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PROTOCOL I: MOVING HUMANITARIAN LAW BACKWARDS

by

DOUGLAS J. FEITH*

Thank you. Good evening. Colonel Carnahan of the Office of the Joint Chiefs of Staff has reviewed some of the practical military problems with Protocol I. I would like to spend a little time on what might be called the philosophical — or broader political — problems. In particular, I would like to discuss the diplomatic conference that produced the protocol and how it demonstrated the links among law, politics, and terrorism.

When you get 126 countries together, as occurred at the diplomatic conference, there is a lot of politics. That is to say, Protocol I is not simply a legal matter than can be grasped using purely legal terms. I propose to examine the main results as reflections of the diplomatic goals of the Soviet bloc, the “Third World,” and the Western countries.

The ability to respond to terrorism effectively is a function of one’s political will to take risky and sometimes violent action against its perpetrators. In a democracy, this is possible only if there is political support for such action. This in turn will be available only if the public views terrorism as a clear evil, an unjustified practice. Terrorists know this; consequently, they have worked hard to win recognition for the legal and moral grounding of what they do.

This may strike people as strange, because terrorists do things that are heinous and immoral. Nevertheless, terrorist organizations are at the same time deeply interested in cultivating a respectable image for their movements within the international community. It is for this reason, among others, that they are attentive to developments in international law and especially to those in the laws of war, including humanitarian law.

The Diplomatic Conference that produced Protocol I convened in Geneva in 1974. One of the first items on the agenda was how to characterize “wars of national liberation,” which were defined as struggles against “alien, racist, or colonial regimes.” The lawyers in the room will presumably notice that such terms are political and not legal in nature. Are such terms appropriate for a legal or humanitarian conference?

To deal with this question of “national liberation” wars and to help develop humanitarian law generally, the conference saw fit to invite a number of so-called “national liberation movements.” Of the eleven that accepted, the most active were the Palestine Liberation Organization and the Southwest Africa People’s Organization.

The Soviet bloc and the “Third World” wanted several things with respect to the categorization of “national liberation wars.” First of all, they wanted them to be classified as inherently international, notwithstanding that international law has traditionally deemed such wars internal or domestic conflicts. This would license international meddling in “national liberation wars” while preserving the principle of non-interference in the internal affairs of states.

The Soviets rely on the non-interference-in-internal-affairs principle to rebuff complaints about human rights violations in the Soviet Union. That principle is important to Soviet diplomacy. On the other hand, the Soviets, who despite their ideological and practical disrespect for legal restraints on the Soviet government are highly legalistic, want legal sanction to support certain subversive activities called “national liberation wars” in other countries. How can the Soviets have it both ways? Answer: Define the wars that the Soviets support as inherently international.

The second aim of the Soviet bloc/“Third World” states was to have such wars declared legitimate — “just wars” as it were. The problem here is that the United Nations Charter does away with the concept of the just war. It does away with the notion that a state has the right to initiate a war even for a just cause. Such a notion is too dangerous in the modern world, so the Charter obligates states to resolve their disputes peaceably. But the Soviets have an interest in legitimating the types of war they like to support. They wanted to effect that legitimation through Protocol I even though it would undermine Article 2(4) of the United Nations Charter — the non-use-of-force provision — the first principle of international law in the post-World War II era.

The third aim of the proponents of Protocol I’s national liberation war language was to define such a war using political and not legal terminology. Hence the alien/racist/colonial formulation. This would allow the Soviet bloc and “Third World” countries to exercise their own subjective judgments about the applicability of humanitarian law and gain the resulting political advantages. Insurgents they favored would reliably be declared by the Arab League or the Organization of African Unity a national liberation movement fighting an unprogressive, alien/racist/colonial enemy, while insurgents they disfavor could easily be denied such recognition.

The Western countries generally strongly opposed the “national liberation war” language. They denounced it as destructive not only of humanitarian law but of the prohibition against war promulgated in Article 2(4) of the United Nations Charter. They argued that it would legally approve the resurrection of the just war doctrine and effectively abolish the distinction between international and non-international conflicts. It would license foreign meddling in internal conflicts and politicize humanitarian law. To politicize that law is to

render illusory the protections it is supposed to afford. If humanitarian law is to be applied or denied according to the subjective, political judgments of the fighting parties, it would offer as much protection of personal rights as would a law that, for example, required the police to obtain a warrant for a search unless the police decided that the public interest dictated otherwise.

Notwithstanding the rigorous and weighty arguments of principle the Westerners launched against the “national liberation war” language, they brought themselves at the end of the day — that is, after many months of debate and negotiation — to subscribe to that very language. Article 1(4) of Protocol I says that the situations to which the Protocol applies “include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . .” This provision was ultimately adopted by the Diplomatic Conference with but a single dissenting vote, that of the Israeli delegation.

The other major issue I want to address — the issue that took more time than just about any other at the Conference — is: Who qualifies for combatant/prisoner-of-war status?

The traditional rule is that uniformed soldiers qualify and irregular soldiers qualify if they meet a number of conditions. The essential conditions are that they have to wear uniforms, carry their arms openly in all military operations, and comply with the laws of war.

These conditions have a long history going back to the American Civil War, a long history of international recognition. It was understood by the drafters of the 1949 Geneva Conventions, that the conditions make it virtually impossible for irregulars operating in occupied territory to qualify as combatants entitled to prisoner-of-war status. If you are an irregular in occupied territory, to wear a uniform and carry your arms openly is suicide. But the 1949 Geneva Conventions reaffirmed those conditions. Why?

They reaffirmed them because they recognized that the alternative was to allow irregulars to disguise themselves as civilians and operate in disguise and still get the benefits of combatant/POW status. What the drafters of the 1949 Geneva Conventions recognized was that there is an inherent conflict between the interests of civilians — those interests being that combatants clearly distinguish themselves from civilians — and the interests of irregulars operating in occupied territory. Traditionally the international community resolved the conflict of interests in favor of the civilians in recognition that the principle goal of humanitarian law is to protect civilians. This ties into the concept of individual human rights — the idea of protecting the integrity of the individual as opposed to the collectivist’s idea that whatever rights individuals have should be subordinated to the greater good of the party, the state, the cause, or whatever.

The reasoning behind the traditional approach reflected in the 1949 Geneva Conventions is important to get clear: In a war in which participants appear only as soldiers, each soldier can reasonably assume that whoever looks like a civilian is a civilian and that he may safely be spared attack. Once you abolish the requirement that fighters desiring combatant status distinguish themselves from civilians, you have undermined the very basis of humanitarian law. But the Diplomatic Conference was more concerned about protecting "national liberation" fighters than they were about protecting civilians, so they shifted the balance. Under Protocol I, irregular soldiers can claim and get combatant and POW status even if they do not wear uniforms, do not carry their guns openly in all military operations, and do not comply with the laws of war.

It bears stressing that the essence of humanitarian law is the distinction between combatants and non-combatants. And the essence of terrorism is the negation of that distinction. Protocol I in effect blesses the negation.

To be sure, Protocol I states that it is illegal to attack civilians and it states that it is illegal to engage in terrorism. There are a number of admirable provisions in Protocol I to that effect. But such provisions are hortatory in nature; unlike the 1949 Geneva Conventions, Protocol I would not deprive an irregular of his legal privileges if he or his organization violates those admirable provisions. Protocol I would eliminate one of international law's principle safeguards of civilians in war.

In my view, the upshot of the Diplomatic Conference was a pro-terrorist treaty that calls itself humanitarian law. It is a vindication of the rhetoric, the aims, and the practices of terrorist organizations. It is a repudiation of the philosophy that holds that one's means must be limited even in war. That is the essence of the law of armed conflict. It is a repudiation of the view that individual rights take precedence over collective interests. In other words, it is a repudiation of the core of our legal philosophy.

The United States has signed Protocol I, but we have not yet decided whether to ratify. The decision will hinge on whether these and other problems can be fixed through American reservations. The administration is studying this right now.

In conclusion, I wish to ask: What does any of this matter? Who pays attention to international law as it relates to terrorism or anything else? I think it does matter because a treaty like Protocol I encourages the kind of thinking that leads to statements like "one man's terrorist is another man's freedom fighter." It confuses the moral issues of humanitarian law and of improper forms of warfare. This, in and of itself, has little effect in lawless countries, but it has its effect in democratic countries. It affects the ability of terrorist organizations to win support in the West — to raise funds and win diplomatic backing. It tends to paralyze Western countries when they are dealing with the

question of responding to terrorism because it affords legitimacy to terrorist organizations and thus raises doubts about the legitimacy of actions opposing them.

Legitimacy is an elusive concept. Let's just say it is the phenomenon that explains why it is easier to advocate in respectable circles a U.S.-P.L.O. dialogue but not a dialogue between the U.S. Government and the Baader-Meinhof gang. The P.L.O. has managed to acquire a certain "legitimacy," and it has done so, despite its terrorist operations, through gatherings like the Diplomatic Conference that produced Protocol I.

What I find especially troubling about that Conference, aside from its product, is the role that the Western governments played. After all, the people we had representing us there were eminent, good people. They come from a great tradition of law. They know better. But when the time came to stand on principle and take the heat or to join the consensus, they rationalized going along with the cynics and the despots. Such rationalizations have become commonplace for Westerners in multilateral diplomatic forums.

This Western bent for unprincipled accomodation, and the talent for devising apologies, brings to mind the 1928 book by Julian Benda entitled *La Trahison des Clercs*, which is translated "the treason of the clerks" or "the treason of the intellectuals." Who were the clerks? They were, according to Benda, men of letters, of learning and culture, of high moral sensibility. Men who stood above mean politics, the men who taught us right from wrong. As Benda wrote: The clerks "were unable to prevent the laymen from filling all history with the noise of their hatreds and their slaughters; but the 'clerks' did prevent the laymen from setting up their actions as a religion, they did prevent them from thinking themselves great men as they carried out these activities. It may be said that, thanks to the 'clerks,' humanity did evil for two thousand years, but honored good. This contradiction was an honor to the human species, and formed the rift whereby civilization slipped into the world." Now what was the treason to which Benda referred? It was that intellectuals allowed themselves to be enlisted in the service of ignoble, inhumane political causes. They dignified, lent respectability to, such causes. Benda wrote: "Our age is the age of the intellectual organization of political hatreds. It will be one of its chief claims to notice in the moral history of humanity." Were Benda alive to read Protocol I, he would weep.

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