

INTERNATIONAL HUMANITARIAN LAW, POSTCOLONIALISM AND THE 1977 GENEVA PROTOCOL I

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The 1977 Geneva Protocols are the core of the contemporary international humanitarian law regime. This article looks at how Protocol I was drafted and how it introduced and managed significant changes to the ius in bello concerning the character of national liberation movements, the status of irregular belligerents and the protection of civilians. It shows that while the delegates fought passionately over some of these changes, compromised and equivocated over others, there were other changes that they accepted readily, without even regarding them as change. The article examines the disciplinary strategies and conventions that allowed the delegates to conceal change in this way. It argues that the most successful legal changes were enabled by discursive changes that had already taken place outside the legal sphere. Postcolonial discourse and social movements had transformed the available possibilities of speech and thought, rendering the traditional understanding of the law reprehensible. Lawyers were compelled to erase the existing provisions of the law and posit new ones that were more in line with contemporary sentiment. Many of these new provisions were problematic and paradoxical, but they were all that could be said at the time. The result was a document that was rejected by military states for many years, but survived as a resource that was eventually adopted by more sympathetic lawyers. In this way, the article historicises the provisions of the Protocol I, while showing the influence of external movements and anticolonial thought on international humanitarian law.

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I INTRODUCTION

In 1974, the International Committee of the Red Cross ('ICRC') convened the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts ('the Conference' or 'Diplomatic Conference') with the hope of making some important changes to the laws of armed conflict. The ICRC, most of the delegates to the Conference and international lawyers generally agreed that the Conference was urgently needed to draft rules concerning what they perceived as the neglected issue of guerrilla warfare. They also felt that the Conference should finally codify the longstanding principles of protection for civilians.

The documents that resulted from the Conference, the 1977 *Additional Protocols* to the *Geneva Conventions*, are the core of contemporary international humanitarian law.¹ *Additional Protocol I* contained new rules on international armed conflicts and *Additional Protocol II* created a new regime for internal armed conflicts. This article will concentrate on *Additional Protocol I*, which was more extensive and more controversial. *Additional Protocol I* defined combatants and non-combatants. It codified what are now considered to be the fundamental principles of the *ius in bello*: proportionality and discrimination. It introduced prohibitions, for the first time, on the starvation of civilians, on reprisals against civilians and it demanded that states take precautions to avoid harming civilians. Today, much of the *Additional Protocols* are considered to be customary international law and binding on all states. Indeed, the ICRC's 2005 study on customary international humanitarian law closely follows the requirements of the *Additional Protocol I*.²

Although the provisions of the *Additional Protocol I* are now considered axiomatic, many of the *Protocol's* provisions were contested at the time and, indeed, remained controversial for many years afterwards. The Conference nearly disbanded over the issue of recognition of wars of national liberation. The question of guerrillas as legitimate combatants was almost as controversial. And while all were agreed on the broad principle of the protection of civilians, when it came to the details there was some discord.

The disagreements and, perhaps even more so, the agreements among the delegates at the Diplomatic Conferences, show a great deal about the nature of international law and the way it changes. First, by looking at this process, it is possible to historicise many of the provisions and principles of international humanitarian law that are now taken for granted. Secondly, by examining the strategies that delegates used to ignore the existing laws, to change provisions, or to impute longstanding principles, it is possible to see how the conventions of international law allow, and limit, change.

¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('*Additional Protocol II*').

² Daniel Bethlehem, 'The Methodological Framework of the Study' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 3, 9.

Finally, this examination makes it possible to ask *why* delegates took the approach they did, and *why* they were so consistent on some issues. Why did delegates agree so easily that there was no law pertaining to guerrillas — when there clearly was law? Why did they maintain that civilians, who had received so little consideration under the existing rules, had been long protected by international humanitarian law? I argue that their acceptance was achieved well before the Conference, compelled by prior battles and victories over the discursive possibilities. In this case, I show that the anti-colonial sentiments of the Nuremberg Tribunal, the work of postcolonial writers like Césaire and Fanon, and the opposition to the Algerian and Vietnam wars had already changed general attitudes towards guerrillas and civilians. Together with the contemporaneous shift towards humanitarianism this controlled the possibilities of speech about war and limited what lawyers could say about law.³

This account suggests that anti-colonial discourse has had a role in the construction of international humanitarian law that has not been fully appreciated. The history of international law is often criticised for its Eurocentric focus.⁴ Where histories of international law have looked at the Third World, it has often been to point out the influence of colonial imperatives on the development of international law⁵ or to stress the many failures of the postcolonial world to change the law.⁶ Recently, there have been some attempts to reinscribe the work of Third World movements into the history of international law.⁷ Balakrishnan Rajagopal in particular has worked to find a theory to account for the relationship between Third World movements and international law.⁸ This paper does not aim at anything so ambitious, but it does describe a process by which alternative understandings of law, international relations and humanity sought and, to some extent, found a way into international humanitarian law.

II PREPARATIONS FOR THE DIPLOMATIC CONFERENCE

I have described elsewhere the various movements and forces that intersected to result in the calling of the Diplomatic Conference and the creation of international humanitarian law.⁹ Very briefly, the 1968 International Conference on Human Rights in Teheran had produced a resolution calling for respect for

³ See Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 *European Journal of International Law* 109.

⁴ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003) 4–5.

⁵ See, eg, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

⁶ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011) 1; Jothie Rajah, 'The Gulf between Promise and Claim: Understanding International Law's Failure to Decolonise' (2012) 3 *Transnational Legal Theory* 285, 287.

⁷ Rajagopal, above n 4; Matthew Craven, *The Decolonization of International Law* (Oxford University Press, 2007); M Sornarajah, 'Power and Justice: Third World Resistance in International Law' (2006) 10 *Singapore Year Book of International Law* 19. These works have focused on the New International Economic Order, development and human rights.

⁸ Ruth Buchanan, 'Writing Resistance into International Law' (2008) 10 *International Community Law Review* 445, 448.

⁹ Alexander, 'A Short History of International Humanitarian Law', above n 3.

human rights in armed conflict.¹⁰ This resolution sparked activity in the United Nations General Assembly, reports from the Secretary-General, and motivated the ICRC to become involved in an attempt to transform the existing laws of war into a more humanitarian code.¹¹ The main areas of concern for the ICRC were the status of irregular combatants and the protection of civilians.

Consequently, in 1971 the ICRC invited around 40 governments to send experts to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts ('Conference of Government Experts'). They met from 24 May to 12 June 1971.¹² As they were not able to cover the entire agenda, there was a second session of government experts from 3 May to 3 June 1972.¹³ All state parties to the *Geneva Conventions* were invited to the second session. Meanwhile, the ICRC collected the opinions of NGOs in November 1971.¹⁴ After these meetings, the ICRC drew up two draft protocols which it sent to all governments in June 1973.¹⁵ At this point the ICRC was still operating on the assumption that it would be its role to draft the protocols and that the government experts would be there to give advice on subsidiary issues.¹⁶

The Diplomatic Conference, organised and convened by the Swiss Government in 1974, did not conform to the ICRC's expectations. Previous conferences on the laws of war had been attended by a small group of mostly Western states. In contrast, around 700 delegates attended the Diplomatic Conference, and they divided into the Eastern Bloc, the postcolonial world and the West — each with a specific understanding of the aesthetics and ethics of war and law. The result was a highly politicised, contentious and drawn out conference. As a result, the Conference took four years to complete its work. And, although the Conference did introduce significant changes to the law, they were not always the changes that the ICRC had envisaged.

III THE CREATION OF NEW LAWS

The Diplomatic Conference revolved around three main questions: the character of national liberation movements; the status of guerrilla fighters; and the protection of civilians. Each of these issues was eventually resolved with the introduction of a significant change to the existing *ius in bello*. Yet, for each issue, delegates confronted and managed the problem of change very differently.

A National Liberation Movements

The contentious nature of the Diplomatic Conference was established from the start. The first session of the Diplomatic Conference was opened by President

¹⁰ Warren E Hewitt, 'Respect for Human Rights in Armed Conflicts' (1971) 4 *New York University Journal of International Law and Politics* 41, 42.

¹¹ R R Baxter, 'Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law' (1975) 16 *Harvard International Law Journal* 1, 5.

¹² International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) xxxi.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Baxter, above n 11, 9.

Ould Dada of Mauritania, who attacked the Zionists, Rhodesia, South Africa and Portugal and praised national liberation movements and freedom fighters.¹⁷ This statement set the tone for the 1974 session, which the Third World countries saw as an opportunity to change the status of national liberation movements. The result was an unexpectedly virulent, political debate that bogged down the entire session. The first part of the session was taken up with the question of whether national liberation movements would be allowed to participate in the conference.¹⁸ Once the voting power of the developing world had decided this question in the affirmative, attention turned to the issue of whether wars of national liberation were international conflicts for the purposes of the *Additional Protocols*.¹⁹ It was a question that was important both for ideological and practical reasons, since it would refute the traditional claim that colonial wars were a domestic matter in which the Imperial power was almost unfettered by international law. Third World states had come to the conference expecting such conflicts to be recognised; they had reiterated this expectation in the General Assembly resolutions that preceded the conference and the Secretary-General's reports.²⁰

The ICRC, however, did not share this expectation. The conclusion of its Conference of Government Experts had been that wars of national liberation were not international.²¹ This opinion was in keeping with legal tradition.²² Common Article 3 of the *Geneva Convention*, dealing with non-international conflicts, had been intended to cover such colonial conflicts.²³ More importantly, for legal experts at the time, colonial wars *looked* like internal conflicts.²⁴ The characterisation of a colonial conflict as a non-international conflict seemed an obvious and objective conclusion.

Many states, especially those which had recently emerged from colonial administration, did not consider this conclusion to be so obvious. An amendment was presented by five Eastern European countries, Algeria, Morocco and Tanzania, which stated that wars against colonial domination, alien occupation and racist regimes were international conflicts covered by *Additional Protocol*

¹⁷ Ibid.

¹⁸ Ibid 10.

¹⁹ Keith Suter, *An International Law of Guerrilla Warfare* (Pinter, 1984) 142.

²⁰ See, eg, *Respect for Human Rights in Armed Conflicts*, GA Res 2597 (XXIV), UN GAOR, 24th sess, 1835th plen mtg, Agenda Item 61, UN Doc A/RES/2597(XXIV) (16 December 1969); *Respect for Human Rights in Armed Conflicts*, GA Res 2674 (XXV), UN GAOR, 3rd Comm, 25th sess, 1922nd plen mtg, Agenda Item 47, UN Doc A/RES/2674 (9 December 1970); Report of the Secretary-General, *Respect for Human Rights in Armed Conflicts*, 25th sess, Agenda Item 47, UN Doc A/8052 (18 September 1970).

²¹ International Committee of the Red Cross, above n 12, 47; International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary* (Geneva, 1973) 6.

²² International Committee of the Red Cross, above n 12, 47. On French attitudes towards the war in Algeria, see Helen M Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press, 2011) 130.

²³ International Committee of the Red Cross, above n 12, 46.

²⁴ For a discussion of the traditional approach, see Arnold Fraleigh, 'The Algerian Revolution as a Case Study in International Law' in Quincy Wright and Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press, 1971) 189.

I.²⁵ Another amendment, sponsored by a group of Asian and African states, Australia, Norway, Cuba and Yugoslavia concentrated on the exercise of the right to self-determination.²⁶ The two amendments were then combined in an amendment that was sponsored by 53 Eastern European, Asian and African states but without the support of Australia and Norway.²⁷

The states that supported these amendments argued that there had been a change in international law. They pointed to the series of General Assembly resolutions that promoted the right to self-determination and the legitimacy of wars of national liberation. Many also argued that wars of national liberation were just wars and, therefore, should be treated the same way as wars between states.²⁸

Western states claimed that these arguments were mistaken. They pointed out that General Assembly resolutions do not make laws. The developing world, they claimed, was advocating for a change to the law that was based on political grounds rather than legal reasoning.²⁹ Moreover, Western states considered that the distinction between just and unjust wars undermined the structure of modern international humanitarian law.³⁰ To reintroduce the connection between the *ius ad bellum* and the *ius in bello* would introduce a subjective, political element into international law.³¹ This, they argued, would be a retrograde and dangerous move.³²

Finally the tortuous discussions were ended and the amendment was put to the vote. The result was 70 in favour and 21 against with 13 abstentions.³³ It was feared that the Western delegations would walk out of the Conference after the vote, but this did not come to pass.³⁴ They seem to have decided that the vote was not too damaging to their interests after all. The decolonisation movement was essentially over and very few places would be affected by the new law.³⁵

²⁵ Michael Bothe, Karl Josef Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, 1982) 41.

²⁶ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)* (Hein, 1981) vol 3, Amendment CDDH/I/11 (8 March 1974) 5 (*‘Official Records of the Diplomatic Conference (Hein)’*).

²⁷ *Ibid* vol 3, Amendment CDDH/I/41 (14 March 1974) 7.

²⁸ Bothe, Partsch and Solf, above n 25, 40.

²⁹ *Ibid*.

³⁰ See, eg, John F DePue, ‘The Amended First Article to the First Draft Protocol Additional to the *Geneva Conventions of 1949* — Its Impact upon Humanitarian Constraints Governing Armed Conflict’ (1977) 75 *Military Law Review* 71, 97.

³¹ See, eg, David P Forsythe, ‘The 1974 Diplomatic Conference on Humanitarian Law: Some Observations’ (1975) 69 *American Journal of International Law* 77, 80.

³² See, eg, *ibid* 80; Baxter, above n 11, 17.

³³ Bothe, Partsch and Solf, above n 25, 43.

³⁴ Charles Lysaght, ‘The Attitude of Western Countries’ in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979) 350, 354.

³⁵ *Ibid* 354.

Although this controversy was resolved, it marked the most precarious moment of the Conference. The destructiveness and hostility of the debate can be attributed to the fact that its participants had conflicting visions of what the law was and should be, and dissonant forms of language. As Forsyth says:

the Third World states approached the issues with the intention of formalizing a consensus in support of the importance of wars of self-determination. This was part of their political strategy against colonial, racist, and occupying regimes, and they saw a legal conference as one more instrument in that struggle. They largely ignored the fact that law is a special language useful in communicating precise expectations.³⁶

As such, the debate shows how difficult it is to deliberately and openly try to change the law with a political vocabulary. Yet, it is these very characteristics that reveal the difference between this particular debate and the peculiar convergence of attitudes and language that enabled the other, equally radical, changes introduced by the Conference. For, having overcome this impasse, the Conference was more productive and less acrimonious than could have been hoped.

B *Guerrillas*

One of the primary aims of the ICRC in calling the Conference was to fill what it described as a gap in international law concerning guerrilla warfare. The ICRC claimed that states were now faced with a ‘truly enormous tidal wave of guerrilla activity’ that had not been anticipated by earlier conventions.³⁷ The belief that guerrilla warfare was taking place in a realm outside the law of war also worried the delegates to the Conference and international lawyers generally.³⁸

Yet, despite this consensus, guerrilla warfare was not virgin legal territory at the Diplomatic Conference. ‘Irregular warfare’ had been an important issue at the 1907 Hague Conference. By irregular warfare, the delegates at the 1907 Conference meant clandestine people, not in uniform, fighting outside the established military.³⁹ This definition is not significantly different to the concept of guerrillas in the 1970s. Moreover, this understanding was shaped by actual experiences of irregular warfare — especially the experiences of the Germans in the Franco–Prussian war⁴⁰ and the British in the Boer War.⁴¹ The difference in 1907 was that the vast majority of states drafting the 1907 convention considered this form of warfare anathema. Having emerged damaged from their encounters

³⁶ Forsythe, above n 31, 87–8.

³⁷ International Committee of the Red Cross, above n 12, 384.

³⁸ James E Bond, ‘Protection of Non-Combatants in Guerrilla Wars’ (1971) 12 *William and Mary Law Review* 787, 789–90; Suter, above n 19, 1, 110; W T Mallison and R A Jabri, ‘The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity’ (1974) 42 *George Washington Law Review* 185, 205.

³⁹ Amanda Alexander, ‘The Genesis of the Civilian’ (2007) 20 *Leiden Journal of International Law* 359, 364

⁴⁰ John Horne and Alan Kramer, *German Atrocities, 1914: A History of Denial* (Yale University Press, 2001) 94.

⁴¹ Lester Nurick and Roger W Barrett, ‘Legality of Guerrilla Forces under the Laws of War’ (1946) 40 *American Journal of International Law* 563, 578–9.

with irregular warfare, the major military states wanted to keep the use of force as firmly as possible in the hands of the established military. They wanted this not only for pragmatic reasons but also because of their ideological and even aesthetic vision of what war should be. War outside the disciplined, respectable clash of armies was brutish, messy and dishonourable.⁴² It threatened to undermine the whole structure of law and civilised warfare.⁴³ Spaight summarised this view:

the more the war is conducted on both sides by regular and disciplined troops, the less will humanity suffer. There is no doubt room for the most noble feeling and the most heroic conduct elsewhere than under a uniform, and it must be admitted that amongst those unfortunate peasants who were shot in virtue of the laws of war, many were guilty of nothing more than having obeyed an instinctive and almost irresistible sentiment of local patriotism. It must, however, be admitted on the other hand, that this kind of resistance, which is, moreover, by no means efficacious when opposed to foreign invasion, must inevitably lead on the one side to marauding ('*banditisme*') and its worst excesses, and on the other to severe repression.⁴⁴

Therefore, in 1907, delegates legislated that, to be considered legitimate, combatants *must* distinguish themselves at all times, must carry arms openly, must follow a responsible command and must conduct their operations in accordance with the laws and customs of war.⁴⁵ The only exception was when the whole population rose in a *levée en masse* — in which case everyone was considered a combatant.⁴⁶ These requirements were retained in the 1949 *Geneva Conventions* — although they were extended to apply to organised resistance movements.⁴⁷ Combatants who did not fulfil these requirements would be considered criminals under domestic or martial law and subject to punishment.⁴⁸ Moreover, whole swathes of the civilian population could be attacked as a reprisal for such criminality in their midst.⁴⁹

Guerrilla warfare was, therefore, a familiar part of the practical experience of nations and their conceptual framework of war. It was undeniably regulated by law. These laws were applied by Germany in the First and Second World

⁴² See, eg, J H Morgan, *The German War Book: Being 'The Usages of War on Land' Issued by the Great General Staff of the German Army* (McClelland, Goodchild & Stewart, 1915) 60–2.

⁴³ See, eg, William I Hull, *The Two Hague Conferences and Their Contribution to International Law* (Ginn, 1908) 221–2.

⁴⁴ J M Spaight, *War Rights on Land* (MacMillan, 1911) 48–9.

⁴⁵ *Convention (IV) Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907 (entered into force 26 January 1910) annex art 1.

⁴⁶ *Ibid* annex art 2.

⁴⁷ *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 2 November 1950) art 4.

⁴⁸ Stanislaw E Nahlik, 'Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law, Geneva 1974–1977' (1978) 42 *Law and Contemporary Problems* 36, 39; Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford University Press, 2015) 107, 125. See generally Horne and Kramer, *German Atrocities, 1914: A History of Denial*, above n 40, 86, 247.

⁴⁹ Fraleigh, above n 24, 196, 202. The French refused to recognise the Algerians as prisoners of war and carried out collective reprisals.

Wars,⁵⁰ by France in Algeria⁵¹ and by the United States in Vietnam.⁵² Yet in the 1970s it was pronounced to be a new and unregulated form of warfare. How did the delegates and lawyers achieve this?

1 *Forgetting the Law*

Delegates to the Diplomatic Conference were able to establish the silence of international humanitarian law on the subject of guerrilla warfare quite easily. Western states simply stated that the laws did not exist or that they were obsolescent.⁵³ As Mr Longva of Norway said:

The price humanity has had to pay for that compromise had been to go through two world wars and numerous limited conflicts without any adequate legal regulation of guerrilla combat situations.⁵⁴

Such a statement required a misrepresentation or misunderstanding of the *Hague* and *Geneva Conventions*. Their strict rules were seen as no rules at all:

Both World Wars ... provided clear evidence that organized guerrilla forces were inadequately protected. In addition, unorganized guerrillas who enjoyed a lawful although unprivileged status in legal doctrine were treated by the Axis powers as common criminals who were outside the protection of international law.⁵⁵

This was, of course, the intention of the laws. Yet, this conclusion, unattractive to the delegates of the 1970s, was seen as too little law, rather than too much or the wrong kind. In this way, the delegates were able to present international humanitarian law as a *tabula rasa* on which new law could be written, without arousing the sort of tension that plagued the changes to the status of wars of national liberation.

Another way of erasing the legal legacy was to argue that the world had changed so much that there was no longer any correspondence between the archaic laws and reality. Decolonisation and the spate of wars of national liberation were the prime example of the radical change that the post-war period had brought.⁵⁶ Commentators also discussed revolutionary violence and asymmetric warfare as though they were new phenomena.⁵⁷ They described these forms of warfare as the breeding ground for guerrilla warfare and a sudden shift in the nature of warfare.⁵⁸ Thus, the familiarity of the drafters of the *Hague*

⁵⁰ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Quadrangle Books, 1970) 136.

⁵¹ Fraleigh, above n 24, 196, 202.

⁵² Taylor, above n 50, 136.

⁵³ See, eg, Bond, above n 38, 797; Suter, above n 19, 1.

⁵⁴ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 14, 332.

⁵⁵ Mallison and Jabri, above n 38, 205–6.

⁵⁶ See, eg, Christopher Greenwood, 'A Critique of the Additional Protocols to the *Geneva Conventions* of 1949' in Helen Durham and Timothy L H McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Kluwer Law International, 1999) 3, 6.

⁵⁷ See, eg, Richard A Falk, 'Introduction' in Quincy Wright and Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press, 1971) xi; Wolfgang Gaston Friedmann, 'Comment 4' in John Norton Moore (ed), *Law and Civil War in the Modern World* (Johns Hopkins Press, 1974) 574–81.

⁵⁸ See, eg, International Committee of the Red Cross, above n 12, 384; Greenwood, above n 56, 6.

and *Geneva Conventions* with irregular warfare was forgotten and they were excused for their inability to foresee or legislate for such a dramatic change. 'It was not clear', the ICRC stated, 'that ultimately guerrilla warfare would be the method of warfare *par excellence* for liberation movements'.⁵⁹

The Third World and some socialist states had their own way of dealing with the legacy of the past. For them, wars of national liberation were not only a new form of warfare but one that was fundamentally just. The combatants in such a conflict should have *more* protection, not less, to assist them in their struggle for 'sovereignty, political independence and freedom'.⁶⁰ The old laws, which denied protection to irregular combatants, were only there to prop up imperialist regimes. This claim allowed the Third World states to simply dismiss the old laws as unjust and therefore illegitimate — a claim that Western states, that had an investment in the law, could not make. In this way, the developing world also negated the existing law and cleared a space for new laws to be written.

2 *The New Law of Guerrilla Warfare*

The prevailing belief that guerrilla warfare was an unregulated, unprecedented and urgent problem meant that almost all the delegates agreed that it was necessary to formulate new laws that would bring guerrillas within the ambit of international law. For the Third World nations and, nominally, the Eastern Bloc, this meant loosening the restrictions on combatant status and giving 'all the necessary assistance to nations that were thus struggling to achieve one of the aims of the *United Nations Charter* — that of abolishing colonial regimes'.⁶¹

For the ICRC and most Western states, the task of incorporating guerrilla warfare in international law was a more delicate problem.⁶² They hoped to recognise guerrillas and provide them with a modicum of protection in order to encourage guerrillas to follow the laws of war, all the while maintaining the protection for civilians that was predicated on the distinction between combatant and civilian.⁶³

The ICRC had dealt with this problem in its Draft Rules by following the traditional approach of the *Hague* and *Geneva Conventions*, requiring that members of 'organized resistance movements' must distinguish themselves from civilians, must follow a responsible command and must conduct their operations in accordance with the laws and customs of war.⁶⁴ At the Diplomatic Conference, most Western states began by agreeing that the three conditions

⁵⁹ International Committee of the Red Cross, above n 12, 384 (emphasis in original).

⁶⁰ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 14, 366. Mr Todoric (Yugoslavia) speaking.

⁶¹ *Ibid* vol 14, 342. Mr Belousov (Ukrainian Soviet Socialist Republic) speaking.

⁶² International Committee of the Red Cross, above n 12, 520–1.

⁶³ George H Aldrich, 'New Life for the Laws of War' (1981) 75 *American Journal of International Law* 764, 770.

⁶⁴ See 'Draft Protocol Additional to the *Geneva Conventions* of August 12, 1949' in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Geneva (1974–1977)* (Federal Political Department Berne, 1981) vol 1, 13 ('*Official Records of the Diplomatic Conference* (FPDB)').

needed to be met.⁶⁵ Norway, Belgium and Italy, however, argued that the conditions were problematic as the question of whether they had been satisfied would likely depend on ‘a subjective assessment, in practice on the subjective assessment of the enemy’.⁶⁶

Third World countries fought against the three conditions. They argued that the requirements to follow the law and have responsible leadership would give imperialist states a pretext to withhold protection.⁶⁷ States such as North Vietnam, Nigeria, North Korea, Pakistan, Ghana and Lesotho also took the extreme stance that members of national liberation movements should *never* have to distinguish themselves. It was simply not fair, they said, to expect ill-armed, repressed groups, fighting against imperialist aggression to have to comply with such restrictions.⁶⁸ As for the protection of civilians, North Vietnam added, the requirement for distinction did not help them. It just gave the imperialists an excuse to attack them, in reprisal for unavoidable infringements of the law.⁶⁹ In another statement, however, North Vietnam questioned the whole nature of distinction:

As regards the national liberation armies, from the intrinsic original fact that they are the armies of weak and ill-armed peoples fighting against a powerful and heavily armed enemy their activities and their lives are inseparable from the civilian population. That is the new law of the people’s war. It is an historical material necessity of national liberation wars.

All the world knows that in guerrilla warfare a combatant must operate under the cover of night in order not to be a target of the modern weapons of the adversary. In such circumstances, does the spirit of humanity compel them to wear emblems of uniforms in order to distinguish themselves from the civilian population ... ?⁷⁰

In contrast, Western delegates insisted that the rule that combatants must distinguish themselves was an essential part of the laws of war and absolutely necessary for the protection of civilians:

In our view, a combatant who deliberately fails to distinguish himself from other civilians while engaging in combat operations has committed such an extraordinary violation of the laws of war and so prejudices the protection for civilians that he loses his entitlement to be a prisoner of war, and, along with it, any immunity from punishment he may have had for acts of violence against the adversary. The desire and urgency to protect the civilians is no different today than it was in 1907 — or 1949 — and the lives of civilians are no less important to-day than they were then.⁷¹

These differences made for a long and difficult debate. Article 42, as it was, consumed weeks of Committee III’s time during the third session, but states could not agree. They did show themselves willing to moderate their extreme

⁶⁵ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 14, 475 (US), 507 (Brazil), 508 (Switzerland), 515 (Federal Republic of Germany), 525 (Australia), 526 (UK, Israel and the Netherlands). Belgium was an exception.

⁶⁶ *Ibid* vol 14, 482 (Norway), 513 (Italy), 492 (Belgium).

⁶⁷ *Ibid* vol 14, 522 (Algeria).

⁶⁸ *Ibid* vol 14, 324, 344, 531.

⁶⁹ *Ibid* vol 14, 466.

⁷⁰ *Ibid*.

⁷¹ *Ibid* vol 14, 477. Mr Reed (US) speaking.

positions on the conditions for recognition, but remained at an impasse on when and how combatants should distinguish themselves. Finally, ‘after two years of hard work, official and unofficial contacts and prolonged discussion and mediation’⁷² and what others described as tireless energy by the American rapporteurs,⁷³ the Chairman was able to present a compromise draft article at the beginning of the fourth session.

This article, which was to become Article 44, when read together with the preceding article, contained references to organised command and adherence to the rules of international law, but did not make prisoner of war status dependent on satisfying these conditions. It solved the standoff over when combatants should distinguish themselves by requiring it only during each military engagement and during military deployment. The term ‘military deployment’ came from an amendment sponsored by the United States and South Vietnam. There was no shared understanding of what ‘deployment’ meant and Aldrich, the head of the US delegation, suggested that this very ambiguity made the term acceptable to all the delegates.⁷⁴

These confusing provisions were enough of a compromise to be adopted by 66 votes to 2 with 18 abstentions,⁷⁵ but too much of a compromise for anyone to be very happy. All the delegates recognised that it was a less than satisfactory result. The Chairman introduced it as such, appealing to delegates to show understanding and good will.⁷⁶ The ICRC commentary presented the article in the most favourable way possible, saying:

The text of Article 44 is a compromise, probably the best compromise that could have been achieved at the time. It is aimed at increasing the legal protection of guerrilla fighters as far as possible, and thereby encouraging them to comply with the applicable rules of armed conflict, without at the same time reducing the protection of the civilian population in an unacceptable manner.⁷⁷

In explaining their votes, almost all states referred to the article as a compromise.⁷⁸ Those states which voted against the article or abstained argued that the compromise was too great, that the resultant article was too ambiguous, contradictory or illogical.⁷⁹ Italy, Ireland and Japan abstained and Brazil voted against because, they stated, the article did not require sufficient distinction

⁷² *Official Records of the Diplomatic Conference* (FPDB), above n 64, vol 15, 155. Mr Sultan (Egypt) speaking.

⁷³ *Ibid* vol 15, 119 (USSR), 156 (UK), 224 (various other governments, thanking the American rapporteurs for their efforts).

⁷⁴ George H Aldrich, ‘Guerrilla Combatants and Prisoner of War Status’ (1981) 31 *American University Law Review* 871, 878–9.

⁷⁵ *Official Records of the Diplomatic Conference* (FPDB), above n 64, vol 15, 155–6. Brazil and Israel voted against. NZ, Nicaragua, Spain, Thailand, UK, Uruguay, Argentina, Australia, Bolivia, Canada, Chile, Colombia, Denmark, Guatemala, Holy See, Ireland, Italy and Japan abstained from the vote.

⁷⁶ *Ibid* vol 15, 155.

⁷⁷ International Committee of the Red Cross, above n 12, 522.

⁷⁸ Nigeria described it as a ‘victory for reason and justice’: *Official Records of the Diplomatic Conference* (FPDB), above n 64, vol 15, 180.

⁷⁹ *Ibid* vol 15, 165 (Australia), 176 (Canada), 177 (Chile). Australia was concerned about the term deployment. Canada said the language was too ambiguous. Chile said it would have voted if not for the ‘illogicalities’ of the article.

between civilian and combatant.⁸⁰ Even those states that voted in favour of the article complained about its ambiguity,⁸¹ or were concerned that it had reduced the protection for civilians⁸² or, as in the case of North Vietnam, regretted that it did not go far enough in protecting guerrillas.⁸³

In this awkward way, the Diplomatic Conference reshaped the legal meaning of the combatant. Instead of the traditional, jealous guarding of the privileges of combatants, the category became inclusive. Not only were the established military in their conventional uniforms included, but any scruffy peasant band under a responsible command. Moreover, these new combatants have a much more fluid role. They are not only one thing; they do not have to be a soldier *or* a civilian. They can be a peasant by day and a guerrilla by night. As such there is no longer any necessary difference between the guerrilla and the civilians around him or her. This is very different from Spaight's traditional assertion that '[n]o invader will suffer the "peaceable" inhabitant to indulge in some amateur hedgerow fighting in his spare moments'.⁸⁴

This article constitutes one of the greatest paradoxes of the *Additional Protocol I*: that this supposedly humanitarian document, which aimed at expanding the protection of the civilian, simultaneously obscured civilian status and, with it, claims to protection. This paradox is partly due to the success that the delegates achieved in obscuring the laws of the past, but it also points to the difficulty of containing diverse narratives within one legal provision. There are two narratives at work here: the Third World discourse of imperialism and national liberation and a Western aesthetic, much shaken but not completely shattered, of decent military behaviour. The incongruous political language of the Third World could not be replicated in the article but much of its intention was — just translated into the appropriate form. Meanwhile, the Western delegates, having expunged the existing legal provisions, found it hard to completely resist the Third World interpretation of law. Yet, they were still committed enough to their established vision of warfare to retain the traditional requirements while allowing them to be rendered virtually meaningless.

C Civilians

The change in the image of the combatant was accompanied by a change in the status of the civilian. It might be expected that the acknowledgement that a civilian could also be a guerrilla would make their position even more precarious.⁸⁵ Yet, the opposite happened. The same document that accepted the duality that past drafters had feared and outlawed also recast the protection of the civilian as a fundamental imperative of international law.

Before the *Additional Protocols*, international law provided very little protection for civilians. The 1907 *Hague Convention* only went as far as

⁸⁰ *Official Records of the Diplomatic Conference (FPDB)*, above n 64, vol 15, 177, 180, 182, 185.

⁸¹ *Ibid* vol 15, 170 (Greece), 171 (Netherlands), 174 (Sweden).

⁸² *Ibid* 162 (Mexico), 163 (Austria).

⁸³ *Ibid* 169 (North Vietnam).

⁸⁴ Spaight, above n 44, 53.

⁸⁵ Bothe, Partsch and Solf, above n 25, 293–4.

prohibiting the bombardment of undefended towns.⁸⁶ International law countenanced, for example, the starvation of civilians or reprisals against civilians.⁸⁷ Yet, despite the existence of a real lack of law on this topic, delegates and commentators did not acknowledge any such gap. Rather, they described the new protection for civilians as a *reaffirmation* of the law. Since there were no written laws on the subject, the law that was to be reaffirmed was customary international law. Prior to the Diplomatic Conference, there was not much state practice that would suggest that there were customary laws protecting civilians. Nevertheless, this deficiency did not deter delegates from stating that there were such laws. As the ICRC commentary states:

The fact that the development of aviation and the use of new arms has almost wiped out the fundamental distinction between combatants and civilians during the last World War, can in no event justify even indirectly a state of affairs which is disastrous for civilization and for human life itself. If the law of war — to the extent that it endeavours to limit the means used for conducting hostilities — is to be a reality, it is essential to re-establish the fundamental concept, which has actually never been explicitly rejected, of the military objective and to reaffirm the basic distinction between combatants and civilians.⁸⁸

This shared belief that civilians were protected by customary international law allowed delegates to agree easily on the *Protocol's* broader, foundational, statements about the protection of civilians and the nature of civilians.

1 *Accepted Principles*

(a) *The Basic Rule Article 43/48*⁸⁹

The 'basic rule' of discrimination between civilians and combatants was set out in Article 43 of the ICRC's *Draft Protocol*.⁹⁰ It said:

In order to ensure respect for the civilian population, the Parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives.

The ICRC's delegate, Mr Mirimanoff-Chilikine, introduced this rule to the delegates as an existing and still valid rule of international law, which had sadly been violated.⁹¹ The delegates agreed with him that the article reaffirmed 'principles already existing in international instruments and in customary law'.⁹² As a result, there was general support in Committee III for the Basic Rule.⁹³

⁸⁶ Alexander, 'The Genesis of the Civilian', above n 39, 363.

⁸⁷ *Ibid* 364.

⁸⁸ International Committee of the Red Cross, above n 12, 509.

⁸⁹ When discussing each article, I have placed the article number from the Draft Rules first, followed by the article number from the Final Act. I have done so to try to avoid confusion when describing or quoting the debates within the conference which refer to different article numbers to the completed *Additional Protocol*.

⁹⁰ See also, *Additional Protocol I* art 48.

⁹¹ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 14, 13.

⁹² See, eg, *ibid* vol 14, 25 (Yugoslavia).

⁹³ *Official Records of the Diplomatic Conference* (FPDB), above n 64, vol 15, 235 (Committee III Report).

The rule was codified in a slightly different form, but with very similar meaning, in Article 48 of the final act and was accepted by consensus.

In this way the Conference took the momentous step of codifying the principle of distinction for the first time, while managing to present the codification as though it had done nothing new, but had only recorded what already existed. The ICRC commentary confirms this assessment, saying that the article merely codified a longstanding norm of international law:

Although it was never officially contained in an international treaty, the principle of *protection* and of *distinction* forms the basis of the entire regulation of war, established in Brussels in 1874 in the form of a draft, and later in the Hague conventions ...⁹⁴

(b) *The Definition of Civilians: Article 45/50*

The definition of civilians in Article 45 of the *Draft Protocol* also found general approval. In this article, the ICRC attempted to define civilians for the first time. It did so by a negative formula, which stated that a civilian was any person who was not a combatant, as described by Article 43 and the 1949 *Geneva Convention on Prisoners of War*.⁹⁵ It also stated that in case of doubt a person was to be presumed to be a civilian and that ‘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’.⁹⁶ This definition makes no reference to innocence, involvement in the war effort or even nationality. As the ICRC says, ‘the important aspect is not so much their nationality as the inoffensive character of the persons to be spared and the situation in which they find themselves’.⁹⁷

The ICRC commentary acknowledges that there are other ways of defining civilians but argued that this was the most practical:

In the course of history many definitions of the civilian population have been formulated and everyone has an understanding of the meaning of this concept. However, all these definitions are lacking in precision, and it was desirable to lay down some more rigorous definition, particularly as the categories of persons they cover has varied.

This definition has the great advantage of being *ne varietur*. Its negative character is justified by the fact that the concepts of the civilian population and the armed forces are only conceived in opposition to each other, and that the latter constitutes a category of persons which is now clearly defined in international law.⁹⁸

Despite the ICRC’s acknowledgement that its definition was novel and not definitive, the delegates accepted it as uncontroversial. It was retained in the Final Draft as Article 50 with a very similar meaning.

⁹⁴ International Committee of the Red Cross, above n 12, 586 (emphasis in original).

⁹⁵ *Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

⁹⁶ *Additional Protocol I* art 50(3).

⁹⁷ International Committee of the Red Cross, above n 12, 610.

⁹⁸ *Ibid.*

(c) *The Protection of Civilians: Article 46/51*

Article 51 of *Additional Protocol I* provides for the protection of civilians during military operations, by prohibiting indiscriminate and disproportionate attacks. The first three paragraphs of the Article, which stated that civilians should not be the object of attack and that they should enjoy protection, received general approval. Mr Freeland of the United Kingdom said that ‘the first three paragraphs of which contained a valuable reaffirmation of existing customary rules of international law designed to protect civilians’.⁹⁹ Other delegates described Article 46/51 as a key article of the *Protocol*,¹⁰⁰ which should not be the subject of reservations.¹⁰¹ In this way, the protection of civilians was established as a fundamental principle of international humanitarian law.

2 *Contested Provisions*

Despite the widespread support for the humanitarian virtues and customary standing of the basic provisions concerned with the protection and definition of civilians, when it came to the details of Article 46/51, and many of the articles that followed, agreement proved more difficult. It might well be allowed that the principle of discrimination and the protection of civilians were part of international humanitarian law, but there was no accord about what that actually entailed; delegates could not agree on what discrimination meant or whether proportionality was a useful concept.¹⁰² Moreover, even while delegates reiterated the customary status of rules for the protection of the civilian, they also agreed that the law, as it stood, allowed for starvation, reprisals and provided little protection against area bombardment.¹⁰³ Delegates, it seemed, were able to hold these conflicting ideas simultaneously. As a result, Article 46/51 and the other articles that aimed to protect civilians incited debate over the nature of ‘indiscriminate attacks’, the notion of proportionality, the prohibition on reprisals and the protection of certain objects.

(a) *Indiscriminate Attacks*

The prohibition of indiscriminate attacks in paragraphs 4 and 5 of Article 46/51 worried many states. France, Afghanistan and Italy were concerned that these articles would interfere with a nation’s ability to defend itself and refused to vote for the article.¹⁰⁴ France argued that the requirement to discriminate would be difficult to apply in large towns or wooded areas¹⁰⁵ and Colombia agreed that it was unrealistic in military terms where such objectives were situated in inhabited areas.¹⁰⁶ Even states who voted for the article were critical of its wording and content. Many delegates argued that the paragraphs were

⁹⁹ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 6, 164.

¹⁰⁰ *Ibid* vol 6, 166 (Poland), 177 (Byelorussia), 198 (Sweden). See also International Committee of the Red Cross, above n 12, 615.

¹⁰¹ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 6, 193 (Mexico).

¹⁰² *Ibid* vol 6, 164 (UK), 166 (Spain), 168 (Netherlands).

¹⁰³ *Ibid* vol 6, 199 (Sweden), 201 (Ukrainian Soviet Socialist Republic).

¹⁰⁴ *Ibid* vol 6, 162, 165.

¹⁰⁵ *Ibid* vol 6, 186.

¹⁰⁶ *Ibid* vol 6, 183.

imprecise,¹⁰⁷ a criticism that even the ICRC acknowledged to be fair.¹⁰⁸ It was not clear what constituted an indiscriminate attack, the distance objects would have to be apart, and what types of attacks, having been acceptable in the past, would now be considered indiscriminate.¹⁰⁹

The paragraphs were sufficiently opaque for some states to be concerned that they could be read to outlaw certain weapons or means of warfare. These states were therefore punctilious in giving an interpretation of the paragraphs that would thwart such a reading.¹¹⁰ Canada said that it interpreted indiscriminate attack as not being intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances.¹¹¹ The Federal Republic of Germany also stated that the definition does not prohibit as indiscriminate any specific weapon.¹¹²

On the other hand, the German Democratic Republic tried to interpret the paragraphs in precisely such a way, saying that they:

re-established the priority of humanitarian principles over the uncontrolled development and barbarous use of highly sophisticated weapons and means of warfare, which from the outset disregarded the fundamental rights of the human being.¹¹³

Mexico made a similar point, arguing that that the protection of the civilian population must be maintained 'even at the cost of restricting the use of means and methods of warfare, the effects of which cannot be confined to specific military targets'.¹¹⁴ The meaning of these paragraphs was, therefore, disputed. Delegates certainly did not consider them to be a clear statement of customary law or even an uncomplicated proclamation of new law.

(b) *Proportionality*

Paragraph five of Article 46/51 raised the question of proportionality, which also proved to be contentious. In the original Article 46(3)(b) it was forbidden 'to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated'.¹¹⁵

Many delegations, especially those from the Eastern Bloc and the Third World, were concerned that this provision actually permitted attacks that would harm civilians, providing that they did not result in losses or damage that was considered excessive. Poland criticised the paragraph, saying that it gave military commanders the unlimited right to decide to launch an attack if they thought there would be a military advantage. Civilian suffering and military advantage, Poland argued, were two values that could not conceivably be compared.¹¹⁶

¹⁰⁷ See, eg, *ibid* vol 6, 182 (Columbia).

¹⁰⁸ International Committee of the Red Cross, above n 12, 625.

¹⁰⁹ Bothe, Partsch and Solf, above n 25, 307.

¹¹⁰ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 6, 164.

¹¹¹ *Ibid* vol 6, 179.

¹¹² *Ibid* vol 6, 188.

¹¹³ *Ibid* vol 6, 167.

¹¹⁴ *Ibid* vol 6, 192.

¹¹⁵ *Official Records of the Diplomatic Conference* (FPDB), above n 64, vol 1, 15.

¹¹⁶ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 14, 61.

North Korea complained that the principle of proportionality ‘would provide war criminals with a pretext for their crimes’.¹¹⁷

In response, Australia, the UK and the US argued that the principle of proportionality should be retained. They shaped their argument in terms of practicality, military necessity and the ultimate protection of civilians. There needed to be rules, they argued, that would actually be followed if civilians were to be protected. As Australia said, ‘since area bombardment was unlikely to be abandoned, there should be a distinct code related to it’.¹¹⁸ The UK agreed, arguing:

It was difficult to visualize an attacker who would not carry out an assault upon an entrenched adversary because of the presence of one or two civilians. The Committee must not put forward formulations which would not in practice be followed. To do away with the rule of proportionality would remove a valuable humanitarian protection from the civilian population ...¹¹⁹

In the same tone, the US stated that ‘[c]ollateral 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’.¹²⁰

The problem of proportionality arose again in relation to Article 57, which dealt with the precautions to be taken to protect civilians. Again, some eastern European and Third World states continued to criticise the concept of proportionality, saying it allowed incidental civilian casualties and ‘weakens the provisions of other articles and other paragraphs of Article 50’.¹²¹ The ICRC, however, in its own words, ‘persisted in proposing a codification of the principle of proportionality, recognizing that some collateral injury to civilians is inevitable’.¹²²

As a result of the dispute, the terms ‘proportionate’ and ‘disproportionate’ did not appear in the final versions of these provisions. Despite this omission, Bothe applauded subparagraph 5 of Article 51 as the ‘first concrete codification of the principle of proportionality as it applies to collateral civilian casualties’ and said that ‘the principle of proportionality is inherent both in the principles of necessity and humanity upon which the law of armed conflict is based’.¹²³ Interestingly, the ICRC commentary does not make an equivalent claim and the UK said that

[t]he reference in paragraph 5(b) to what had become known as the ‘rule of proportionality’ was a useful codification of a concept *that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict*.¹²⁴

¹¹⁷ Ibid.

¹¹⁸ Ibid vol 14, 62.

¹¹⁹ Ibid vol 14, 64.

¹²⁰ Ibid vol 14, 67.

¹²¹ Ibid vol 6, 236 (Romania).

¹²² Bothe, Partsch and Solf, above n 25, 361.

¹²³ Ibid 309.

¹²⁴ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 6, 164 (emphasis added).

This debate shows that delegates did not universally agree that the rule of proportionality was important or that it was a traditional legal principle. Where there was consensus, that consensus held that the principle of proportionality had a permissive aspect; proportionality allowed for civilian casualties. Nevertheless, despite all the controversy, the value of proportionality was, in this way, embedded in the *Protocol*.

(c) *Reprisals*

Paragraph 6 of Article 51 prohibited reprisals against civilians. This paragraph garnered some attention, but not as much as might have been expected. Delegates acknowledged that the prohibition was a departure from existing customary international law, which allowed reprisals under certain conditions, such as when an adversary had violated the laws of war.¹²⁵ France, indeed, argued that the paragraph was contrary to existing international law and ‘would leave a State which saw its civilian population decimated by serious, overt and deliberate breaches ... without any means of reply’.¹²⁶ Yet, with the exception of this French opposition, there was not much debate about the paragraph, and during the second session the text was adopted by consensus and with little comment.¹²⁷

This change in approach did not, however, extend to the protection of civilian objects. When delegates began to discuss Article 47/52, which dealt with the protection of civilian objects, the debate on reprisals became quite energetic. The original Article 47 did not contain a reference to reprisals as the ICRC had felt that there would be strong opposition to such a proposal.¹²⁸ It was introduced at Committee level instead, where it was eventually approved by a vote of 58 to 3, with 9 abstentions

Australia, Canada, France, Uganda, the Federal Republic of Germany and the UK argued strenuously against the prohibition of reprisals against civilian objects.¹²⁹ They considered that a complete ban was unrealistic, idealistic and dangerous in so far as it removed a sanction that might stop adversaries from violating the law.¹³⁰ Australia explained that it abstained from the vote because ‘[a] reprisal is a sanction to deter further violation of the law. It is not an act of vengeance. The availability of this sanction may persuade an adversary not to commit violations of the law in the first place’.¹³¹

Australia went further than other states in its opposition to the prohibition of reprisals, saying that it would have voted against Article 47 *bis*, prohibiting reprisals against cultural objects; Article 48, prohibiting reprisals against objects necessary for the survival of civilian population; and Article 49, prohibiting reprisals against objects containing dangerous forces.¹³² Australia argued that,

¹²⁵ Bothe, Partsch and Solf, above n 25, 312.

¹²⁶ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 6, 162.

¹²⁷ Bothe, Partsch and Solf, above n 25, 312–13.

¹²⁸ *Ibid* 323.

¹²⁹ *Ibid* 312; Nahlik, above n 48, 59.

¹³⁰ L C Green, ‘The Geneva Humanitarian Law Conference 1975’ (1975) 13 *Canadian Yearbook of International Law* 295, 302.

¹³¹ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 6, 176.

¹³² *Ibid* vol 6, 220.

while it unreservedly supported all rules prohibiting reprisals against *persons*, it considered that prohibitions of reprisals against objects did nothing to further international humanitarian law.¹³³

In response to these arguments, the Netherlands pointed out that reprisals could not be confined to civilian objects alone but would hurt the civilian population as well while Sweden argued that countermeasures never led to observance of the law.¹³⁴ Sweden went on to state that '[t]he adoption of those provisions was clearly in keeping with the trend of international humanitarian law, which was to restrict the application of the traditional customary principle on the permissibility of reprisals'.¹³⁵

(d) *Precautions: Articles 50/57 and 51/58*

One of the controversial innovations of the *Additional Protocol I* was a list of precautions that military commanders must take in order to protect civilians during attacks and from the effects of attacks. The US described these articles as a major step in the reaffirmation and development of humanitarian law applicable in armed conflict.¹³⁶

Article 50/57 was, however, a complex and controversial article to draft. The ICRC had been unsure of the best approach and had included two alternative provisions in its draft. There were lengthy discussions at the Conference and the text which was finally agreed upon was 'the fruit of laborious compromise between the various points of view'.¹³⁷ In the end, the compromise was reached by the introduction of the words 'all feasible precautions'. Bothe states that it was only the inclusion of these modifying words that rendered the agreement of the delegates possible.¹³⁸

As the discussions of the delegates show, the words 'everything feasible', transformed the article from a binding obligation to a flexible guide. Italy demonstrated this attitude most clearly by saying 'this is not a question of absolute obligations, but, on the contrary, of precepts that should be followed if, and to the extent that, the particular circumstances permit'.¹³⁹ Other delegates interpreted the words more obliquely as meaning 'everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations'.¹⁴⁰

Even with the modifying words, delegates were still uncomfortable with Article 50/57. They criticised the article, like many others, for being imprecise.¹⁴¹ Some delegates argued that it put too much responsibility on military commanders, and even subordinate officers, exposing them to

¹³³ Ibid vol 6, 177.

¹³⁴ Ibid 210.

¹³⁵ Ibid.

¹³⁶ Ibid 241.

¹³⁷ International Committee of the Red Cross, above n 12, 678.

¹³⁸ Bothe, Partsch and Solf, above n 25, 372.

¹³⁹ *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 6, 232.

¹⁴⁰ Ibid vol 6, 211 (Turkey), 214 (UK concerning art 58), 224 (Canada), 226 (Federal Republic of Germany), 241 (US).

¹⁴¹ Ibid vol 6, 212 (Switzerland and Austria), 231 (Italy).

prosecution under Article 85.¹⁴² They also pointed out that the interdependence of the civilian population with the infrastructure of a modern society made full implementation of the goals of the precautionary articles impossible.¹⁴³

(e) *Starvation: Article 48/54*

The ICRC¹⁴⁴ and other commentators¹⁴⁵ applauded the prohibition of starvation as one of the innovations of the *Additional Protocol*. It was an especially notable innovation, given the acceptance and prevalence of starvation as an effective weapon under the laws of war, whether through the use of blockade, siege or refusing to allow 'useless mouths' to flee.¹⁴⁶

Nevertheless, the delegates diluted the principle over the course of the Conference. The original Article 48 had included a blanket prohibition. Members of Committee III were not comfortable with this general prohibition and they added on paragraphs 3, 4, and 5. The ICRC commentary does not appear to be certain on how these provisions were formulated,¹⁴⁷ but they except some situations from the blanket prohibition. Paragraph 3 states that foodstuff that is only being used for the military may be attacked. It also allows for such objects to be attacked when they are used for support of military action, unless it will cause starvation among civilians. Most importantly, paragraph 5 allows a power to carry out destruction in its own territory under its control,¹⁴⁸ thereby allowing a scorched earth policy to continue to be legal. This provision had substantial support.¹⁴⁹ As the Rapporteur of Committee III stated:

The committee generally considered that it would be impossible to prohibit completely the conduct of a scorched earth policy where the armed forces of a State were being forced to retreat within the national territory of that State, and the best protection on which agreement was possible was to permit derogation from the rules of Article 48, paragraph 2 only where required by imperative military necessity. Several representatives expressed dissatisfaction with that standard because of its apparent anti-humanitarian implications, but it was generally regarded as the most demanding standard that would be acceptable.¹⁵⁰

Finally the Rapporteur and the ICRC acknowledged that the new article did not seem to refer to naval blockade,¹⁵¹ although, as the ICRC pointed out, the purpose of blockade should not include starvation.¹⁵² Thus, while Article 48 introduced a new principle into international humanitarian law, it was one that states were keen to circumscribe at the time.

¹⁴² International Committee of the Red Cross, above n 12, 679; *Official Records of the Diplomatic Conference* (Hein), above n 26, vol 6, 212 (Switzerland), 212 (Austria), 219 (Afghanistan).

¹⁴³ Bothe, Partsch and Solf, above n 25, 371–2.

¹⁴⁴ International Committee of the Red Cross, above n 12, 653.

¹⁴⁵ Bothe, Partsch and Solf, above n 25, 336.

¹⁴⁶ A Pearce Higgins, *War and the Private Citizen* (P S King & Son, 1912) 47–8.

¹⁴⁷ International Committee of the Red Cross, above n 12, 656.

¹⁴⁸ *Ibid* 658.

¹⁴⁹ Bothe, Partsch and Solf, above n 25, 342.

¹⁵⁰ *Official Records of the Diplomatic Conference* (FPDB), above n 64, vol 15, Committee III Report, 462.

¹⁵¹ International Committee of the Red Cross, above n 12, 653.

¹⁵² *Ibid* 654.

In this way, the delegates to the Conference, by affirming the existence of a pre-existing law, were able to codify broad new standards for the perception and protection of civilians. At the same time, they produced carefully ambiguous legal provisions that were capable of embracing several radically different interpretations — from the states that refused to countenance any civilian casualties to those which peddled pragmatism as a way to protect civilians. As a result, the final draft of the *Additional Protocol I* contained two incongruous positions: on the one side, the broad, incontrovertible statements of protection and on the other, the range of cautious disclaimers and imprecise provisions.

IV THE CREATION OF NEW STANDARDS

The construction of *Additional Protocol I* provokes a range of questions. Why did the delegates seem to forget the law when it existed and presume it when it did not? How could they allow guerrillas to be civilians while seeing civilians as protected victims? How were they able to replace the old concepts of combatants and non-combatants and the vision of law that attended them without the controversy that marked the more visible change to the status of national liberation movements? This section attempts to find some answers for these questions.

One of the truisms that facilitated the paradoxical changes of the *Additional Protocols* was the claim that the world had changed so much since the Second World War that the old conventions were obsolete. Yet, neither guerrilla warfare nor attacks on civilians were new features of the post-war world. This is not to say that there was no difference between the 1970s and the 1940s. The difference, however, was not so much a change in the world as a change in the way the world could be spoken and thought about. This change was partly due to the reconceptualisation of the laws of war as international humanitarian law,¹⁵³ but it was also assisted by the spread of a new, anti-colonial sensibility that emerged after the Second World War and spread during the Algerian and Vietnam campaigns.

A *Nazism and Anti-Imperialism*

The extent of the horror of the Second World War left the world with a new vocabulary. It bequeathed terms that could be used as accusations of unequivocal evil, like 'Nazism', 'genocide' and 'concentration camp'. Nothing that could be described by these words was defensible. To this extent, the Second World War left behind a new sensibility. The vast scale of the destruction inspired pity for the victims and the beginning of a new awareness of and concern for victims generally. This was recognised to some extent in the new legal instruments. The *Geneva Convention IV* was there to protect the vanquished — those civilians who had been conquered. The new legal categories of crimes against humanity and genocide were additional attempts to protect the weak. At the same time as people were seen as powerless, the *Universal Declaration of Human Rights* insisted that they were nevertheless endowed with rights. Henceforth, people would be both vulnerable and valuable.

¹⁵³ See Alexander, 'A Short History of International Humanitarian Law', above n 3.

One aspect of this new sensibility was a growing distaste for colonialism. The Nuremberg trials had described Nazism in a way that suggested an extreme version of colonialism practised in Europe¹⁵⁴ and postcolonial writers such as Césaire and Fanon seized on this theme, painting all colonialism as manifestations of Nazism.¹⁵⁵ Nazism, Césaire argued, was essentially the same as colonialism, except that it had taken place in Europe. What Hitler had done, Césaire wrote, was to apply to Europe ‘colonialist procedures which until then had been reserved exclusively for the Arabs of Algeria, the “coolies” of India, and the “niggers” of Africa’.¹⁵⁶

Fanon repeated Césaire’s argument, stating that European civilisation and its best representatives were responsible for colonial racism¹⁵⁷ and were morally bankrupt. ‘Leave this Europe’, Fanon argued, ‘where they are never done talking of Man, yet murder men everywhere they find them’.¹⁵⁸ Imperialism had become an accusation of racism and violence.

Some intellectuals in Western countries also adopted this type of language. They agreed with the descriptions of the evils of colonialism, too long hidden by a facade of Western values. This type of liaison can be seen in Sartre’s introduction to Fanon’s *The Wretched of the Earth*:

We must confront an unexpected sight: the striptease of our humanism. Not a pretty sight in its nakedness: nothing but a dishonest ideology, an exquisite justification for our plundering; its tokens of sympathy and affectation, alibis for our acts of aggression.¹⁵⁹

The war was not only responsible for this new lexicon, but also for weakening Europe’s colonial empires so as to allow it greater expression. The colonies that had lost contact with their Imperial centres during the war or seen them defeated had more confidence in their ability to govern themselves and less respect for their former governors. After the first round of colonies gained independence they met at the 1955 Bandung Conference where they proclaimed that colonialism was an evil and a denial of human rights.¹⁶⁰

As the decolonisation movement spread, the newly liberated countries formed a large political bloc which was able to dominate the General Assembly. These countries made decolonisation and the evils of colonialism a foremost concern in the 1960s.¹⁶¹ As a result, anti-imperialist language became common and even formulaic in political discussions. It informed the General Assembly resolutions that preceded the Diplomatic Conference and, as has been shown, penetrated the

¹⁵⁴ See, eg, Office of United States Chief of Counsel for the Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (United States Government Printing Office, 1946) vol I, ch xiii, ‘Germanization and Spoilation’. This chapter outlines Nazi plans to administer and exploit as colonies the nations they conquered. See also Peter Maguire, *Law and War: An American Story* (Columbia University Press, 2000) 92–3.

¹⁵⁵ Robert Young, *White Mythologies: Writing History and the West* (Routledge, 1990) 125.

¹⁵⁶ Aimé Césaire, *Discourse on Colonialism* (Joan Pinkham trans, Monthly Review Press, 1972) 14 [trans of: *Discours sur le colonialisme* (first published 1955)].

¹⁵⁷ Frantz Fanon, *Black Skin, White Masks* (Charles Lam Markmann trans, Pluto Press, 2008) 66 [trans of: *Peau noire, masques blancs* (first published 1952)].

¹⁵⁸ Frantz Fanon, *The Wretched of the Earth* (Richard Philcox trans, Grove Press, 1963) 236.

¹⁵⁹ *Ibid* lvii–lviii.

¹⁶⁰ Carlos P Romulo, *The Meaning of Bandung* (University of North Carolina Press, 1956) 98.

¹⁶¹ Geoffrey Best, *War and Law since 1945* (Clarendon Press, 1994) 343.

supposedly legalistic discourse of the Conference itself. Eventually, it began to have a broader, more general acceptance in social, political and legal discourse.

B The Algerian War

The Algerian revolution marked the fruition of these strains of language and sentiment. When the war began in 1954, the French, regardless of political allegiance, generally considered imperialism to be acceptable and beneficial.¹⁶² Yet, by the end of the war in 1962, the Algerian conflict had become so controversial and damaging both in France and for France, in the international sphere, that French President de Gaulle was not able to insist on any of the French demands at the 1961 negotiations — despite the fact that France still had the military advantage.¹⁶³ The conversion of the events in Algeria from a domestic police operation to a just war of self-determination was achieved by the dissemination of an ethical narrative about the evils of imperialism and the development of a new approach to international law.

1 Colonialism and Torture

The French public first began to notice the Algerian war in 1956 but it was in 1957, especially after the Battle of Algiers, that the campaigns against it became prominent. The Battle of Algiers attracted media attention and exposed the shocking French treatment of a series of high-profile and sensitive victims.¹⁶⁴ The main issue — the narrative that provoked criticism and seized the public imagination — was the use of torture in Algeria. A range of accounts of torture in Algeria appeared. At first they came from French soldiers who were revolted by what they had seen. *Temoignage chrétien* reproduced *Dossier Jean Muller*, an account of the army's atrocities and a group of Catholic humanists published *Des rappelés témoignent* — 71 letters by soldiers, relating their experiences in Algeria.¹⁶⁵

Later, accounts were published by and about individuals who were tortured. In 1958, Henri Alleg published *La question*, which described his dreadful experiences at the hands of the French military. It sold more than 60 000 copies before it was seized by the government.¹⁶⁶ Simone de Beauvoir and Gisèle Halimi wrote *Djamila Boupacha*,¹⁶⁷ about a young Algerian woman who was

¹⁶² Gil Merom, *How Democracies Lose Small Wars: State, Society, and the Failures of France in Algeria, Israel in Lebanon, and the United States in Vietnam* (Cambridge University Press, 2003) 89; Martin Evans, *The Memory of Resistance: French Opposition to the Algerian War (1954–1962)* (Berg, 1997) 73.

¹⁶³ Merom, above n 162, 150–1; Mathew Connelly, *A Diplomatic Revolution: Algeria's Fight for Independence and the Origins of the Post-Cold War Era* (Oxford University Press, 2002) 4.

¹⁶⁴ Merom, above n 162, 113.

¹⁶⁵ *Ibid.* 106.

¹⁶⁶ Benjamin Stora, *Algeria, 1830–2000: A Short History* (Jane Marie Todd trans, Cornell University Press, 2001) 88–9 [trans of: *Histoire de l'Algérie coloniale, 1830–1954*; *Histoire de la guerre d'Algérie coloniale, 1954–1962*; and *Histoire de l'Algérie depuis l'indépendance* (first published 1991–95)].

¹⁶⁷ Simone de Beauvoir and Gisèle Halimi, *Djamila Boupacha: The Story of the Torture of a Young Algerian Girl which Shocked Liberal French Opinion* (Peter Green trans, André Deutsch and George Weidenfeld and Nicolson, 1962).

tortured, and *La Gangrène* was written about people being tortured in France.¹⁶⁸ In addition to these books, reports of torture were widely and frequently disseminated in France through the media.¹⁶⁹

The individual testimonies, with their distressing and disgusting details were powerful means of overcoming apathy or indifference towards the war.¹⁷⁰ Their effect was made stronger still, however, by the way that they employed the post-war language and sensibility mentioned above. Both *Djamila Boupacha* and *La question* began with a comparison of the French soldiers to the Nazis. Nazism, they stated, was not a German evil but something that could take root anywhere. As Sartre writes in the preface to *La question*:

In 1943, in the Rue Lauriston (the Gestapo headquarters in Paris), Frenchmen were screaming in agony and pain: all France could hear them. In those days the outcome of the war was uncertain and the future unthinkable, but one thing seemed impossible in any circumstances; that one day men should be made to scream by those acting in our name.¹⁷¹

The fact that the French were acting like Nazis was not, as Fanon explained, ‘an accident or an error or a fault’.¹⁷² Rather, it was a necessary and inevitable corollary of colonialism. Fanon went on to explain that ‘[c]olonialism cannot be understood without the possibility of torturing, of violating, or of massacring’.¹⁷³ Simone de Beauvoir echoed this understanding, illustrating it again with the imagery of the Second World War:

Either despite your willing and facile grief over such past horrors as the Warsaw ghetto or the death of Anne Frank — you align yourselves with our contemporary butchers rather than their victims and give your unprotesting assent to the martyrdom which thousands of Djamilas and Ahmeds are enduring in your name, almost, indeed, before your very eyes; or else you reject, not merely certain specific practices, but the greater aim which sanctions them, and for which they are essential.¹⁷⁴

This was a compelling comparison in a country that remembered the occupation and prided itself on being the vanguard of civilisation, the home of the *Declaration of Rights of Man and the Citizen*, liberty and equality. It made it impossible to defend policies of repression and allowed the anti-war movement to transform the issue into a question of France’s own identity. Indeed, Fanon complained that the French were more concerned for the well-being of the French torturers than for the tortured Algerians.¹⁷⁵

¹⁶⁸ *The Gangrene* (Robert Silvers trans, Lyle Stuart, 1960) [trans of: *La Gangrène* (first published 1960)].

¹⁶⁹ Evans, above n 162, 77–8.

¹⁷⁰ *Ibid* 143.

¹⁷¹ Henri Alleg, *The Question* (John Calder trans, John Calder Publishers, 2006) xxvii [trans of: *La question* (first published 1958)].

¹⁷² *Ibid* 66.

¹⁷³ *Ibid*.

¹⁷⁴ Beauvoir and Halimi, above n 167, 20.

¹⁷⁵ Frantz Fanon, *Towards the African Revolution: Political Essays* (Haakon Chevalier trans, Monthly Review Press, 1967) 71 [trans of: *Pour la révolution africaine: Écrits politiques* (first published 1964)].

This focus on French identity and understanding might have had its problematic aspects, but it did facilitate a significant change in French society and politics. Some important officials resigned from their positions, including General Jacques Paris de Bollardière and Paul Teitgen, the police commissioner of Algiers.¹⁷⁶ Intellectuals set up committees and organisations, including the Comité d'Action des Intellectuals contre la Poursuite de la Guerre en Afrique du Nord [Action Committee of Intellectuals Against the Continuation of the War in North Africa] in 1955 and the Djamila Boupacha committee.¹⁷⁷ There was also the Jeanson network and the 121 manifesto that supported illegal activities against the war.¹⁷⁸ From 1960–62, large protests took place in Paris, resulting in deaths.¹⁷⁹ Eventually, the lack of support for the war in French society made it impossible to continue to prosecute the war.¹⁸⁰

2 *The Algerian Resistance and International Law*

The Algerian Front de Libération Nationale ('FLN') and, later, the Algerian Provisional Government endeavoured to prove that the French were not just acting unethically, but also illegally. Algerian lawyers took the allegations made in the works discussed above, like *La Gangrene* and *Les rappelés témoignent*, they referred to the accusations of Sartre¹⁸¹ and the damning reports that were disturbing the public conscience, and presented them as offences against the laws of armed conflict. This argument required a reinterpretation of the existing laws of armed conflict and principles of international law. The FLN pursued this understanding of law in the diplomatic sphere and at the United Nations¹⁸² and it was articulated in the Provisional Government's White Paper on the Application of the Geneva Conventions¹⁸³ and Bedjaoui's *Law and the Algerian Revolution*.¹⁸⁴

The primary aim of the FLN, the White Paper and Bedjaoui's treatise was to deny the French argument that Algeria was an integral part of France and the war taking place there was domestic police action¹⁸⁵ — an argument that, as Bedjaoui stated, allowed France to settle down 'amid the bloodstained horrors of an unforgivable war under shelter of plea that the laws of humanitarian conventions do not apply'.¹⁸⁶ Instead, the FLN aimed to show that, under international law, Algeria had a right to independence and self-determination;

¹⁷⁶ Merom, above n 162, 115.

¹⁷⁷ Stora, above n 166, 90; Melissa M Ptacek, 'Simone de Beauvoir's Algerian War: Torture and the Rejection of Ethics' (2015) 44 *Theory and Society* 499, 523.

¹⁷⁸ Merom, above n 162, 129; Stora, above n 166, 79.

¹⁷⁹ Stora, above n 166, 87.

¹⁸⁰ Merom, above n 162, 150; Fraleigh, above n 24, 199.

¹⁸¹ See, eg, Algerian Office, *White Paper on the Application of the Geneva Conventions of 1949 to the French-Algerian Conflict* (1960) ('White Paper'), referring to *La Gangrene* at 33 and citing Sartre at 58. See also Mohammed Bedjaoui, *Law and the Algerian Revolution* (International Association of Democratic Lawyers, 1961), referring to the 'gangrene of torture' at 214.

¹⁸² Mohamed Alwan, *Algeria before the United Nations* (Robert Speller & Sons, 1959) 70.

¹⁸³ *White Paper*, above n 181.

¹⁸⁴ Bedjaoui, above n 181.

¹⁸⁵ *White Paper*, above n 181, 10–12.

¹⁸⁶ Bedjaoui, above n 181, 218.

that its army, the Armée de Libération Nationale ('ALN'), was a legitimate force; and that the laws of war applied.

One of the ways in which the FLN tried to prove this was to gain legal recognition from other states. This took time and a concerted diplomatic effort;¹⁸⁷ at the beginning of the war, the Arab League was unwilling to support the FLN's claims about the nature of the conflict,¹⁸⁸ the United States supported France, and many Third World nations were cautious about articulating their position.¹⁸⁹ The FLN, however, set about establishing diplomatic posts and permanent missions abroad.¹⁹⁰ Their representatives began attending various Third World international conferences.¹⁹¹ Eventually the Provisional government joined the Arab League,¹⁹² played off the Soviet bloc and garnered support in the United States.¹⁹³ It gained recognition from the increasing number of Third World countries.¹⁹⁴

With this growing support, the Provisional Government was able to use the United Nations as a forum to publicise its concerns and fight for recognition of the Algerian right to independence and self-determination. From 1955 onwards, the question of Algerian self-determination was discussed in the General Assembly, with ever more support for Algeria.¹⁹⁵ Alwan describes the gradual shift between 1955 and 1958 in favour of the Algerian cause:

The analysis of the voting records on the different resolutions from the 10th to the 13th sessions of the Assembly shows three major changes in position, which came about gradually. Firstly, the number of the outright supporters of France has decreased by one-third during the four-year period. In 1958, France was left with 18 votes of support instead of 27 as in 1955. Secondly, the number of the supporters of the Algerian cause to self-determination and independence has increased in the same period by 15 per cent, namely from 28 votes in 1955 to 35 votes in 1958.

Thirdly, the number of countries which have adopted a policy of hands-off in regard to the Algerian problem has tremendously increased. The abstentions have increased by almost six times from 5 in 1955 to 28 in 1958.¹⁹⁶

Eventually, in December 1960, the General Assembly adopted, first, a declaration on the granting of independence to colonial countries and, later, a declaration on the Algerian right to self-determination.¹⁹⁷ By 1959, even the French were forced to adopt the language of self-determination — although they did limit it with significant qualifications.¹⁹⁸ In this way, the idea of

¹⁸⁷ Connelly, above n 163, 74; Alwan, above n 182, 67.

¹⁸⁸ Connelly, above n 163, 75.

¹⁸⁹ Ibid.

¹⁹⁰ Eldon van Cleef Greenberg, 'Law and the Conduct of the Algerian Revolution' (1970) 11 *Harvard International Law Journal* 37, 43.

¹⁹¹ Ibid.

¹⁹² Ibid 44.

¹⁹³ Connelly, above n 163, 277.

¹⁹⁴ Alwan, above n 182, 40.

¹⁹⁵ Ibid 67–8.

¹⁹⁶ Ibid.

¹⁹⁷ Arnold Fraleigh, 'The Algerian War of Independence' (1967) 61 *Proceedings of the American Society of International Law* 6, 12.

¹⁹⁸ Ibid 11.

self-determination was expanded, as Bedjaoui explains, from a principle that applied to European peoples, to ‘a fundamental principle of international morality’ — a ‘driving force, a dynamic principle, in world affairs’.¹⁹⁹ Eventually, as was shown, it was forced into the *Additional Protocol I*, despite its unsettling effect on the established categories of international law.

The Algerian legal analyses referred to the increasing recognition of the Algerian Provisional Government,²⁰⁰ its expanding diplomatic relations,²⁰¹ and the United Nation resolutions²⁰² to bolster their legal arguments about the legitimacy and nature of the Algerian conflict. Bedjaoui used these examples, together with an array of evidence that, he argued, showed that France had treated the conflict as a war, to prove that it was an international conflict to which the laws of armed conflict applied.²⁰³

This was a controversial claim in light of the existing law,²⁰⁴ and the White Paper took a more circumspect approach, arguing that even if the conflict was not recognised by France as an international conflict, it was still governed by Common Article 3 of the *Geneva Conventions*.²⁰⁵ Common Article 3, the White Paper stated, applied to every internal armed conflict, even if it were the ‘work of “bandits”’.²⁰⁶ Bedjaoui, while maintaining that the French Republic had no discretion to decide whether an armed conflict was international, agreed that that Common Article 3 applied to all internal armed conflicts. It was the ‘minimum humanitarian protection applicable in *all* circumstances’.²⁰⁷

The application of Common Article 3 meant, the White Paper argued, that the French use of torture and summary executions was illegal. So was the degrading treatment of soldiers and civilians.²⁰⁸ Furthermore, the White Paper argued, reprisals, internment and *regroupment* of civilians were ‘acts of violence’ prohibited by Article 3(a). Indeed, the *regroupment* was described as being akin to concentration camps. This broad interpretation of the scope and application of Common Article 3 was something of an extension of the prevailing understanding of the laws of armed conflict, which, as has been discussed, gave little protection to civilians.²⁰⁹

The White Paper also made the argument that the ALN was a legitimate belligerent because it complied with the requirements of an organised resistance movement under Article 4 of the 1949 *Geneva Prisoners of War Convention*.²¹⁰ Bedjaoui went beyond the White Paper’s argument, claiming that the ALN was more than a group of partisans — it was a regular, national and belligerent army

¹⁹⁹ Bedjaoui, above n 181, 242.

²⁰⁰ Ibid 123.

²⁰¹ Ibid 129–39.

²⁰² *White Paper*, above n 181, 8.

²⁰³ Bedjaoui, above n 181, 141–7.

²⁰⁴ Greenberg, above n 190, 47.

²⁰⁵ *White Paper*, above n 181, 19–22.

²⁰⁶ Ibid 19. Bedjaoui uses the same phrase: Bedjaoui, above n 181, 212.

²⁰⁷ Bedjaoui, above n 181, 212 (emphasis in original).

²⁰⁸ Ibid 212; *White Paper*, above n 181, 20.

²⁰⁹ Greenberg, above n 190, 50.

²¹⁰ *White Paper*, above n 181, 26. These requirements were: being commanded by a responsible person; having a fixed distinctive sign; carrying arms openly; conducting their operations in accordance with the laws and customs of war.

in law.²¹¹ To bolster this claim, the Algerian Provisional government acceded to the 1949 *Geneva Conventions* in 1960 and pointed to its record of compliance with the laws of war. Indeed, the ALN made special, public, gestures of treating prisoners well and releasing them to show its adherence to the humane laws of war.²¹²

These arguments, if accepted, would have clear practical benefits for the ALN, because they would circumscribe the possibilities of French action and would make the ALN eligible for treatment as regular belligerents. Yet, the Algerian legal work did more than this. It lent the Algerian cause legitimacy and dignity. Simply by making such legal claims, by showing its ability to deploy legal language and comply with the law, the Provisional Government showed that it was a civilised government. In contrast, the French, in their refusal to acknowledge the law, could be shown again to be falling short of the standards of civilisation:

The *Geneva Conventions* are intended to be an emphatic avowal before the world that the humanitarian principles of justice and compassion must govern and determine the treatment of man by man if our civilization is to be worthy of the name.²¹³

Bedjaoui outlined the ‘crimes of the colonists’:

No one can to-day plead ignorance, no one can to-day deny the organised use of torture, summary executions, the practice of genocide through the extermination of whole villages, the cowardly shot in the back, the mutilations practiced by especially trained ‘paras’, the brain washing, the slow death in dungeons, passed off as suicide, the execution of those sentenced to death after farcical trials, the economic blockade of villages decimated by famine, fire and napalm bombs, the ‘regroupments’ and other inhuman systems of herding human beings.²¹⁴

In this way, the Algerian account of the law insisted that the French manner of pursuing the war in Algeria was not an example of the insufficiency of law, or the Imperial partiality of law. Rather, it posited laws — laws that were civilised and humane, laws that protected national liberation movements, civilians and belligerents, and argued that this law was simply not being applied. This technique shares much with the approach taken later at the Diplomatic Conference. When the Algerians used it in the early 1960s, however, it was still considered, by contemporary Western lawyers, as being ‘original’²¹⁵ and somewhat controversial;²¹⁶ certainly partial.²¹⁷ Cot, in his supportive preface to *Law and the Algerian Revolution*, described it as an attempt to remodel the existing law for a new time.²¹⁸ Less supportive reviewers questioned the fervour

²¹¹ Bedjaoui, above n 181, 53.

²¹² Ibid 215.

²¹³ *White Paper*, above n 181, 58.

²¹⁴ Bedjaoui, above n 181, 207 (emphasis added).

²¹⁵ Pierre Cot, ‘Preface’ in Mohammed Bedjaoui, *Law and the Algerian Revolution* (Publications of the International Association of Democratic Lawyers, 1961) 1, 3.

²¹⁶ Greenberg, above n 190, 41; Fraleigh, above n 24, 181.

²¹⁷ C A Hopkins, ‘Law and the Algerian Revolution (Book Review)’ (1963) 39 *British Yearbook of International Law* 499, 499; Richard Falk, ‘Law and the Algerian Revolution (Book Review)’ (1963) 57 *American Journal of International Law* 176, 176.

²¹⁸ Cot, above n 215, 2.

of Bedjaoui's work, suggesting that lists of atrocities were out of place in a legal treatise.²¹⁹

Nevertheless, despite these doubts, the reiteration of the Algerian legal position in the public sphere seemed to have some effect on French actions. In 1961, Bedjaoui was able to suggest that, after six years of war, the French army was starting to treat captured Algerian combatants as prisoners of war.²²⁰ Greenberg argues that there were changes in France. He points out that, although at first French tribunals rejected Algerian claims to belligerency, there was some change in the later years of the war, as the Cour de cassation, France's highest court, became ambiguous in its judgments about Algerian prisoners:

This trend in French jurisprudence was perhaps more indicative of the Court's humanitarian solicitude than of the strength of the legal arguments for applying the *Geneva Conventions*, and was also undoubtedly a response to the fact that FLN prisoners were often treated by processing authorities as prisoners of war. But, again, it additionally indicates the extent to which French opinion had been moved to accept the Algerian situation as requiring some imposition of international legal restraint.²²¹

Greenberg argues that these decisions put pressure on authorities to be more careful about giving prisoner of war treatment to regular ALN forces.²²² In this way, he explains, 'political factors led to increased pressure to conform to legal restraints; legal restraints pressured political actors to shape their behaviour in certain ways'.²²³

Thus, the Algerian legal interpretation, the work done in the United Nations on the principle of self-determination, and the diplomatic efforts of FLN meant that there were new legal arguments, ideas and principles available. And even if they weren't universally accepted they were still there as an alternative and a reference point that was making it harder to simply insist on the traditional application of law. Indeed, when these innovative principles were allied with the increasing hostility towards imperialism and sympathy for national liberation movements,²²⁴ it became increasingly harder to justify colonialism or to accept the repressive strategies that underpinned it.

C *Opposition to the Vietnam War*

The Vietnam War marked another shift in the possibilities of language and action. The anti-war demonstrations are as iconic of the war as the conflict itself. Nevertheless, it has been suggested that the opposition to the war was not as widespread as the popular memory of protests suggests.²²⁵ For the first part of the war, Mueller argues, the degree of opposition to the war was unexceptional.²²⁶ Indeed, when the US became involved in the war, the government chose not to publicise it much, partly from fear that the public would

²¹⁹ Hopkins, above n 217, 499

²²⁰ Bedjaoui, above n 181, 219.

²²¹ Greenberg, above n 190, 62.

²²² Ibid 64.

²²³ Ibid 70.

²²⁴ Connelly, above n 163, 279.

²²⁵ John E Mueller, *War, Presidents, and Public Opinion* (Wiley, 1973) 63.

²²⁶ Ibid 56.

respond too enthusiastically and demand the escalation of the war.²²⁷ Even when the weight of opposition did increase in 1968–69 this was also for unremarkable reasons: war weariness among the troops and public with a war that was dragging on and going badly, and a lack of direction from a government in which divisions were showing.²²⁸

Yet, while the amount of opposition was not unusual, its appearance and its eventual impact were certainly unprecedented. Mueller attributes this difference to the fact that the intellectual left, which had supported the Korean War, turned against the Vietnam War.²²⁹ This was a group that had been involved in disarmament and then in the civil rights movement. They were able to bring to the anti-war campaign the techniques and methods that they had learnt in the civil rights movement.²³⁰ From 1965 there were teach-ins and protests and in 1967 there was a shift to resistance.²³¹

The basic premise of the anti-war movement was that the war was immoral and illegal. The anti-war campaign complained that population centres were being attacked, that people were being deported and massacred and even that genocide was taking place in Vietnam.²³² They emphasised the horrible way innocent, defenceless civilians — especially women and children — were being killed. Protests carried dummies of bandaged children and Uncle Sam covered in blood.²³³ There were posters of children burned with napalm put up by the Students for a Democratic Society ('SDS'), asking, 'why are we burning, torturing, killing the people of Vietnam?'²³⁴

The immorality of these actions was confirmed in two ways; by comparing it to Nazi behaviour and American values. Just like the French opposition to the Algerian war, those opposed to American involvement in Vietnam invoked the memory of Nazi Germany to show the depths to which America had sunk. Bertrand Russell stated that '[t]he war in Vietnam is a war like that waged by the Germans in Eastern Europe. It is a war designed to protect the continued control over the wealth of the region by American capitalists'.²³⁵ Telford Taylor, who was endowed with a special authority on account of his involvement in the Nuremberg trials, based his book *Nuremberg and Vietnam: An American Tragedy* on this type of analogy.²³⁶ Taylor placed side-by-side eyewitness

²²⁷ Daniel C Hallin, *The 'Uncensored War': The Media and Vietnam* (University of California Press, 1989) 212.

²²⁸ Mueller, above n 225, 56.

²²⁹ Ibid 39.

²³⁰ Ibid 158.

²³¹ Charles DeBenedetti and Charles Chatfield, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse University Press, 1990) 391; Nancy Zaroulis and Gerald Sullivan, *Who Spoke Up? American Protest Against the War in Vietnam, 1963–1975* (Doubleday, 1984) 38.

²³² See, eg, Richard Falk, 'Introduction' in Frank Browning and Dorothy Forman (ed), *The Wasted Nations: Report of the International Commission of Enquiry into United States Crimes In Indochina, June 20–25, 1971* (Harper & Row, 1972) xi, xv. See also Sven Ekberg et al, 'Task Force Report' in Frank Browning and Dorothy Forman (ed), *The Wasted Nations: Report of the International Commission of Enquiry into United States Crimes in Indochina, June 20–25, 1971* (Harper & Row, 1972) 81, 90.

²³³ Zaroulis and Sullivan, above n 231, 56.

²³⁴ Ibid 49.

²³⁵ Bertrand Russell, *War Crimes in Vietnam* (George Allen & Unwin, 1967) 117.

²³⁶ Taylor, above n 50.

accounts of a massacre of Jews in 1942 and the events of Son My (My Lai).²³⁷ He asked: 'Will Son My go down in the history of man's inhumanity bracketed with Katyn, Lidice, Oradour, Malmédy and other names that still ring sadly in the ears of those old enough to have heard the sound'.²³⁸ Taylor concluded that: 'Somehow we failed ourselves to learn the lessons we undertook to teach at Nuremberg, and that failure is today's American tragedy'.²³⁹ As in France, this comparison to the Nazis constituted an irrefutable allegation of evil.

The depravity of American actions was further highlighted by holding it up against stated American principles. American pride in enlightened values became a tool for the opposition. This is shown in Bertrand Russell's statement:

In the name of freedom pregnant women were ripped open, and the electorate did not rebel. Every American who voted Republican or Democratic shares the guilt of these sanguinary deeds. America, the self-proclaimed champion of freedom to torture and kill women and children for the crime of wishing to go on living in their homes.²⁴⁰

If America continued betraying its principles in this way, it would lose its soul and become a nation of murderers. For some this had already happened. Susan Sontag said 'America has become a criminal sinister country — swollen with priggishness, numbed by affluence, bemused by the monstrous conceit that it has the mandate to dispose of the destiny of the world'.²⁴¹

This interference in other countries seemed, to the anti-war movement, to compound the immorality of the war. In France, the brutality of the conflict was used to show the evils of colonialism. In America, the evils of imperialism were taken for granted (by the anti-war movement, at least) and were used to highlight the evils of the conflict. Any such asymmetric, Imperial conflict, critics argued, would unavoidably lead to brutality and immorality. As Hans Morgenthau stated: 'It is the nature of the Vietnam war itself which makes what we are doing there inevitable'.²⁴² In a world where imperialism was no longer acceptable, America had become the 'universal empire of evil'²⁴³ and any such war it carried out would be immoral.

This application of American principles to the conflict was a powerful technique. It is impossible to say that the values are wrong; the only answer is that the disputed behaviour does not contravene the established values. This was the only argument open to the government and apologists for the law, and they used it when they tried to show that they were not attacking civilians but military objectives or that they were not involved in an Imperial adventure.²⁴⁴ Yet, by making such statements they confirmed the values and assumptions found in the anti-war movement's ideology.

²³⁷ Ibid 124–5.

²³⁸ Ibid 13.

²³⁹ Ibid 207.

²⁴⁰ Russell, above n 235, 63.

²⁴¹ Sandy Vogelgesang, *The Long Dark Night of the Soul: The American Intellectual Left and the Vietnam War* (Harper & Row, 1974) 73.

²⁴² Erwin Knoll and Judith Nies McFadden (eds), *War Crimes and the American Conscience* (Holt Rinehart and Winston, 1970) 14–15.

²⁴³ Russell, above n 235, 73.

²⁴⁴ Vogelgesang, above n 241, 121.

The opposition to the war was expressed not only in moral terms but also with legal assessment. It was possible for those with some passing acquaintance with the laws of war to argue that American actions in Vietnam were illegal, war crimes or even genocide.²⁴⁵ Eventually, however, this facile statement became a problem for international lawyers to work through. For those familiar with the laws of war, it was not easy to argue that the conduct of the war was illegal but it was not impossible either. There were two major obstacles to the argument that the US was acting illegally. First, the 1949 *Geneva Convention* only protected civilians in occupied territory. It did not protect civilians who lived, for example, in an ally's territory. Thus, citizens of South Vietnam, an ally of the US, did not benefit from the *Geneva Conventions*. The second problem was that there was almost no law dealing with aerial bombardment.

Although some lawyers recognised these limitations to the law,²⁴⁶ others tried to extend the reach of international law. Telford Taylor dealt with the first problem by arguing that it was important to look at the principles of Nuremberg, rather than the bare record of the law. In this way, he argues that even though Son My was in South Vietnam, the area was considered to be a Vietcong military base. It would be 'highly artificial' to say that this was not 'hostile' territory within the meaning of the *Hague Convention* or to question the applicability of the laws of war.²⁴⁷ Taylor was not, however, able to continue to use this approach to state that the air war was illegal. He admitted that there was nothing in the laws of war to prevent aerial bombardment or to stop guerrillas from being put to death.²⁴⁸

Others, however, felt themselves able to go further than Taylor. Some commentators simply stated that the US was contravening the *Hague* and *Geneva Conventions*, without pointing to any specific clauses that might have been contravened.²⁴⁹ More developed arguments included the statement that the air war was illegal because the places attacked were undefended, and therefore protected by the 1907 *Hague Convention*.²⁵⁰ Another argument was that the illegality of bombing could be extrapolated from the prohibition on killing civilians face to face.²⁵¹ Finally, critics increasingly argued that the bombing was illegal because it targeted places that did not have military importance or, when

²⁴⁵ Gunnar Myrdal, 'Preface: On the Necessity for an American Catharsis' in Frank Browning and Dorothy Forman (eds), *The Wasted Nations: Report of the International Commission of Enquiry into United States Crimes in Indochina, June 20–25, 1971* (Harper & Row, 1972) vii, vii.

²⁴⁶ See, eg, Tom J Farer, Robert G Gard and Telford Taylor, 'Vietnam and the Nuremberg Principles: A Colloquy on War Crimes' (1973) 5 *Rutgers Camden Law Journal* 1, 22; Benjamin B Ferencz, 'War Crimes Law and the Vietnam War' (1968) 17 *American University Law Review* 403, 412.

²⁴⁷ Taylor, above n 50, 134.

²⁴⁸ *Ibid* 136, 140.

²⁴⁹ See, eg, Hans Göran Franck, 'International Law and the US War in Indochina' in Frank Browning and Dorothy Forman (eds), *The Wasted Nations: Report of the International Commission of Enquiry into United States Crimes in Indochina, June 20–25, 1971* (Harper & Row, 1972) 293, 295.

²⁵⁰ See, eg, Fred Branfman, 'Bombing in Laos — A Crime against Humanity' in Frank Browning and Dorothy Forman (eds), *The Wasted Nations: Report of the International Commission of Enquiry into United States Crimes in Indochina, June 20–25, 1971* (Harper & Row, 1972) 63, 76.

²⁵¹ See, eg, Knoll and McFadden (eds), above n 242, 75.

they were military objectives, nevertheless resulted in disproportionate casualties.²⁵²

As has been discussed, the distinction between acceptable and illegal targets for aerial bombardment had not yet been confirmed in international law. Nonetheless, this accusation had a profound resonance. It was not only repeated by opponents of the war but it was taken on by the supporters of the war as a pertinent accusation that needed to be answered. This is shown increasingly towards the end of the war, especially in response to the outrage about the Christmas Bombing in 1972.²⁵³ The Administration and supporters of government policy countered accusations that it had resulted in excessive civilian casualties by arguing that the bombs were only meant for military targets.²⁵⁴ To try to show the legality of the bombing, Burrus Carnahan states that all the targets were carefully verified to be military objectives and that one was rejected because it was in a highly populated area.²⁵⁵ He proceeds to argue that there was an attempt to keep civilian casualties to a minimum. Moreover, this attempt was made even at the risk of pilots' lives, who were instructed to fly straight and level for the last four minutes of the bomb run to ensure that they had properly identified their target.²⁵⁶ The result of these impressive efforts, Carnahan states, was a remarkably small number of civilian casualties that were certainly not disproportionate to military advantage.²⁵⁷

Therefore, by the end of the Vietnam War in 1975, many of the moral and legal propositions of the anti-war movement had been accepted, at least rhetorically and to an arguable extent in practice,²⁵⁸ by the government and the supporters of the war. It had become impossible to say that civilians were being killed in the course of the war without appearing to be a perpetrator of a war crime. The only way to try to escape this label was to show that when civilians were killed it was the unavoidable and proportionate result of an attack on a military objective. In this way, a new value system started to become accepted and unarguable.

V CONCLUSION

Thus, when the Diplomatic Convention began in 1974, many of the fights for language and possibilities had already been waged and won (or lost). Almost all international lawyers agreed that colonialism was wrong and that there were certain things that you could not do to people, whether they were regular or irregular combatants or civilians. Indeed, these matters were so clearly agreed upon and starting to seem so obvious that other positions were becoming untenable. The existing rules surrounding guerrillas were so objectionable that

²⁵² See, eg, Ekberg et al, above n 232, 90; Branfman, above n 250, 76.

²⁵³ See Martin F Herz and Leslie Rider, *The Prestige Press and the Christmas Bombing, 1972: Images and Reality in Vietnam* (Ethics and Public Policy Center, 1980) 54.

²⁵⁴ Vogelgesang, above n 241, 121.

²⁵⁵ Burrus M Carnahan, "Linebacker II" and *Protocol I: The Convergence of Law and Professionalism* in 'Civilian Immunity and the Principle of Distinction' (1982) 31 *American University Law Review* 855, 865.

²⁵⁶ *Ibid* 866.

²⁵⁷ *Ibid* 867.

²⁵⁸ DeBenedetti and Chatfield argue that they stopped President Nixon's 1969 plan to launch a large military blow against North Vietnam: DeBenedetti and Chatfield, above n 231, 399.

they were simply ignored. Meanwhile, the gap where the rules protecting civilians should have been was filled in with what was assumed to be obvious. States might wrangle over details but they could not question the broad principles of protection. To say anything else would have been to question the legitimacy and value of the law itself — a position which only marginalised, Third World countries could take with any comfort.

That this sensibility came partly from anti-colonial discourse and social movements shows some indirect and direct ways in which such movements can have an impact on the law. International law is, as Martti Koskenniemi points out, a way to promote dominant positions but also to hear claims of the excluded against the dominant.²⁵⁹ The Diplomatic Conference shows some of the ways this can be done and some of the limits and possibilities fashioned by international law. When Third World delegates tried to directly change the law during the Conference concerning wars of national liberation with political language, the process was contested and destructive. This process stands as a warning of the difficulties entailed in an overt departure from the apolitical language and accepted categories of law.

In contrast, the success in changing the general principles regarding civilians attests to the possibilities of creativity when the legal forms are complied with correctly. Correctly, in this case, means using the appropriate legal language, invoking customary law and traditional principles of law.²⁶⁰ It means presenting laws as already part of the law, rather than an innovation. To do this also requires the expression of an acceptable and shared sensibility about the law. In the 1970s, this sensibility was the humanitarian, anti-colonial sensibility that was established in general discourse prior to the legal change. This indirect work, therefore, laid the ground for the most successful changes. For, once established, if a new interpretation conformed to the prevailing sensibility and the other disciplinary requirements, the more likely it was to pass uncontested and unnoticed and, therefore, have greater resonance.

The invisibility and compulsion of this change resulted in many paradoxes and ambiguities. The concurrent protection of guerrillas and civilians was a problem for the law. So too were the ambiguous expressions about the protection of civilians. There were many provisions that were, deliberately, left open to different interpretations. Yet, the delegates to the Conference, pressed and limited in what they could say and eager for a successful conclusion, were able to overlook these paradoxes.²⁶¹ Military states, however, found themselves less ready to do so, and they refused to ratify *Additional Protocol I*.²⁶² This might have been the end of the story — just another failure of the Third World to change international law. Yet, the rules continued to stand in the documents, until, after years of being shunned, they were called upon as a resource,

²⁵⁹ Martti Koskenniemi, *The Politics of International Law* (Hart, 2011) 265.

²⁶⁰ *Ibid* 298.

²⁶¹ Aldrich, above n 63, 778. Aldrich had reservations about the provisions on reprisals but otherwise seemed positive about the outcome.

²⁶² W Hays Parks, 'Air War and the Law of War' (1990) 32 *Air Force Law Review* 1, 111; Ariane L DeSaussure, 'The Role of the Law of Armed Conflict during the Persian Gulf War: An Overview' (1994) 37 *Air Force Law Review* 41, 49; Abraham D Sofaer, 'The Position of the United States on Current Law of War Agreements: Remarks' (1987) 2 *American University Journal of International Law and Policy* 460, 463.

interpreted in their most humane light, and then declared to be binding law by international lawyers at the end of twentieth century.²⁶³ In this way, the work and sentiments of the delegates to the Conference, the postcolonial theory and activism of intellectuals and activists, the compromises and paradoxes of the Protocols, survived to be eventually reinscribed as relatively straightforward, authoritative expressions of international humanitarian law.

²⁶³ Alexander, 'A Short History of International Humanitarian Law', above n 3, 130–3.