distinguish themselves face under IHL? How does the exception in Art. 44(3) alter these consequences for those, e.g. guerrilla fighters, who fail to comply with the obligation to distinguish themselves from the civilian population? When do guerrilla fighters lose combatant or prisoner-of-war status? Whether they retain or lose prisoner-of-war status, are they punishable for violations of the laws of war? In the exceptional situation referred to in Art. 44(3), what are the legal consequences if combatants fail to carry their arms openly or if they abusively assume the existence of an exceptional situation?

4. How does Protocol I further define legitimate objects of attack? And means and methods of warfare? Are these unreasonable restrictions? Is Protocol I really too ambiguous and simultaneously too complicated for practical military use, as the US letter of submittal claims?

5. Does Protocol I really not improve the compliance and verification mechanisms of Conventions? If so, is this alone a sufficient reason to reject it? Does Protocol I in fact increase protection for victims of conflicts, e.g. by expanding the acts regarded as grave breaches? Does Protocol I eliminate an important sanction against violations of the Conventions? To which important sanction is the US Department of State referring?

6. a. Do Protocol II and common Art. 3 have the same material scope of application? Which situations does each of them cover?

b. Why did the drafters of Protocol II not extend its material scope of application to all non-international

armed conflicts?

c. Is a non-State armed group without control over territory able to comply with all provisions of Protocol II?

d. Do you think that the US would be ready to apply Protocol II to all non-international armed conflicts today?