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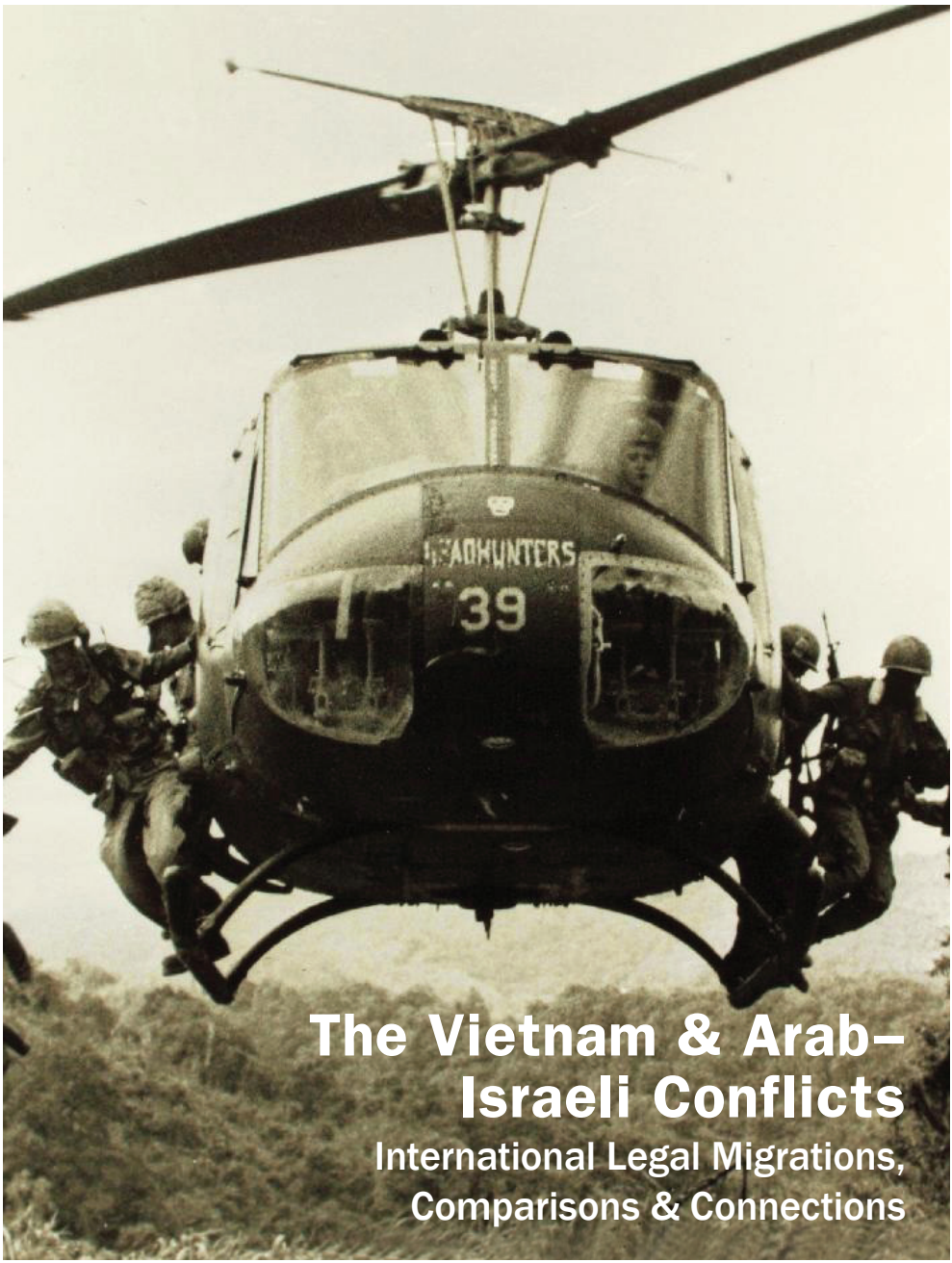

The Vietnam & Arab–Israeli Conflicts

International Legal Migrations, Comparisons & Connections

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Preface

The wars fought in Vietnam and the Middle East in the 1960s and early 1970s were not just physical confrontations. They were also battles of ideas, including legal ideas. To justify their decision to resort to the use of military force and to use that force in a particular way, the United States, North Vietnam, South Vietnam, Israel, Egypt, Syria and other parties to these conflicts appealed widely to international laws and customs. These appeals rested not only on settled understandings of the relevant international law but also on legal interpretations that attempted to shift those understandings. Moreover, the legal arguments advanced in one place (Vietnam or the Middle East) often had significant purchase in another place.

On 6 December 2018, the Transsystemic Law Research Cluster at the Middle East Institute, National University of Singapore, and Macquarie University, Australia, jointly held a workshop to examine in greater depth some of the international legal justifications both for the resort to force and for the conduct of hostilities that emerged during the Vietnam War and the 1967 and 1973 Arab–Israeli wars. This issue of *Insights* carries papers based on the presentations made at the workshop.

Editor's Introduction
"The Third World is a Problem"
Arguing about the Laws of War after the Fall of Saigon

Following the fall of Saigon in 1975, debates on the laws of war among lawyers serving in the United States government shared a common theme: The third world, which had mostly supported North Vietnam throughout that war and which, in 1977, sought to introduce the Soviet doctrine of national liberation wars into the corpus of international law, was a problem. Prominent lawyers in the Carter and Reagan administrations did not like the look and orientation of the United Nations after decolonisation, because in their view, it had become anti-American and pro-Soviet. Accordingly, the United States refused to ratify the 1977 Additional Protocols to the 1949 Geneva Conventions, which are at the core of the regulation of armed conflict in international law. Moving away from the UN Charter's provisions on the use of force and from law-making in multilateral UN fora, the United States, in its conversations with smaller subgroups of "like-minded states", began to advance new legal justifications for employing force.

In 1985, US Secretary of State George Shultz went so far as to call the UN Charter a "suicide pact".[1] The political discourse on the use of force by Reagan administration officials shifted markedly.[2] It was now being argued that international law had to be reformed if it was to remain credible. How did this shift, in which the UN Charter was no longer viewed as being fit for purpose, occur?

In my view, what lay behind this shift was ideological opposition to the new international law, as embodied in the 1977 Additional Protocols and the law of human rights, which was now seen as reflecting the interests of the "third world". We can see these changes influencing American policy by revisiting:

[1] George Shultz, *Turmoil and Triumph: My Years as Secretary of State* (New York: Charles Scribner's Sons 1993), 678.

[2] Richard Falk, "The Decline of Normative Restraint in International Relations", *Yale Journal of International Law* 10 (1984–5), 263–270.

(i) Debates on Article 51 of the UN Charter in the 1980s and comparing these to earlier debates in the 1960s when there was still a certain reverence for the charter, which had been invoked to provide a legal basis for the US intervention in the collective self-defence of South Vietnam.

(ii) Debates on why the Reagan administration did not ratify the 1977 Additional Protocols to the 1949 Geneva Conventions.

Debates on Article 51 of the UN Charter

On 10 March 1966, the Office of the Legal Adviser of the US Department of State published a memorandum titled "Legal Advice in Defence of the Vietnam War" ("Memorandum").[3] Drafted by Leonard Meeker, it was a carefully constructed document that provided the legal basis for the collective self-defence of South Vietnam. Reading the document today, one does not find it controversial, especially as many of its assumptions regarding the definition of an armed attack and the inherent right of self-defence in customary international law are widely accepted. While the narrative that the United States constructed was considered factually deceptive by some scholars, it was presented in a way that was consistent with the charter's provisions on collective self-defence. Or, as **Richard Falk** puts it in his paper in this issue of *Insights* (see page 10), the US government "put forward elaborate documents defending actions taken by invoking international law rationalisations".

The legal advice was drafted at a time when, I argue, policymakers took lawyers seriously and paid a certain deference to their views. As **Brian Cuddy** explains in his paper (see pages 23–24), US policymakers had originally wanted to characterise their air strikes against North Vietnam as one of reprisal; but after Meeker advised McGeorge Bundy, then-national security adviser, that this was contrary to modern international law, the government relied instead on the right of collective self-defence under the UN Charter. As **Madelaine Chiam** explains in her paper (see pages 17–18), the legal advice was published in response to a memorandum by the Lawyers Committee Concerning American Policy in Vietnam that had criticised an earlier State Department memorandum that lacked detail. She notes that the second memorandum contained far more information and legal authority than the first document. It was this second version of the legal advice that was widely disseminated and published in the *American Journal of International Law*.

[3] *American Journal of International Law* 60 (1966), 565–585.

It was only in the 1970s and 1980s that US policymakers stopped taking lawyers seriously, so much so that government lawyers were forced to come up with increasingly strained readings of the UN Charter to justify the use of force to achieve foreign policy goals, such as containing communism, promoting human rights, and furthering democracy.[4] In more recent years, small groups of lawyers from the United States and the United Kingdom have even come up with new definitions of when force may be employed prior to an armed attack — otherwise known as preventive self-defence — which would revise, if not repudiate, the language of Article 51 of the charter.[5]

The appearance of these later criticisms of government lawyers is not to suggest that the legal advice of 1966 was not without its critics. For the memorandum did provoke a debate between lawyers Quincy Wright, Wolfgang Friedmann, and John Norton Moore, with Friedman complaining that Wright and Moore were invoking the norms of international law supposedly as an objective and compelling standard, when in fact they were just marshalling facts and interpreting the law to conform to their own interpretations of the national interest.[6] Whereas Wright had criticised some of the assumptions contained in the US legal advice justifying the war, especially when it came to the facts of US involvement in Vietnam, Moore expressed a greater willingness to uncritically accept the US interpretation of events. Significantly, however, neither Wright, nor Moore, nor Friedmann went so far as to repudiate Article 51 of the UN Charter. They did not call the charter a "suicide pact".

The Mood Changes

It was only when US defeat in Vietnam became inevitable that the mood changed. This mood was reflected in Falk's debate with Eugene Rostow following the conclusion of the 1973 Paris Accords, when Rostow complained that he no longer recognised international law:

[4] Michael P Scharf and Paul R Williams, *Shaping Foreign Policy in Times of Crisis:* (Cambridge: Cambridge University Press, 2010), 65–86.

[5] Victor Kattan, "Furthering the 'war on terrorism' through international law: How the United States and the United Kingdom resurrected the Bush doctrine on using preventive military force to combat terrorism", *Journal on the Use of Force and International Law* 5 (2018), 97–144.

[6] Quincy Wright, "Legal Aspects of the Vietnam Situation", *American Journal of International Law* 60, no 4 (October 1966), 750–769; John Norton Moore, "The Lawfulness of Military Assistance to the Republic of Vietnam", *American Journal of International Law* 61, no 1 (January 1967), 1–34; Wolfgang Friedmann, "Law and Politics in the Vietnamese War: A Comment", *American Journal of International Law* 61, no 3 (July 1976), 776–785.

> It used to be considered orthodox black-letter doctrine that a state in a condition of civil war had a right to ask for help from friendly states, but that no state had a right under international law to assist the insurrectionaries. Now, we are told, international law has changed in this regard.[7]

Two years prior to Rostow's debate with Falk, the UN general assembly had adopted the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".[8] According to this document, "In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples [entitled to self-determination] are entitled to seek and to receive support in accordance with the purposes and principles of the Charter". [9] International law was clearly evolving in a way that would allow a national liberation movement to claim support from socialist countries to overthrow US allies (like South Vietnam and Israel) that were suppressing these struggles. Alarm bells started ringing, especially after Egypt and Syria sought to recover the territories they lost to Israel in the June 1967 war, which is the subject of **John Quigley's** paper on the October 1973 war (see page 28).

In addition, the liberation movements were invited to participate in the formulation of the law of war at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, where the Egyptian government played a leading role. A proposal to invite a delegation from the Viet Cong to participate in the conference was narrowly rejected by 38 votes to 37, with 33 abstentions.[10] In 1974, the Palestine Liberation Organization (PLO) was granted observer status at the United Nations. As **Ihab Shalbak and Jessica Whyte** explain in their paper (see page 35), the PLO, supported by Egypt, was able to influence the negotiations over the Additional Protocols, in particular by pressing the conference to reconfirm "the legitimacy of the struggles of peoples exercising their right to self-determination".

[7] "The Justness of the Peace: Remarks by Richard Falk" with a response from Eugene Rostow in *American Journal of International Law* 67, 5 (November 1973), 258–271, 266.

[8] General Assembly Resolution 2625 (XXV), 24 October 1970.

[9] Ibid.

[10] *Official Records of the Diplomatic Conference, Vol. V*, at 52–53 (no paragraph number provided). Library of Congress: https://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html

The Debate on Additional Protocol I

On 30 April 1975, the last American helicopter scurried off the roof of the American embassy in Saigon as the city fell to the North Vietnamese army. In 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law adopted the First Additional Protocol to the Geneva Conventions, broadening the scope of International Humanitarian Law (IHL) to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination". As a result, explains **Amanda Alexander** (see pages 50–51), in the final draft of Additional Protocol I, "civilians were defined as not being combatants and granted increased protection yet at the same time combatants were defined in a way that meant that they could also be civilians, at least some of the time".

The demand that IHL apply equally to "freedom fighters" and conventional forces provoked the wrath of Vietnam War veterans and neoconservatives, not only because it appeared to confer legitimacy on armed groups such as the Viet Cong and the PLO, but also because it extended the protection of IHL to guerrilla fighters by allowing them to hide among the civilian population as "farmers-by-day, fighters-by-night".

One of the Vietnam War veterans who strenuously opposed these developments was W Hays Parks, whom William V O'Brien, professor of government at Georgetown University, described as "the leading international law of war expert in the US Army's Judge Advocate General's International Affairs Division".[11] For Parks, international law had been hijacked by the Soviet Union and its Communist proxies and turned into a weapon of war against the West:

> Socialist World protests against US efforts to assist South Vietnam in its resistance to conquest by North Vietnam, and especially the Socialist World's campaign against the United States bombing of North Vietnam, were carefully couched in law of war terms alleging "indiscriminate" bombing of "non-military objectives", "civilian" casualties, and the use of "illegal" weapons.[12]

[11] William V O'Brien, *Law and Morality in Israel's War with the PLO* (New York: Routledge 1991), 191.

[12] W Hays Parks, "Air War and the Law of War", *Air Force Law Review* 1 (1990), 1–111, 68.

In Parks' view, the anti-war movement was using the language of international law to undermine US policy in the Vietnam War by "utilizing fictional accounts of 'war crimes' committed by US military personnel".[13] While Parks acknowledged that acts of violence committed by US military personnel "did occur" and that these could be characterised as "war crimes", he dismissed them as "isolated acts of personal wrongdoing for which the perpetrators were brought before military court-martial to account for their actions."[14] He added:

> These accounts differed substantially from the conduct of the Viet Cong and the North Vietnamese, who used violence against the civilian population as a means of waging war. Anti-war accounts, however, tended to ignore Viet Cong and North Vietnamese atrocities while suggesting that the United States was engaged in a war of genocide as a matter of policy.[15]

Given these strong views, it is not surprising that Parks, along with Douglas Feith, deputy assistant secretary of defense for negotiations policy in the Reagan administration, succeeded in persuading the president to refrain from ratifying Additional Protocol I. In Feith's view, the protocol was "a pro-terrorist treaty that calls itself humanitarian law".[16] President Ronald Reagan would echo these views when he told the nation why the United States could not ratify the treaty:

> We cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the law of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.[17]

[13] W Hays Parks, "Exaggerated or One-sided Claims of Law of War Violations" in *Deception and Deterrence in 'Wars of National Liberation', State-Sponsored Terrorism and Other Forms of Secret Warfare*, ed. John Norton Moore (Durham, North Carolina: Carolina Academic Press 1997), 113.

[14] Ibid, 113–114.

[15] Ibid, 114. One of the historical accounts of the war that Park relied on to support his views was that by the controversial revisionist historian Guenter Lewy. See Guenter Lewy, *America in Vietnam* (Oxford University Press, 1978).

[16] Douglas Feith, "Protocol 1: Moving Humanitarian Law Backwards", 19 *Akron Law Review* (1985–1986), 534.

[17] Letter of Transmittal, 29 January 1987, in 81 *American Journal of International Law* (1987), 911.

Conclusion

It is argued that the shift in the political discourse on the use of force by which the United States would end up viewing Article 51 of the UN Charter as a "suicide pact", and attempts to change IHL as nefarious, occurred for two reasons: Bitterness over the loss of the Vietnam War and the perceived success of national liberation movements in transforming the law of war in a direction inimical to US interests.

What lay behind this shift was resistance to cultural changes taking place in American society in the aftermath of the Vietnam War, when the anti-war movement had gained influence in academia and within the Democratic Party. These cultural changes upset two domestic political constituencies: Vietnam War veterans and neoconservatives who were both of the view that President Jimmy Carter, at best, lacked resolve to confront America's enemies overseas, especially in the Middle East;[18] at worst, he was ideologically sympathetic to the third world.

Following the election of Ronald Reagan in the 1980 presidential election there was a profound shift in the way the US government approached international law issues.[19] These changes would be given added impetus following the attacks against the United States on 11 September 2001, when former Reagan officials encouraged the Bush administration to embrace the doctrine of preventive war, marking a death blow to the UN Charter's provisions on the use of force.[20] Moreover, the United States, along with Israel, still refuses to ratify the Additional Protocols to this day.

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[18] Norman Podhoretz, *Why we were in Vietnam* (New York: Simon and Schuster 1982).

[19] Allan Gerson, *The Kirkpatrick Mission: Diplomacy without Apology America at the United Nations, 1981–1985* (New York: The Free Press 1991).

[20] Victor Kattan, "The "Netanyahu doctrine", the National Security Strategy of the United States of America, and the Invasion of Iraq" in *Human Rights and America's War on Terror*, ed. Satvinder S Juss (Routledge, 2019), 1–28.

How International Law Evolves

Norms, Precedents and Geopolitics

By **Richard Falk**

Abstract

Without the benefit of international governmental institutions, the development of international law depends on agreement, patterns of practice, and criteria of reasonableness. International legal norms that do exist are therefore often modified or extended by informal law-making processes. In the 1960s and 1970s, primarily in the context of the wars in Indochina and the Middle East, both states and non-state actors attempted to use such informal law-making processes to circumvent and distort the understandings of the international law of war and peace that had been established under the framework of the UN Charter at the end of World War II.

Prologue

We should understand that this workshop devoted to the relevance of international law to these two geographically distinct war zones in the period between 1961 and 1973 is a very distinctive undertaking. I am not familiar with any similar search for comparisons and connections, either in relation to the Indochina or Arab–Israeli conflicts, with respect to law-making interactions and potentialities. What is notable about this inquiry is that it considers the interaction between regional scale conflicts to be both a source of new norms of international law and occasions for the evasions and justifications of existing norms.

My point of departure is to take note of the motivation of the lead political actors in both conflict configurations to evade the constraints on the use of force imposed by the UN Charter, a constitutional framework for international law drafted under the primary influence of World War II along with the implications for future wars associated with the use of atomic bombs against Japanese cities. This influence expressed itself by the adoption of a war prevention rationale powerfully set forth in the opening words of the charter preamble: "… to save succeeding generations from the scourge of war". This language was a response not only to the devastation associated with the thus concluded war with its 60 million deaths, but to the fear that a future war of similar proportions would bring even more

catastrophic results for the entire world. The charter norms on the use of force were designed to be very constraining, suggesting that recourse to force by states was legal only if undertaken in self-defence against a prior armed attack [Articles 2(4), 51 of the UN Charter] or in response to a decision of the UN security council.

There was also a geopolitical condition of fragile harmony that prevailed in 1945 as a result of the recent victory over fascism achieved by the Allied Powers. The United Nations was established with some hope, although contested by political realists from its inception, that the combination of these restraining norms and the collective security mechanisms of the security council could ensure a peaceful world. Such idealistic expectations were challenged by the Korean War (1950–52) and by the 1956 Suez Crisis and Operation, and above all, by the outbreak of the Cold War. Nevertheless, until the decade of the 1960s, there remained a superficial attachment by the geopolitical antagonists to the UN Charter framework constraining aggressive war making as the focus continued to be on the avoidance of a third world war.

Both in Indochina and the Middle East the warfare that resulted was not between political entities of symmetric technological capabilities and tactics. International law had been evolved to address wars fought between sovereign states of roughly equal technological capabilities and was concerned with limiting war rather than outlawing it.

This changed in the decade of the 1960s. It became clear that the victors in World War II were faced with significant geopolitical challenges that could not be addressed by adhering to the charter norms. This was made apparent in the Indochina War, especially its Vietnam central arena. The charter notion of self-defence was not applicable nor would the American extension of the war to North Vietnam in 1965 have enabled the security council to restore peace due to the veto power possessed by the geopolitical antagonists, the Soviet Union, China, and the United States. For these reasons the Indochina War, despite its scale and level of destruction, was undertaken without heeding the UN framework or contemporary international law, although the US government in particular put forward elaborate documents defending actions taken by invoking international law rationalisations.

As well, both in Indochina and the Middle East the warfare that resulted was not between political entities of symmetric technological capabilities

and tactics. International law had been evolved to address wars fought between sovereign states of roughly equal technological capabilities and was concerned with limiting war rather than outlawing it. The experience of World War II convinced the victors that there was a gap in the legal framework concerning the protection of civilians living under military occupation, captured prisoners of war, and the treatment of wounded soldiers on the battlefield. This realisation resulted in the negotiation of the four Geneva Conventions of 1949, a new corpus of law that became known as "international humanitarian law".

Yet, these Geneva Conventions were still preoccupied with wars between sovereign states. What was shown by the Indochina and Middle East wars of the 1960s was the importance of extending international humanitarian law to conditions of sustained warfare *within* sovereign states. This gave rise to the two 1977 Geneva Protocols that were deemed supplemental to the 1949 treaties. In particular, Protocol II dealing with the Protection of Victims in *Non-international Conflicts* was a tricky area for international law as it challenged the sovereign rights of the territorial government. This complexity explains why the first protocol dealing with international protection was widely adopted, while the second addressing non-international civil war has not been ratified by several important states, including the United States.

In assessing these legal developments two features of international political society are paramount and need to be kept in mind when discussing the two war zones of the 1961–1973 period:

- the primacy of geopolitics vis-à-vis international law;
- the primacy of military necessity in combat situations.

These two realities, given the absence of centralised governmental institutions, explain the marginality of international law in war/peace situations, both with respect to recourse to force and the behaviour of the parties in the course of warfare.

Acknowledging these two definitive constraints on the role of international law in relation to war should not lead us to cynical conclusions that "law is irrelevant with respect to war" or that "international law does not matter". International law is relevant and matters for several reasons: it empowers civil society activism; it provides a channel for domestic dissent from war making in democratic societies in both government circles and civil society; it moderates behaviour to the extent that reciprocal interests support compliance with international legal norms (eg, treatment of prisoners of war).

A Brief Comment on the Two War Zones

For the United States in Vietnam, the charter norms were perceived as inconsistent with the mission to prevent a communist victory in South Vietnam and a subsequent unification of Vietnam under the control of Hanoi. It was believed in Washington that it was militarily necessary to extend the war zone beyond the boundaries of South Vietnam to punish North Vietnam for supplying the anti-regime insurgency led by the National Liberation Front (NLF) or Viet Cong. Similarly, in 1971, the extension of the war to Cambodia was prompted by calculations associated with disrupting the support of the war in the South by keeping a base area in Cambodia. Similar reasoning produced a sustained military assault within Laos, orchestrated by the American embassy. In other words, the Cold War priorities prevailed over efforts to constrain recourse to war and tactic in war. On the other side, the priorities of national liberation and anti-colonial legitimacy also prevailed over legal constraints.

For the United States in Vietnam the charter norms were perceived as inconsistent with the mission to prevent a Communist victory in South Vietnam and a subsequent unification of Vietnam under the control of Hanoi.

In the Middle East, there were similar factors at work, although tempered by some balancing considerations. The United States was still in the 1960s seeking to balance its commitment to Israel with its vital strategic interests in retaining favourable access to regional oil supplies. In this respect, contrary to Israel's wishes at the time, it sought to affirm international law with respect to the acquisition of territory by force, the major premise of the unanimous UN Security Resolution 242 adopted shortly after the 1967 war. Yet, even then there was insufficient political will to achieve an Israeli withdrawal.

Of even greater relevance to the focus of the workshop is the degree to which antagonists in the Middle East with respect to Israel/Palestine evaded the charter norm on recourse to war. Israel in 1967 and Egypt in 1973 both sought to gain military advantage by striking first, and thus violating the requirement of a prior armed attack contained in Article 51. Both governments defended their actions by claiming security imperatives as providing a convincing "legal" rationale for pre-emption.

As far as interconnections are concerned, both war zones produced conflicts that ignored the fundamental framework of international law and institutional accountability that was the hallmark of the war prevention efforts after World War II. The asymmetric nature of the wars also strained the law of war during combat, especially in Indochina, but also in the Middle East to the extent that warfare after 1967 shifted to Palestinian efforts to pursue an armed struggle strategy that was designated as "terrorism" by Israel and its supporters. Such a rationale had been used by the United States in Vietnam, but with less impact due to the outcome of the struggle and the absence of widespread support for South Vietnam in the West, especially the United States.

International Law Evolves

Against this background, it becomes possible to get a better appreciation of how international law evolves. It is important to realise that in some sense, all of international law is "soft law" because of the absence of regular procedures of authoritative interpretation and of enforcement. Added to this, international law in relation to peace and security issues suffers from the special issues previously mentioned — essentially, the primacy of geopolitics and of military necessity. Geopolitics manipulates the law governing recourse to force, while military necessity is constantly reshaping the law involving the use of force.

> **Israel in 1967 and Egypt in 1973 both sought to gain military advantage by striking first, and thus violating the requirement of a prior armed attack contained in Article 51 of the UN Charter. Both governments defended their actions by claiming security imperatives as providing a convincing "legal" rationale for pre-emption.**

A major interconnection between Indochina and the Middle East is illustrative. In Indochina, the United States created a strong precedent for disregarding the charter's provisions governing recourse to force. It put forward some legal justifications to the effect that North Vietnam was guilty of "indirect aggression" by its support of the insurgency in the South, creating a legal foundation for extending the war beyond the confines of South Vietnam. It also contended that Cambodia and Laos violated the laws of war governing neutrality by allowing their territories to be used for hostile purposes associated with North Vietnam's belligerent activities.

Although Israel in 1967 and Egypt in 1973 did not specifically invoke the American precedents set in the Vietnam War, their conduct was shielded from critical scrutiny by the combination of a weakening of the geopolitical commitment to the charter conception, and by the sense that such recourses to force were within their context "reasonable". Because of their geopolitical alignment with Israel, western countries legally condemned the Egyptian surprise attack on Israel, but in a manner that made it appear to be more an expression of alliance diplomacy than a pronouncement of allegiance to international law. Such a view gains weight from the pattern of practice in years subsequent to 1973.

> **International law in relation to peace and security issues suffers from the primacy of geopolitics and of military necessity.**

It was also evident that the West controlled international legal discourse on permissible and impermissible uses of force. In this way the violence of non-state actors and liberation movements was demonised as "terrorism" while state violence even if directed at civilian targets was treated under rubrics of security and self-defence. Such a discourse gained wider impacts after the 9/11 attacks on the United States, and through the launch of the so-called "War on Terror". It has impacted strongly in the Middle East contexts, especially allowing Israel to validate its excessive force and collective punishment as security measures or an exercise of the right of every sovereign state to defend itself. To some extent, especially in recent years, the United Nations has challenged this discourse by issuing many reports on Israeli violations of the Geneva Conventions and international humanitarian law more generally. This tension between the geopolitical discourse and the UN discourse is what leads the United States and Israel, in particular, to make accusations about UN bias when it comes to violations of international law. It is this tension, however, that enables civil society initiatives to claim the legitimacy of international law, as is the case with the Boycott, Divestment and Sanctions (BDS) Campaign against Israel.

It should be noted, in passing, that when western interests are engaged, as by Russia's recent confrontation with the Ukraine, the charter framework is again invoked as if it is as authoritative as when adopted in 1945. In other words, the fate of norms is tied to the control of the international normative discourse, and especially in relation to the geopolitics of propaganda.

Conclusion

The main conclusion reached is that the charter framework established in 1945 was greatly weakened, if not altogether rendered somewhat anachronistic, by the combined impact of geopolitical opportunism and military circumstances in the wars taking place in Indochina and the Middle East between 1961 and 1973. To some extent, it can be asserted that the charter framework was always unrealistic, given the character of a state-centric world order system that included hegemonic actors recognised as such by their right of veto in the UN security council, a reality that was fully disclosed after the onset of the Cold War. The nature of the conflicts, which consisted of nationalist movements, was also not anticipated by the kind of legal order envisioned for the post-World War II era, and not able to cope with the normative challenges of asymmetric warfare or wars of national liberation.

> **It was also evident that the West controlled international legal discourse on permissible and impermissible uses of force. In this way the violence of non-state actors and liberation movements was demonised as "terrorism" while state violence even if directed at civilian targets was treated under rubrics of security and self-defence.**

There is also an important tension with regard to the orientation towards normative discourse. The West seeks a statist discourse with unrestricted discretion for geopolitical actors, excepting, of course, its rivals, who are held fully accountable. The South, especially at the UN general assembly, is generally favourable to the claims and struggles of nationalist movements if directed towards liberation from European or western control. In this regard, this subaltern discourse is supportive of the situation of the Vietnamese and Palestinian national liberation struggles, given concreteness in international law by the wide consensus supporting the right of self-determination as enshrined in Article 1 of both International Covenants on Human Rights.

International Law in the US Debates on the Vietnam War

By **Madelaine Chiam**

Abstract

This article outlines some of the ways that international law has featured in public debate and the conceptions of international law that emerged from these debates. It does so by examining the terms of a debate that took place in the United States in 1965–66 over the legality of its intervention in Vietnam. The paper highlights the doctrinal arguments and the ways in which the participants in the debate characterised international law. Understanding past uses of international law in public debates helps to contextualise the hopes and disappointments expressed about international law in contemporary public debates.

In 1965 and 1966, a debate took place between lawyers in the US State Department, a group called the Lawyers Committee Concerning American Policy in Vietnam, and individual scholars such as Richard Falk and John Norton Moore, over the legality of the war in Vietnam. The debate took place across a range of media, including memoranda issued by the State Department and the Lawyers Committee, and articles published in the *Yale Law Journal* and *Dissent* magazine. The terms of the debate were raised in government channels such as the Senate Foreign Relations Committee and were covered by newspapers such as *The New York Times* and through the televising of some of the hearings of the Foreign Relations Committee.

This debate is interesting for many reasons, but in this paper, I focus on two. First, the Vietnam War is surprisingly absent from international legal scholarship on the use of force. This absence elides the important contributions of these debates to the development of the law on the use of force. Second, the debates in 1965 and 1966 are part of a long and under-appreciated history of public debates in which participants relied on international law. Exploring this longer history allows us to better understand the past, present and continuing attitudes that participants in such debates have held in relation to the international legal order. This in turn gives more context to the hopes and disappointments expressed about international law in contemporary public debates.

The Terms of the Debate

This description of the 1965–1966 debates focuses on the arguments made by the Lawyers Committee and the State Department and highlights both the doctrinal arguments — what were the legal arguments supporting and contesting the US action in Vietnam? — and the ways in which the participants in the debate characterised international law — how did they understand the role of international law in public debate?

The terms of the 1965–66 debate were driven by the Lawyers Committee. The US State Department had issued a memorandum outlining the legal basis for the enlargement of its military commitment to Vietnam in 1965, but this document was short and lacked detail.[1] Dissatisfied with the State Department's reasoning, in the summer of 1965, the Lawyers Committee released a long and detailed memorandum of law, titled "American Policy Vis-à-vis Vietnam".[2] The Lawyers Committee memorandum was distributed to lawyers and law professors across the United States and read into the congressional record in September 1965, but did not receive the widespread attention its authors sought. The increased US military commitment in 1966 was an occasion to raise the legal arguments again and a second push of the Lawyers Committee memorandum was given political momentum through supportive members of the Senate Foreign Relations Committee: Republican Senator Wayne Morse of Oregon and Democrat Senator Ernest Gruening of Alaska. In hearings that took place in January and February 1966, these senators drew on the work of the Lawyers Committee to question Secretary of State Dean Rusk about the justifications for, and legality of, the US military intervention in Vietnam. The attention given to the legal arguments in early 1966 then generated responses from the State Department, the American Bar Association and individual lawyers.[3]

The international legal debate revolved around two main issues: Whether the US intervention could be characterised as assisting South Vietnam in collective self-defence against aggression from North Vietnam; and whether

[1] Department of State, "Legal Basis for United States Actions Against North Viet-Nam," 8 March, 1965 (reprinted in Committee on Foreign Relations, United States Senate, "Background Information Relating to Southeast Asia and Vietnam (revised edition) 1965", 145–148).

[2] Lawyers Committee on American Policy Towards Vietnam, "American Policy Vis-à-vis Vietnam" (New York, 1965).

[3] Narrative accounts of these events are contained in Peter Weiss, "Nuclear War in the Courts," in, *Nuclear Weapons, the Peace Movement and the Law*, ed John Dewar, Abdul Paliwala, Sol Picciotto and Matthias Ruete (London: Macmillan, 1986); and Samuel Moyn, "From Antiwar Politics to Antitorture Politics," in *Law and War*, ed. Austin Sarat, Lawrence Douglas and Martha Umphrey (Stanford Law Books, 2013), 154.

the US action was justified as part of America's treaty commitments under either or both the Geneva Accords and the treaty creating the Southeast Asian Treaty Organization (Seato). In its initial memorandum, the State Department offered justifications based only on collective self-defence. The memorandum relied on earlier State Department reports to characterise the actions of North Vietnam as "continuing armed aggression against South Viet-Nam in violation of international agreements and international law", specifically the 1954 Geneva Accords and the UN Charter. According to the memorandum, it was North Vietnamese "aggression" that justified US military support for South Vietnam as an act of collective self-defence under Article 51 of the charter. The memorandum included no authorities for its legal arguments, seeming to consider them so obvious as to be unnecessary to detail or too peripheral to matter.

> **The international legal debate revolved around two main issues: whether the US intervention could be characterised as assisting South Vietnam in collective self-defence against aggression from North Vietnam; and whether the US action was justified as part of America's treaty commitments under either or both the Geneva Accords and the treaty creating Seato.**

In contrast to the first State Department memorandum, the Lawyers Committee memorandum was a study in carefully presented, densely written and comprehensively foot-noted legal writing. The memorandum rebutted the State Department arguments about collective self-defence on two bases. First, the Lawyers Committee adopted a strict reading of the charter requirement that self-defence was justified only after an "armed attack" had occurred. The actions of insurgents in South Vietnam who were supported by North Vietnam did not, on this reading, amount to an "armed attack". Even if they did, the Lawyers Committee argued that, under the Geneva Accords, North and South Vietnam were a single state. The conflict between them was thus "civil strife" that did not give the United States the right to intervene in support of one side. The Lawyers Committee memorandum also included a detailed section on American obligations under Seato. The obligations of Seato members had not been raised in the first State Department memorandum, but representatives of the US government had begun to rely on Seato to justify US actions in Vietnam in mid-1965 in addition, or as an alternative to, the charter-based collective self-defence arguments. Briefly, the argument was that the United States had

an obligation to defend South Vietnam under Seato, which it could exercise unilaterally. The Lawyers Committee memorandum was scathing about the Seato arguments, rejecting in particular the argument that the collection of disparately located members of Seato could act as a regional defence arrangement. "If artifices like Seato were sanctioned", the memorandum stated: "the path would be open for the emasculation of the United Nations organization and the world system of international security assiduously developed to prevent the scourge of war."

> **Implicit in the Lawyers Committee memorandum was the belief that exercises of government power could be restrained by law.**

The second State Department memorandum, "Legality of US actions in Vietnam", was issued in March 1966 in direct response to the Lawyers Committee memorandum.[4] It contained far more detail and legal authority than the first State Department memorandum. For example, the memorandum repeated the arguments that the United States was justified in acting in collective self-defence to protect South Vietnam, but this time it identified the actions that it argued amounted to an "armed attack" by North Vietnam. It also explained the administration's assertions that its actions were justified under Seato. According to the State Department, the other Seato member states accepted the American interpretation that the treaty authorised members to act unilaterally, rather than collectively, to protect one another.

The Characterisations of International Law

This debate between the Lawyers Committee and the State Department generated media headlines. "Senators Challenge Rusk on Vietnam Policy Legality", wrote *The New York Times* on 29 January 1966 and then, on 5 February 1966, "Legality of Vietnam War Questioned". Legality seemed to matter at this point, at least to the members of the Lawyers Committee, some in the State Department and the Senate and, perhaps, even to some members of the wider public. Unlike later Vietnam War debates, this debate was not an example of "ordinary people" deploying the language of international law as a means to speak to those in power. It was, rather, an example of already powerful members of an elite class of lawyers attempting to influence American policy by using international law in the public sphere.

[4] "The Legality of United States Participation in the Defense of Viet-Nam," 4 March, 1966 (reprinted in *American Journal of International Law* 60 (1966), 565.

Implicit in the Lawyers Committee memorandum was the belief that exercises of government power could be restrained by law; the memorandum wielded its international law arguments with conviction. Sometimes, though, the confident tone of the legal arguments slipped, and the wording of the memorandum indicated a concern that the Johnson administration would not take seriously its international obligations. The second paragraph of the memorandum, for example, reads as almost an apologia for the Lawyers Committee advocacy:

> Observance of the rule of law is a basic tenet of American democracy. Hence it is fitting that American lawyers examine the action pursued by our government to determine whether our government's conduct is justified under the rule of law mandated by the United Nations Charter — a charter adopted to banish from the earth the "scourge of war".

Similarly, at the end of the section on the US obligations under the UN Charter, the memorandum implored its audience to take the authors' arguments seriously because of who they were. "[We], *as lawyers*", they wrote, "have been compelled to reach [this conclusion]. We, *as lawyers*, urge our President to accept the obligations for international behaviour placed upon us by our signature on the United Nations Charter." (Emphasis added.)

In contrast, the State Department's two legal memoranda — the first perfunctory at best, and the second forced into comprehensive justifications by the Lawyers Committee memorandum — suggest an administration for whom international law was an after-thought; a nuisance to be managed, rather than standards to be taken into account from the outset.

For the Lawyers Committee, international law offered both a way to critique the Vietnam policies of the Johnson administration, and a model for how better to address the situation. Framing the Vietnam War as "illegal" allowed the Lawyers Committee to harness what they characterised as the power of an international law that was both transcendent (designed to "banish from the earth the 'scourge of war'") and standard-setting ("the rule of law"). By emphasising that it was lawyers authoring the memorandum, the Lawyers Committee called on professional expertise to add weight to their claims.

In contrast, the State Department's two legal memoranda — the first perfunctory at best, and the second forced into comprehensive justifications by the Lawyers Committee memorandum — suggest an administration for whom international law was an afterthought; a nuisance to be managed, rather than standards to be taken into account from the outset. Notwithstanding this attitude, the sequence of State Department action suggests that the department was concerned about the public purchase of arguments about international law. The department engaged in the legal debate when it could have chosen to ignore it, and its second engagement was crafted as a direct response to the criticisms made of its first memorandum. The US legal justifications were echoed by the Australian government of Prime Minister Robert Menzies as part of its public justification for sending Australian troops to support the US intervention.[5] International law here was not a nuisance but a language of solidarity for two states seeking to justify war.

Conclusion

This analysis of a small snapshot of international law in the American public debates about the Vietnam War is in many ways unsurprising. That a government appeared to regard international law as a relatively unimportant tool of foreign policy, and that the people who cared most about international law were the international lawyers, is consistent with "realist" views of international law. My aim, however, is to give an example of the complexities that are revealed by a close examination of who used international law and how they used it in public debates. Approaching international law in this way — not only as doctrine but as a public language — opens up our understandings of how international law has functioned and continues to function in domestic contexts, including as a language of justification, of critique, of resistance, and of solidarity.

[5] See, for example, "Exchange of Letters Between the Prime Minister The Rt Hon Sir Robert Menzies and The Rt Rev JS Moyes and Certain Archbishops and Bishops," Prime Minister's Department Pamphlet, Canberra, 20 April 1965.

The Logic of Reprisal in US Vietnam War Policy Debates

By **Brian Cuddy**

Abstract

Reprisals have long been one of the most controversial features of international law. This article explores how strategic and legal debates over the use of reprisals played out in America's Vietnam War. While key strategic thinkers and national security officials held reprisals to be a tactic particularly suited to the kind of conflict Washington was waging in Vietnam, administration lawyers consistently argued against framing any use of force as an act of reprisal. This position was informed by earlier American arguments regarding the use of reprisals in the Arab-Israeli conflict, highlighting the importance of the connections between these two conflicts.

In international legal doctrine as it developed through the 19th and early 20th centuries, reprisals were otherwise illegal acts of force that were permitted in response to an enemy's violation of law and with the purpose of forcing the enemy back into conformity with the law. While governments, and especially militaries, argued that reprisals were necessary as a law enforcement mechanism, their use outside the heat of battle, sometimes against non-combatants, made them extremely controversial and much debated. Geoffrey Best, a noted historian of the law of war, labelled *reprisals* "the most deceptive and shifty word in the whole vocabulary of the subject".[1]

The scope for lawful reprisals during an armed conflict was successively narrowed across the 20th century, and peacetime reprisals are generally held to have been outlawed altogether in 1945. In the dominant strand of post-World War II legal opinion, the UN Charter made reprisals involving the use of force obsolete. The charter, with its prohibition on the use of force unless approved by the UN security council or used in self-defence, seemingly had no place for this old-world tool of statecraft.

[1] Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1980), 108. In legal terms, reprisals are different from, although often lumped with, retaliation, retorsion, and revenge. Following Best, this paper does not dwell on the differences among the terms. As he notes on page 19, "when dealing with the painfully important topic of reprisals, which international lawyers carefully (and with very good reason) distinguish and separate from retaliation and revenge, we may need to remind ourselves that the international lawyer's delicate surgery may be less helpful towards the full understanding of them than a rougher socio-political analysis which will identify their common sources and strengths. The concerns of international law are too important to humanity, in this respect at least, to be left to the international lawyers."

Against the lawyers, however, arose a brand of strategic thinkers that saw reprisals — understood as discrete and fitting responses to particular acts of violence — as particularly suited to Cold War situations requiring some force, but not so much as to provoke all-out war. One such thinker, Thomas Schelling, thought the August 1964 American airstrikes on North Vietnamese patrol boats and naval installations delivered a neatly tailored message in response to the Gulf of Tonkin incidents. While the attacks certainly communicated a message of the potential harm that the United States could inflict, they also implicitly promised a certain symmetry. "There is an idiom in this interaction," described Schelling, "a tendency to keep things in the same currency, to respond in the same language, to make the punishment fit the character of the crime, to impose a coherent pattern on relations." This tendency, in turn, "helps to set limits and bounds. … It avoids abruptness and novelty of a kind that might startle and excessively confuse an opponent. It maintains a sense of communication, of diplomatic contact, of a desire to be understood rather than misunderstood." In the final analysis, "it was as an act of reprisal — as a riposte, a warning, a demonstration — that the enterprise appealed so widely as appropriate."[2]

Against the lawyers, however, arose a brand of strategic thinkers that saw reprisals — understood as discrete and fitting responses to particular acts of violence — as particularly suited to Cold War situations requiring some force, but not so much as to provoke all-out war.

But if the logic of reprisal drove this action, as well as some other key US policies and targeting directives during the Vietnam War, the legal language of reprisal was formally shunned. The August 1964 strikes, as well as the February 1965 Flaming Dart strikes in response to an attack on an American air base at Pleiku, were both formally justified as measures of self-defence under the UN Charter, and letters to the security council making this claim accompanied both sets of strikes.[3]

[2] Schelling, *Arms and Influence* (New Haven: Yale University Press, 2008 [1966]), 146–147, 149, 145.

[3] Leonard C Meeker, Memorandum for Mr McGeorge Bundy, "Legal Basis for United States and South Vietnamese Air Strikes," 11 February 1965, Doc 214, Folder 4 (Vol. XXVIII, 2/9-19/65, Memos), Box 13 [2 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. See also: Leonard C Meeker (State Department Legal Adviser), quoting Senator William Fulbright, "The Legality of United States Participation in the Defense of Viet-Nam: Text of Legal Memorandum," Department of State Bulletin Vol LIV, No. 1396 (28 March 1966), 474–489 at 486.

On 7 February, the same day as Flaming Dart raids were launched, the Johnson administration was already looking past tit-for-tat raids and reaching for a regularised bombing programme that would respond not to individual acts of violence but to the "pattern of aggression" emanating from the North. In a memo passed to President Lyndon Johnson late that evening, National Security Adviser McGeorge Bundy recommended shifting to a "policy of graduated and continuing reprisal", with Pleiku having "produced a practicable point of departure for this policy of reprisal." Bundy described this policy of "sustained reprisal" as one "in which air and naval action against the North is justified by and related to the whole Viet Cong campaign of violence and terror in the South."[4]

On 7 February 1965 ... the Johnson adminstration was already looking past tit-for-tat raids and reaching for a regularised bombing programme that would respond not to individual acts of violence but to the "pattern of aggression" emanating from the North.

But if the language of reprisal *tout court* was problematic under the charter, then so was the oxymoronic idea of "sustained reprisal". In early 1965, State Department lawyers were formulating their legal justification for American military action in Vietnam, and it did not take long for them to react to the proposed policy of "sustained reprisal". On 11 February, Leonard Meeker, the State Department legal adviser, wrote to McGeorge Bundy gently critiquing the logic of reprisal as Bundy had laid it out to the president four days earlier. Meeker suggested that the United States avoid "reliance on theories of reprisal or retaliation, which are less readily available under contemporary international law than they were before the charter," and noted the "inconsistency in US reliance on reprisal or retaliation with respect to Vietnam when we have been publicly critical of such justifications in other circumstances — for example, in the Near East in situations involving Israel and the Arab states." Meeker further thought that his own proposed legal basis for the air strikes, based on the right of collective self-defence under the UN Charter, would be "politically more appealing in presenting our case to other governments and in the court of public opinion around

[4] Memorandum From the President's Special Assistant for National Security Affairs (Bundy) to President Johnson, 7 February 1965, Foreign Relations of the United States 1964-1968, Volume II, Vietnam, January-June 1965, Document 84. Previous drafts of this memo were titled "A New Approach to Retaliation."

the world".[5] Meeker's advice won out and reprisal never constituted a formal legal rationale for launching air strikes against North Vietnam. But while the language of reprisal and retaliation was struck from the official American vocabulary of justification, the underlying logic of reprisal proved much harder to dislodge.

Henry Cabot Lodge, Jr, the US ambassador to South Vietnam, made further calls for reprisals when, in December 1965, the National Liberation Front bombed Saigon's Metropole Hotel, which served as a billet for US personnel. Since February, Washington had considered and rejected the idea of launching specifically designated reprisal strikes in the wake of several high-profile incidents: the bombing of the US embassy in March; the bombing of the My Canh restaurant in June; and the execution of enemy-held US servicemen in June and September. Now, after the Metropole bombing, Washington decided to meet Lodge and his team halfway, writing to the embassy that a "strike should be carried out but that it should not repeat not be represented as 'reprisal' for Metropole incident." Elaborating on their reasoning for this position, the Washington-based officials essentially repeated Meeker's arguments from February for rejecting the legal logic of reprisal. They wrote that the "background" to rejecting the use of reprisal was "that USG [the US government] has repeatedly joined in denunciation of specific reprisal actions as in Yemen, Algeria, and Israel. Explicit reprisal rationale will also raise serious questions on future incidents. But basic reason is … to avoid serious international repercussions for action that we believe is in fact distinguishable from cases we have denounced but that could not easily be separated in face of criticism."[6]

The United States launched an air strike at the Uong Bi thermal plant on 15 December, and again on 22 December. In response to any questions that might arise, the US embassy was instructed to note "that target is directly related to military installations in the area being used in support of continuing infiltration and aggression in the South by the North Vietnamese regime" and that the "whole targeting pattern of bombings in North is of course related to level of VC [Viet Cong] action in South", with the Metropole incident being only "one of acts indicating continued high level of terrorism" and infiltration.[7] Speaking from Washington, Secretary of Defence Robert McNamara toed the same line, declaring publicly that the

[5] Meeker, "Legal Basis for United States and South Vietnamese Air Strikes," 11 February 1965.

[6] State Dept to Amembassy Saigon, Cable, State 1602, 9 December 1965, Doc 81, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[7] State, 1602.

attack was "representative of the type we have carried out and will continue to carry out. I would not characterise it as retaliatory, but I think it is appropriate to the increased terror activity."[8]

> **The American rejection of reprisals as a legal justification for particular acts of violence in Indochina was probably a prerequisite for the rise of other US interpretations for the right to use force in the Vietnam War, including the "Unwilling or Unable" doctrine that emerged after the 1970 Cambodian incursion.**

The formal rejection of reprisals as a justification for belligerent actions in Vietnam can be assessed in various ways. Two early analysts of the air war over North Vietnam wrote (distinguishing between reprisal and retaliation) that "reprisal raids could have opened the door to consistent and unjustifiable attack upon civilian objects in North Vietnam. It is admirable that the United States Air Force never sought to justify on this tenuous and debatable ground the use of an estimated seven million tons of bombs over Indochina".[9] But did the rejection of reprisals as a public justification matter if the logic of reprisals still underlay at least some of the US policy on bombing? In the context of the Vietnam War, perhaps it mattered, as US officials hoped it would, in terms of domestic and international public opinion. But it may also have mattered outside the military and humanitarian context of the Vietnam War — in the context of shifting understandings of responsibilities under the charter and rights of self-defence.

The American rejection of reprisals as a legal justification for particular acts of violence in Indochina was probably a prerequisite for the rise of other US interpretations for the right to use force in the Vietnam War, including the "Unwilling or Unable" doctrine that emerged after the 1970 Cambodian incursion.[10] But Washington's rejection of the legal logic of reprisal might also have had an effect beyond the geographic and

[8] Cited in Jacob Van Staaveren, *Gradual Failure: The Air War Over North Vietnam, 1965–1966* (Washington, DC: Air Force History and Museums Program, 2002), 204.

[9] Hamilton DeSaussue and Robert Glasser, "Air Warfare — Christmas 1972," in *Law and Responsibility in Warfare: The Vietnam Experience*, ed Peter D Trooboff (Chapel Hill: University of North Carolina Press, 1975), 119–139, at 124.

[10] Brian Cuddy, "Was It Legal for the U.S. to Bomb Cambodia?" *The New York Times*, 12 December 2017, https://www.nytimes.com/2017/12/12/opinion/america-cambodia-bomb.html.

temporal context of the Vietnam War. It is worth considering, in particular, how the American position against reprisals might have affected how actors engaged in the Arab–Israeli conflict interpreted the right to use force. Novel interpretations of self-defence, some of which consciously incorporate elements of reprisals, such as defensive armed reprisals,[11] might have resulted partly from a process of legal triangulation that sought to take account of the US anti-reprisal position. If so — and more research is needed on this point — the path of legal influence regarding reprisals went in both directions. The US position against reprisals in Vietnam, which was in part a product of its earlier position against reprisals in the Arab-Israeli conflict, may very well have looped back to have consequences for the use of force in the Middle East.

[11] Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Grotius Publications Limited, 1988), 202–212.

Legality of Military Action by Egypt and Syria in October 1973

By **John Quigley**

Abstract

The military force initiated by Egypt and Syria in October 1973 was directed against Israeli forces that had been in unlawful occupation of Egypt's Sinai Peninsula and Syria's Golan Heights since the June 1967 Middle East war. At the UN security council, no state other than Israel suggested that Egypt or Syria should be condemned for aggression. Only a few weeks earlier, a draft security council resolution condemning Israel's continuing occupation of the territories had been vetoed by the United States although approved by 13 member states. Given that Israel's act of occupying the two territories in 1967 was unlawful and the security council had failed in its obligation to reverse that illegality, the military action by Egypt and Syria cannot be considered aggression. While their action did violate ceasefire resolutions that the security council had adopted in 1967, it was not an unlawful use of force.

The legality of the initiation of the hostilities that pitted Syria and Egypt against Israel in 1973 received little attention in any formal setting. The issue was raised in the United Nations security council, with Syria and Egypt accusing Israel, and Israel accusing Syria and Egypt. The security council engaged in no fact-finding. Nor did the members of the security council engage in serious polemics. Their orientation was to achieve a ceasefire and, beyond that, to ensure that such hostilities not recur in future.

The 1973 war must be seen against the backdrop of the June 1967 war, during which Israel occupied Syria's Golan Heights and Egypt's Sinai Peninsula. Syria and Egypt regarded those hostilities as acts of aggression by Israel. Although the UN security council made no finding in regard to the aggression of 1967, Syria and Egypt were both correct.

The hostilities that began on 6 October 1973 were immediately brought to the United Nations by Syria and Egypt. Syria claimed "that the Israeli armed forces have launched aggression against Syrian forward positions all along the cease-fire line. Our forces had to return the fire".[1] Egypt sent a letter similarly claiming aggression by Israel.[2]

[1] Letter dated 6 October 1973 from the permanent representative of the Syrian Arab Republic to the United Nations addressed to the president of the security council, 6 October 1973, 1, UN Doc. S/11009.

[2] Letter dated 6 October 1973 from the Ministry for Foreign Affairs of Egypt to the president of the general assembly, 6 October 1973, 1, UN Doc. A/9190.

Syria and Egypt highlighted the fact that the security council had failed to compel Israel to withdraw from territory it had occupied since 1967. The ceasefire resolutions the security council adopted in 1967 provided that they were only a step towards resolving the occupations by Israel. Syria complained that the security council was not fulfilling its function.[3]

The 1973 hostilities were, however, initiated by Syria and Egypt.[4] Egypt had been planning an attack for several weeks and had drawn Syria into this effort.[5] Syria moved into portions of the Golan Heights, and Egypt crossed the Suez Canal, taking up positions Israel had held on the eastern bank of the canal.[6] The United Nations Truce Supervision Organization, which maintained personnel in both sectors, reported on the outbreak to the secretary-general on the afternoon of 6 October 1973:

> General heavy air and ground activity continues along all sectors. Egyptian ground forces have crossed the Suez Canal . . . Syrian forces have crossed the area between the limits of the forward defended localities indicating the cease-fire lines in the vicinity of Kuneitra and near OP [Observation Post] November.[7]

When US Secretary of State Henry Kissinger consulted with Soviet Ambassador Anatolii Dobrynin on how to deal with the hostilities, the latter said: "The Arabs are trying to regain the lands occupied by Israel … for us to tell them you cannot free your land, it is ridiculous."[8]

On 22 October, the security council adopted Resolution 338, in which it called for a ceasefire in place. Fighting continued, however. A Disengagement Agreement between Israel and Egypt was reached only on

[3] UN Security Council Verbatim Record 9 October 1973, 5, UN Doc. S/PV.1744.

[4] Mohammed Abdel Ghani El-Gamasy, *The October War* (Cairo: American University in Cairo Press, 1993), 191–192.

[5] Mohamed Heikal, *The Road to Ramadan* (New York: Quadrangle/The New York Times Book Co: 1975), 18–35.

[6] Memorandum From William B. Quandt and Donald Stukel of the National Security Council Staff to Secretary of State Kissinger, Washington, October 8, 1973, *Foreign Relations of the United States FRUS* [hereinafter FRUS], 1969–1976, Volume XXV, Arab-Israeli Crisis and War, 1973, Document 124.

[7] Supplemental information received by the secretary-general on the situation in the Middle East, UN Doc. S/7930/Add.2141, 6 October 1973, in Security Council Official Records, 28th Year, Supplement for October, November and December 1973: 3.

[8] Transcript of Telephone Conversation Between Secretary of State Kissinger and the Soviet Ambassador (Dobrynin), Document 111, *FRUS 1969–1976* 25: 319–320.

18 January 1974,[9] and one between Israel and Syria on 31 May 1974.[10] Egypt kept control of a strip of territory on the eastern side of the Suez Canal; Israel kept control of the Golan Heights.

Egypt's aim in initiating hostilities against Israel in October 1973 was short of recapturing the territory Israel had taken in 1967. Kisssinger later wrote:

> Sadat aimed not for territorial gain but for a crisis that would alter the attitudes into which the parties were frozen — and thereby open the way for negotiations.[11]

In a situation where the entirety of a state's territory is occupied, leaving that state with no government, the population is deemed entitled to use force, within the bounds of humanitarian law, to recapture the territory. If any among the population are captured by the occupying power in the course of such efforts, they are entitled to be treated as prisoners of war, rather than as criminals.

The assessment by the US Central Intelligence Agency had been that Egypt would not try to send troops across the Suez Canal because Egypt's forces would not have the wherewithal to advance far into Sinai.[12] Egyptian President Anwar Sadat communicated with the United States during the fighting.[13] Kissinger read this effort by Egypt as a sign that Egypt's intention was to spur diplomacy rather than take the Sinai militarily.[14]

Egypt worked with Syria to undertake a coordinated strike against Israel that would force the latter to defend from two directions.[15] Egypt did not

[9] "Pullback accord signed: Kissinger, Sadat turn to Syrians," *The Washington Post*, 19 January 1974.

[10] Bernard Gwertzman, "Israel and Syria accept accord for disengaging on Golan front," *The New York Times*, 30 May 30 1974.

[11] Henry Kissinger, *Years of Upheaval* (Little, Brown & Co., New York 1982), 460.

[12] Ibid, 461.

[13] Backchannel Message From the Egyptian Presidential Adviser for National Security Affairs (Ismail) to Secretary of State Kissinger, Cairo, 7 October 1973, *FRUS*: 347.

[14] Kissinger, *Years of Upheaval*, 482.

[15] Hassan el Badri, Taha el Magdoub, Mohammed Dia el Din Zohdy, *The Ramadan War*, 1973 (Hippocrene Books, New York, 1978), 16–18, 45.

anticipate being able to drive Israel out of the Sinai Peninsula; its intention was probably to take and hold at least some Sinai territory in the hope that doing so might invigorate the diplomatic process. Even though Egypt's military aims may have been modest, it was using military means. That requires an assessment of the legality of those means.

Whatever the aims of Syria and Egypt, each was attacking into its own territory that was under foreign occupation. Their use of force must be analysed in that context. The issue of whether a state that has been invaded may use force to re-take captured territory may seem so obvious as to be a non-issue. International practice supports such a use of force.

The invasion and occupation of one state by another gives rise to obligations on the part of the international community. All states are required to "co-operate to bring an end through lawful means any serious breach".[16] In the context of an invasion and occupation, the military action to repel the invader would be "lawful".

A state that is invaded enjoys a right of self-defence. That right does not dissipate with the passage of time. Even apart from the right of the invaded state to recapture occupied territory, one finds in international humanitarian law the right of the population of occupied territory. In a situation where the entirety of a state's territory is occupied, leaving that state with no government, the population is deemed entitled to use force, within the bounds of humanitarian law, to recapture the territory. If any among the population are captured by the occupying power in the course of such efforts, they are entitled to be treated as prisoners of war, rather than as criminals.[17] If the population of occupied territory has a right to resist being occupied by force of arms, it follows that if the occupied state still has a government with military capability, that government enjoys the same right.

Even if Egypt's aim was short of a recapture by military force of the Sinai Peninsula, and Syria's aim was short of a recapture by military force of the Golan Heights, their actions involved a use of force into territory of their own that was under belligerent occupation. And, even though Egypt and Syria claimed an initiation of the use of force by Israel, they both considered themselves within their rights to take military action to recapture their territory. Thus, Syria declared to the security council on 9 October

[16] International Law Commission, Responsibility of States for Internationally Wrongful Acts, art 41, UN General Assembly Res. 56/83, 12 December 2001.

[17] *Law of Belligerent Occupation* (Ann Arbor, Michigan: Judge Advocate General's School, 1945): 102; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949: art 4(A).

1973: "Our goal can be none other than to recover usurped Arab territory." Responding to Israel's call for a return to positions held before 6 October 1973, Syria said: "Such positions happen to be in our national territory. And the fight we are waging now, and which was provoked by the Israeli attack, cannot be qualified as anything other than a national liberation fight, which is in conformity with the principles of the United Nations and in accordance with the norms of international law."[18]

In the security council, no state other than Israel called out Syria or Egypt for aggression. Most avoided the issue of legal liability.

Egypt, referring to Israel's claim of aggression against both Egypt and Syria, replied:

> The exercise of our right of self-defence is labelled aggression committed by Egypt and Syria. The representative of Israel has been hammering away on that point and constantly repeats it, imagining that he will be believed. Egypt and Syria are defending themselves. We are not in Israeli territory; we are on our territory, our national territory.[19]

Egypt depicted Israel's aggression as continuing in character: "The Arab people have been the victim of aggression since 1967, not the aggressors."[20]

Among the security council, no state other than Israel called out Syria or Egypt for aggression. Most avoided the issue of legal liability. The United Kingdom counselled against "engaging now in attempts to apportion blame or attribute responsibility". It said: "The ultimate verdict may well be that the basic factor was the frustration of the international community in its efforts to bring about that just and lasting peace in the Middle East of which the promise was held out by Security Council Resolution 242 (1967) nearly six years ago."[21] That was a reference to the security council's November 1967 resolution that had sought to end the standoff between Israel and the Arab states.

[18] UN Security Council Verbatim Record 9 October 1973, 7, UN Doc. S/PV.1744.

[19] UN Security Council Verbatim Record 11 October 1973, 18, UN Doc. S/PV.1745.

[20] UN Security Council Verbatim Record 11 October 1973, 18, UN Doc. S/PV.1745.

[21] UN Security Council Verbatim Record 8 October 1973, 6, UN Doc. S/PV.1743.

India too blamed the security council:

> What Egypt and Syria are doing now is nothing more than upholding the provisions of the charter in asserting their right to self-defence and to territorial integrity. This right is inherent to every sovereign state, and if Egypt and Syria have desisted from exercising this right it was because they had hoped that the council would find a peaceful solution.[22]

The issue of use of force to retake territory occupied by aggression was not debated in the security council. Each side accused the other of initiating the hostilities, and the members of the security council focused on finding a solution, not on assigning blame.

Security Council Resolution 338 did not condemn Egypt or Syria for aggression. It did not even condemn them for violating the 1967 ceasefire. It merely called for a new ceasefire. The majority of the security council members understood the situation of Egypt and Syria and declined to place the onus on them.

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The factual context of the 1973 hostilities makes it difficult to peg them under precedential situations. However, Ambassador Dobrynin's quip perhaps best characterises the approach taken by the international community, as represented by the security council, in reaction to the 1973 hostilities. It is difficult to tell a state a portion of whose territory is occupied that it cannot recapture that portion, particularly if the security council has shown itself unable to deal with the situation. Here, the security council, as a result of a veto cast by the United States, had only two months earlier shown itself unable to adopt even a resolution condemning Israel's occupation, much less a resolution calling for international action to reverse the occupation. In these circumstances, one can only conclude that Egypt and Syria were justified, even though they did not claim self-defence but rather put the onus on Israel for initiating hostilities.

[22] UN Security Council Verbatim Record 9 October 1973, 15, UN Doc S/PV.1744.

War against the People and the People's War

Palestine and the Principle of Distinction

By Ihab Shalbak and Jessica Whyte

Abstract

This paper examines the Palestine Liberation Organisation's discourse on the protection of civilians during the drafting of the Additional Protocols to the Geneva Conventions. We argue that the PLO's account of what was necessary to protect civilians from "the atrocities committed by colonialist and racist powers" differed starkly from that of the major military powers and Israel. While the latter argued that only the principle of distinction and the codification of a proportionality standard would protect civilians from harm, the PLO argued that the Palestinians were faced with a war against the people, to which the only response was a people's war.

In a keynote address at the 2017 Israel Defense Forces International Conference on the Law of Armed Conflict, the "founding father of international law studies in Israel", Yoram Dinstein, argued that the biggest contemporary challenge for international law is the direct participation of civilians in hostilities.[1] Dinstein argued that the revolving door of "farmers-by-day, fighters-by-night" is an area still shrouded in doubt. Rejecting the position of the International Committee of the Red Cross (ICRC) — according to which civilians lose protection against direct attacks only for the duration of a specific *act* of direct participation in hostilities — Dinstein argued for a "continuum" approach that would deny civilian status to members and supporters of armed groups who serve as "cooks, drivers, administrative assistants [and] legal advisers" as well as to members of the political wings of armed groups.[2]

[1] For the description of Dinstein, see "*Introduction to Keynote Address: A Tribute to Yoram Dinstein," Vanderbilt Journal of Transational Law 51*, no 3, posted on website of Vanderbilt University, https://wp0.vanderbilt.edu/jotl/2018/05/introduction-to-keynote-address-a-tribute-to-yoram-dinstein/.

[2] "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law," International Committee of the Red Cross, 1 December 2015, https://www.icrc.org/en/publication/0990-interpretive-guidance-notion-direct-participation-hostilities-under-international; Yoram Dinstein, "The Recent Evolution of the International Law of Armed Conflict: Confusions, Constraints, and Challenges Special Issue: The Law of Armed Conflict: Keynote Address," *Vanderbilt Journal of Transnational Law* 51 (2018): 711.

Dinstein is far from alone in his attempt to redefine civilian status. Today, the prevalence of such arguments testifies to what Neve Gordon and Nicola Perugini have described as the "evisceration of one of [international law's] foundational figures — the civilian."[3] While Dinstein himself argues elsewhere that "the armed forces of a civilised country are rarely likely nowadays to target civilians with premeditation", the very claim to be engaged in a "civilised" and discriminating form of conflict has served to morally elevate the violence of the strong and to call into question the civilian status of "uncivilised" adversary populations.[4]

In order to understand the contemporary conflicts over the notion of the civilian, we need to return to a key moment in the construction of the principle of distinction: the drafting of the 1977 Additional Protocols to the Geneva Conventions. In 1974, the International Committee of the Red Cross sponsored a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. While the ongoing war in Vietnam profoundly shaped the conference, here we focus on the place of Palestine in the drafting debates, and the tensions generated by the attempt by the Palestine Liberation Organisation (PLO) to frame its continuing national liberation struggle in legal terms. At that conference, the belatedness of the PLO's national liberation struggle, which remained unresolved after so many others had been victorious, gave Palestine a central place in the discussions about how international law should regulate anti-colonial conflicts.

The most significant outcome of these discussions is Additional Protocol I's recognition that the situations to which the protocol applies "include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination". This has typically been seen as a significant victory for national liberation movements — both by their opponents and by representatives of these movements themselves.[5] During the final session of the conference, the PLO representative, Chawki Armali, expressed "deep satisfaction" that the "international community had re-confirmed the legitimacy of the struggles of peoples exercising their right to self-

[3] Nicola Perugini and Neve Gordon, "Distinction and the Ethics of Violence: On the Legal Construction of Liminal Subjects and Spaces," *Antipode* 49, no 5 (1 November 2017): 1387, https://doi.org/10.1111/anti.12343.

[4] Talal Asad, "Reflections on Violence, Law, and Humanitarianism," *Critical Inquiry* 41, no 2 (nd): 412, accessed 2 December 2018.

[5] Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol 1), Article 1, Paragraph 4.

determination".[6] Yet, this victory came at a price. In order to inscribe themselves within a legal framework established to regulate conflicts between states, national liberation fighters were required to reconstitute themselves on the model of states and their liberation fighters on the model of a regular army.

At the most basic level, complying with the protocols meant accepting the principle of distinction and avoiding indiscriminate attacks on civilians. Throughout the conference, PLO representatives declared themselves willing to renounce such attacks. The PLO would sign the conference's Final Act, Armali told the conference, "not only for the protection of the civilian population of Palestine but also for the greater good of its adversaries", since it was ready to comply with all principles of the protocols.[7] This meant not only that combatants must "distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack"; more significantly, it meant accepting the conceptual principle that national liberation fighters are distinct from the civilian population. For a national liberation movement whose political legitimacy rested on the claim to be fighting a people's war, and thereby reconstituting a people, this was not without tensions. It raised the question of whether the principle of distinction was adequate to the specificities of settler colonialism, and to the Palestinian struggle against a settler colonial power that denied the status of the Palestinians as a people. The PLO's decision to frame itself as waging a people's war reflected the belief that their adversaries were not fighting a limited war but a war against the people as a whole.

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According to the standard account of the diplomatic conference, "the victims of wars were largely forgotten" during the drafting process (as a Red Cross observer put it at the time) as delegates from national liberation movements focused their energies on extending international status to wars of national liberation and securing privileged belligerent status for anti-colonial fighters.[8] Yet, the violence done to civilians by colonial powers was a regular topic of discussion during the conference. Charging Israel with "daily crimes

[6] Chawki Armali in International Committee of the Red Cross, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts," (Geneva, 77 1974), 53 (CDDH/SR.36).

[7] Armali in International Committee of the Red Cross, 257 (CDDH/SR.57).

[8] David P Forsythe, "The 1974 Diplomatic Conference on Humanitarian Law: Some Observations," *The American Journal of International Law* 69, no 1 (1975): 77, https://doi.org/10.2307/2200192.

against humanity", the PLO delegate Armali put forward three fundamental principles for the consideration of the conference, including "protection of the civilian population against the atrocities committed by colonialist and racist powers".[9] Armali singled out the use of arbitrary detention, collective reprisals, forcible displacement, the destruction of homes and other objects without military value, and the use of cruel weapons.

"While national liberation movements, including the PLO, sought to extend international status to national liberation struggles and combatant status to national liberation fighters, their opponents argued that only confining this status to regular soldiers would secure the protection of civilians.

The scholarly criticism that anti-colonialists ignored the plight of civilians echoed the position taken by the major military powers throughout the conference. Depicting themselves as the guardians of what they characterised as the "traditional" understanding, according to which an international armed conflict was fought between the regular fighters of juridically equal states, the major powers argued that any concession to the rights of irregular fighters would weaken compliance and expose civilians to harm. They argued, as David Forsythe puts it, "that 'peoples' should not be regulated by rules developed to regulate the conduct of states", as peoples lack both the responsibilities and the capabilities of states.[10] While national liberation movements, including the PLO, sought to extend international status to national liberation struggles and combatant status to national liberation fighters, their opponents argued that only confining this status to regular soldiers would secure the protection of civilians.

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As the scale of the Arab states' defeat in 1967 became apparent, the modern Palestinian national liberation movement emerged to announce the re-emergence of the Palestinians as a collective political subject after 21 years of "political living death" in refugee camps across the Levant.[11] In a matter

[9] CDDH/SR.19-204. The other two fundamental principles were confirmation of the international character of wars of national liberation and prisoner-of war status for combatants fighting for national liberation.

[10] Forsythe, "The 1974 Diplomatic Conference on Humanitarian Law," 81.

[11] Edward Said, "The Palestinian Experience," in *The Edward Said Reader*, ed Moustafa Bayoumi and Andrew Rubin (London: Granta, 2001), 32.

of a few years, the guerrilla movement institutionalised itself through the Palestine Liberation Organisation, which came to embody a national political identity capable of making claims for repatriation and self-determination. The figure of the guerrilla fighter at once symbolised the emergent Palestinian identity and the assertive Palestinian agency. As Edward Said put it in his 1970 article "The Palestinian Experience": "In Amman today two ways of life enclose all other ways, which finally connect the two. These two being a refugee in a camp and being an active member of one of the resistance groups."[12]

Echoing the Vietnamese struggle, the various Palestinian guerrilla factions conceived of their fight as a people's war.

Throughout the 1970s, much of the PLO's energy went into articulating the moral, political, logistical and juridical connection between the refugee and the resistant (or, put differently, between the farmer and the fighter). For a dispossessed population deprived of the material means of self-reproduction, armed struggle served as the central locus for self-reconstitution. The "imagery and language of armed struggle", as Yazid Sayigh argues, "gave new substance to the imagined community of the Palestinians"; Palestinians now portrayed themselves "as a revolutionary people waging an active struggle to determine their fate, rather than as a mass of helpless refugees passively awaiting charity handouts".[13] Echoing the Vietnamese struggle, the various Palestinian guerrilla factions conceived of their fight as a people's war. This designation lacked the sociological precision that it had in Vietnam, where General Võ Nguyên Giáp defined the people's war as a "long and vast guerrilla war" in which the people as a whole took part.[14] What it signified in the Palestinian case was that what was at stake was a struggle about who the Palestinians are, who they were and who they could be. In this sense, Edward Said saw the Palestinian struggle in the 1970s as "an effort at repatriation … [an] early transition [from] *being* in exile to *becoming* a Palestinian once again".[15] Becoming Palestinian once again entailed the immediate task of negating marginality and the political silence of a life confined to the refugee camps.

[12] Said, "The Palestinian Experience," 20.

[13] Yezid Sayigh, *Armed Struggle and the Search for State: The Palestinian National Movement, 1949-1993* (Clarendon Press, 1997), 668.

[14] Võ Nguyên Giáp, *People's War, People's Army* (University Press of the Pacific, 2001).

[15] Said, "The Palestinian Experience," 16.

In his first speech to the United Nations general assembly in 1974, Yasser Arafat, the chairman of the Palestine Liberation Organisation, depicted the strategy of what he called Israeli "settler colonialism" as an attempt to reduce the Palestinians to "disembodied spirits, fictions without presence, without traditions or future."[16] Symbolically, Arafat was given the floor by Algeria's then foreign minister, Abdelaziz Bouteflika, who had accepted the presidency of the General Assembly one year earlier on behalf of "generations of freedom fighters who contribute to making a better world with weapons in their hands".[17] Speaking "in the name of the people of Palestine" Arafat began by acknowledging Bouteflika's place in what he termed the "vanguard of the freedom fighters in their heroic Algerian war of national liberation".[18] Yet, if Algeria was once the inspiration for anti-colonial guerrilla fighters, it was now, also, a model for post-colonial states. Appealing to those statesmen who had once stood in the position of the rebel that he now occupied, Arafat asked that, having converted their own dreams into reality, they now share in his revolutionary dream. Yet, the United Nations was not a place for revolutionaries. The belatedness of the Palestinian national liberation movement inscribed Arafat's dream within a clear teleology — from the rebel to the statesman, from the people to the state.

The PLO had learnt much from the Algerians, just as they learnt from the Vietnamese. In August 1967, in the immediate wake of the 1967 war, the Palestinian faction Fatah published 14 pamphlets in the series "Revolutionary Studies and Experiences", including one on the Vietnamese revolution and a shorter study of the Algerian revolution. They positioned themselves as part of what Paul Thomas Chamberlain calls a "new global political geography" that united the "forces of liberation" (Palestine, Cuba, Vietnam, China and Algeria) against the forces of imperialism (the United States, Rhodesia, South Africa and Israel).[19] In March 1970, when Arafat and his deputy Salah Khalaf travelled to Hanoi for a two-week tour, General Giap told them: "The Vietnamese and the Palestinian people have much in common […] just like two people suffering from the same illness."[20] One aspect of that illness,

[16] Yasser Arafat, "Question of Palestine, A/PV.2282 and Corr.1 of 13 November 1974," 1974, https://unispal.un.org/DPA/DPR/unispal.nsf/0/A238EC7A3E13EED18525624A007697EC.

[17] Cited in David E. Graham, "The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the Just War Concept of the Eleventh Century," *Washington and Lee Law Review* 32 (1975): 43.

[18] Arafat, "Question of Palestine, A/PV.2282 and Corr.1 of 13 November 1974".

[19] Paul Thomas Chamberlin, *The Global Offensive: The United States, the Palestine Liberation Organization, and the Making of the Post-Cold War Order* (Oxford University Press, 2012).

[20] Chamberlin, *The Global Offensive*.

both parties believed, was that they were faced with adversaries who refused to spare their civilian populations. The Fatah newspaper greeted the My Lai massacre, for instance, by explicitly linking it to the most infamous massacre that took place during the founding of Israel as a state: "Vietnam has its Deir Yassin", the headline read, referring to a 1948 massacre in a town whose name had come to epitomise Zionist atrocities.[21]

Armed struggle came to be the locus around which the various cultural, political and social elements that constituted the Palestinian people as a national group evolved.

Even as Arafat addressed the United Nations, armed struggle continued to play a central role in the transformation of Palestinian identity, which ceased to "mean that one is a 'refugee', a second-class citizen" and became a source of pride; as Yusif Shihada put it: "the Palestinian has become the *fida'i* or revolutionary who bears arms."[22] Armed struggle came to be the locus around which the various cultural, political and social elements that constituted the Palestinian people as a national group evolved. Post-1967, "Palestinian" now named a collectivity with a specific historical experience and clear political demands. For Israel, it was this re-constitutive effect of the armed struggle more than its military effectiveness that was of utmost concern; armed struggle signified the return of the dead, the undoing of the political living death of the Palestinians.

Much of the Israeli counter-effort therefore went into dissolving the connection between the fighter and the refugee, the *fedayeen* and the civilians. As Colonel Shlomo Gazit, head of intelligence coordination in the Occupied Territories put it, Israel's aim was to "isolate the terrorist from the general population and deny him shelter and assistance, even though the natural sympathy of that population is with the terrorists and not the Israeli administration".[23] Just as the PLO learnt from the North Vietnamese and the Viet Cong, the Israelis learnt from the US counter-insurgency operation in Vietnam. In 1966, four years before Arafat's visit to Hanoi, Moshe Dayan, who would become Israel's defence minister, toured South Vietnam to study the American war effort.[24] Although he concluded that, for all their

[21] Chamberlin, *The Global Offensive*, 27.

[22] Shihada Yusif, cited in Sayigh, *Armed Struggle and the Search for State*, 195.

[23] Chamberlin, *The Global Offensive*, 36.

[24] "Rare Photos: When Moshe Dayan toured Vietnam and called out US arrogance," Haaretz.Com, 14 February 2017, https://www.haaretz.com/israel-news/MAGAZINE-photos-when-moshe-dayan-toured-vietnam-called-out-u-s-arrogance-1.5433374.

military superiority, the US could not eradicate support for North Vietnam's independence struggle, he refused to view the Palestinian *fedayeen* as a similar *political* threat. Palestinian nationalism was a fabrication, Dayan believed, as there was no authentic Palestinian political identity.[25] The Israeli response to the re-emergence of the Palestinian movement ultimately embraced a logic that sought to negate the very notion of a Palestinian people. This logic found its definitive statement in then Israeli Prime Minister Golda Meir's 1969 statement: "There were no such thing as Palestinians … They did not exist."

> **While Israel sought to isolate the fighters from the people, Palestinians, on the other hand, always rejected Israel's claims that its attacks were targeted solely at the fighting elements.**

Militarily, Israel launched collective punitive reprisals and targeted assassinations against Palestinian communities and spokespersons to weaken and destroy the emergent Palestinian movement.[26] While Israel sought to isolate the fighters from the people, Palestinians, on the other hand, always rejected Israel's claims that its attacks were targeted solely at the fighting elements. The principle of distinction, as Avishai Margalit and Michael Walzer have argued, presumes that war should be a conflict between states not nations or peoples, and that whatever becomes of the armies, and whatever the casualties, "the two nations, the two peoples, must be functioning communities at war's end".[27] Yet, this presupposition could never ground the rules of a conflict in which one party denied the very existence of the other as a people. As Rashid Khalidi observed of the 2014 war on Gaza, Israel's attack "has been seen universally among Palestinians as a war on their entire people, not on Hamas". In reality, Israel has impeded Palestinian life since 1948 in ways that have often made the distinction between civilian and non-civilian immaterial, as the eliminatory logic of settler colonialism took precedence over the logic of limited war.

This conviction that Israel was not waging a limited war but one aimed at dissolving the political and moral personhood of the Palestinians made it difficult for the Palestinians to inscribe their experience in the language of

[25] Chamberlin, *The Global Offensive*.

[26] Markus Gunneflo, *Targeted Killing: A Legal and Political History* (New York: Cambridge University Press, 2016); Ronen Bergman, *Rise and Kill First: The Secret History of Israel's Targeted Assassinations* (USA: Random House, 2018).

[27] Avishai Margalit and Michael Walzer, "Israel: Civilians & Combatants," *The New York Review of Books*, 14 May 2009.

international humanitarian law. In speaking the language of international law the Palestinians were torn between their own specific need to codify a normative framework for a people engaged in an existential struggle against a colonial-settler occupation, and the realities of a law designed to regulate the conduct of limited wars between states. For some sections of the Palestinian movement, the lack of discrimination on Israel's part and the nature of its settler-colonial enterprise justified targeting Israeli civilians. The Popular Front for the Liberation of Palestine military commander Abu Hammam, for instance, argued that Israel's military reserve system meant that Israeli civilians were in fact "military personnel in civilian clothes", and had played a central role in "driving out the Arab population from the occupied homeland".[28] In contrast, during the proceedings of the ICRC Diplomatic Conference, the PLO delegation declared its willingness to accept the principle of distinction.

“In speaking the language of international law the Palestinians were torn between their own specific need to codify a normative framework for a people engaged in an existential struggle against a colonial-settler occupation, and the realities of a law designed to regulate the conduct of limited wars between states.

In the course of the diplomatic conference, the PLO and the Israeli delegates both accused one other of violating the principle of distinction and attacking non-military targets. The Israeli delegate drew attention to a 1977 article in which, he told the conference, "an organisation called the Palestinian Democratic Freedom Front claimed credit for two guerrilla actions" — one against an oil storage depot, which had killed some workers, and another against a Jerusalem vegetable store, which had killed and wounded "a large number of Zionists". "Such were the military objectives attacked by the Palestinian rebels," he argued, "they not only attacked them, but boasted of having done so."[29] At another point in the conference, the PLO's Armali responded to the statement of the Israeli delegate, "that Israeli forces had attacked only military objectives", by asking: "Had the Arab population of the village of Deir Yassin been a military objective?"[30]

[28] Sayigh, *Armed Struggle and the Search for State*, 213.

[29] Sabel in International Committee of the Red Cross, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts," 313 (CDDH/SR.58).

[30] Armali in International Committee of the Red Cross, 313 (CDDH/SR.58).

The Palestinians' "coming of age" as a national liberation movement was largely out of sync with the great decolonisation struggles of the previous decades. They shared both the liberationist and statist aspiration of this struggle but achieved neither liberation nor a state. Their fight was not simply an asymmetrical struggle against a technologically superior army; it was a fight for survival against a settler-colonial adversary determined to impair the viability of the Palestinians as a people. In this context, the Palestinians' options ranged from complete erasure to qualified inclusion. To overcome erasure, the PLO spoke in the name of the people of Palestine. To secure inclusion, they spoke the language of international institutions and international law. Over the years, in order to be accepted as worthy of law's protection in their pursuit of self-determination, the Palestinians had to speak the vocabularies of languages not necessarily their own. These languages offered the Palestinians political opportunities but they came with political risks and limits. In particular, the effort to gain juridical recognition of the PLO made the Palestinians dependent on the support and acknowledgement of existing normative, institutional and legal mechanisms that excluded them as a People and included them solely as a state in the making.

In acting as a state in the making, the PLO accepted the classifying logic of the law, with its distinction between combatants and non-combatants. Yet, this distinction was inadequate to the permanent state of aggression faced by the Palestinians as a people.

In acting as a state in the making, the PLO accepted the classifying logic of the law, with its distinction between combatants and non-combatants. Yet, this distinction was inadequate to the permanent state of aggression faced by the Palestinians as a people. And, as Dinstein's "continuum" approach to direct participation in hostilities makes clear, in continually re-articulating the threshold between the combatant and the non-combatant, Israel construes and constructs Palestinians as "inhabiting a threshold between civilians and combatants".[31] Long after the PLO had declared its willingness to abide by the principle of distinction, Israel continues to view Palestine's farmers-by-day as fighters-by-night.

[31] Perugini and Gordon, "Distinction and the Ethics of Violence," 1387.

The Vietnam War and the Civilian/Combatant Distinction in International Humanitarian Law

By **Amanda Alexander**

Abstract

This paper discusses the effect of the Vietnam War on the construction of the civilian/combatant distinction in the 1977 Additional Protocols to the Geneva Conventions of 1954. It argues that when states met to draft the additional protocols, third world and socialist states, such as North Vietnam, challenged the existing laws regarding civilians and combatants. Meanwhile, western states found it hard to defend laws that had caused widespread public outrage. After much debate, new definitions of civilians and combatants were agreed upon — although later rejected by many states. Nevertheless, despite this opposition, by the end of the century these definitions were regarded as customary international law.

The distinction between civilians and combatants is perhaps the central precept of international humanitarian law (IHL) today. In the list of customary rules of IHL prepared by the International Committee of the Red Cross (ICRC), the principle of distinction is Rule 1.[1] In Rule 4 combatants are defined as members of the armed forces and in Rule 5 civilians are defined as those who are not members of the armed forces.[2] Under Rule 106, combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack in order to be eligible for prisoner of war status.

These rules reflect the provisions of the 1977 Additional Protocols to the Geneva Conventions of 1949. As such, they could now be considered customary, as well as treaty, law. Yet, when they were being negotiated, during the 1974-1977 Diplomatic Conferences on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, many of these sections were highly contested. The provisions

[1] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* — Volume 1: Rules (Cambridge University Press, 2005), 3.

[2] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 14, 17

that resulted from these years of negotiations were viewed by many of the parties as flawed compromises.

> **In the list of customary rules of IHL … combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack in order to be eligible for prisoner of war status.**

In this article, I intend to discuss the way the Vietnam War informed some of the positions on these issues and ultimately contributed to the problematic shape of the provisions. Vietnam was not the only conflict to influence the drafting of the protocols, but it was an archetype of conflicts that had prompted the ICRC to draft new laws. When the ICRC began agitating for new laws of armed conflict it was concerned by military developments, such as aviation, that had "almost wiped out" the fundamental distinctions between combatants and civilians.[3] It was also troubled by the rise of a "truly enormous tidal wave of guerilla activity" that had not been anticipated by earlier conventions.[4] The Vietnam War was the consummate example of these concerns. More importantly, however, the experience of the Vietnam War informed the drafting process by challenging the traditional western statement of the laws of armed conflict.

The Western Position on the Laws of Armed Conflict

When the delegates met in 1974 to draft the additional protocols, they held a number of conflicting positions on the nature and purpose of the laws of armed conflict — none of which provided unequivocal protection for civilians. The first position to be aware of was the traditional state of international law, shaped by predominantly western nations. When the ICRC and other commentators claimed that there were longstanding principles protecting civilians and an absence of law concerning guerrilla warfare,[5] this was something of a misrepresentation of the existing state of the laws of

[3] Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (M. Nijhoff Publishers, 1987), 509.

[4] Claude Pilloud et al, *Commentary on the Additional Protocols*, 384.

[5] See, for example, James E Bond, "Protection of Non-Combatants in Guerrilla Wars," *William and Mary Law Review* 12, no 4 (1971): 787, 797; WT Mallison and RA Jabri, "The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity," *George Washington Law Review* 42 (1973–1974):185, 205.

armed conflict.[6] There *were* laws concerning what had been termed "irregular warfare". "Irregular warfare" had been an important issue at the 1907 Hague Conference. However, most of the states at the Hague Conference considered this form of warfare anathema. They therefore drafted clear regulations 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.[7] These requirements were retained in the 1949 Geneva Conventions — although they were extended to apply to organised resistance movements.[8] Combatants who did not fulfil these requirements would be considered criminals and subject to punishment. Moreover, whole swathes of the civilian population could be attacked as a reprisal for such criminality in their midst.[9]

As this last proviso showed, civilians had not been traditionally protected to the extent that the ICRC suggested. The 1907 Hague Convention only provided non-combatants with a bare modicum of protection by prohibiting the bombardment of undefended towns.[10] Civilians could be legally exposed to starvation, reprisals, and bombardment. This legal position was actually demonstrated by the United States' campaign in Vietnam.[11] So why then was there this belief that civilians were protected and guerrillas were unregulated?

My argument is that the public demonstrations concerning Vietnam, the academic outrage, and the war crimes trials that had been put in place shifted the western understanding of the nature of the laws of armed conflict.[12]

[6] Amanda Alexander, "The Genesis of the Civilian," *Leiden Journal of International Law* 20 (2007): 359.

[7] *Convention (IV) Respecting the Laws and Customs of War on Land*, The Hague, 18 October 1907, art 1.

[8] *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, art 4 (2).

[9] Arnold Fraleigh, "The Algerian Revolution as a Case Study in International Law," in *The International Law of Civil War*, ed Quincy Wright and Richard A Falk (Johns Hopkins Press, 1971), 196, 202.

[10] Amanda Alexander, "The Genesis of the Civilian," *Leiden Journal of International Law* 20 (2007), 363.

[11] Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Quadrangle Books, 1970), 136; Tom J Farer, Robert G Gard and Telford Taylor, "Vietnam and the Nuremberg Principles: A Colloquy on War Crimes," *Rutgers-Camden Law Journal* 5, no 1 (1973–1974): 22; Benjamin B. Ferencz, "War Crimes Law and the Vietnam War," *The American University Law Review* 17 (1968): 403, 412.

[12] Amanda Alexander, "International Humanitarian Law," 48.

Legal commentators increasingly adopted the criteria used by critics of the campaign and found themselves unable to defend or even discuss the traditional understanding of the law.[13] If the laws of armed conflict were meant to be civilised and beneficial, then how could they countenance the sort of military campaign carried out in Vietnam or Algeria? Western delegates and lawyers, unable to argue that the law allowed the sort of attacks on civilians that were carried out in Vietnam, simply insisted that international law *did* protect civilians. And instead of acknowledging the brutal law concerning guerrillas, they claimed there was no law at all.

> **The United States and other western delegations were ready to write new laws to fill what they saw as a gap, but they also believed that for civilians to be protected combatants must distinguish themselves.**

Once the law was viewed in this way, western delegates were able to arrive at the diplomatic conferences ready to change the law (even when they did not see it as a change). Yet, the changes they intended to make were still constrained by the terms of the unacknowledged, pre-existing law. Western delegates hoped that the new law would provide enough recognition of guerrillas to encourage them to commit to the law and identify themselves, as well as provide better protection of civilians.[14] If this worked, the result would be to make irregular combatants look more like regular combatants and guerrilla warfare more like the warfare envisaged by the traditional codes of war.

North Vietnam and the Laws of Armed Conflict

I have suggested that there was not a longstanding principle of civilian protection in international law, that the fate of the civilian, as understood before the diplomatic conferences, was always precariously tied to her state. The Vietnamese communists put this position even more starkly. The "One Struggle" strategy necessarily involved seeing the people and the military as the same. As the North Vietnamese military strategist General Võ Nguyên Giáp wrote:

[13] Amanda Alexander, "International Humanitarian Law," 48.

[14] See, for example, George H Aldrich, "New Life for the Laws of War," *The American Journal of International Law* 75 (1981): 764, 770; Claude Pilloud et al, Commentary on the Additional Protocols, 520–21.

> In fact, our Resistance War was a people's war. On the battlefronts the army men rushed forward to annihilate the enemy, while in the rear the people were striving to increase production — the peasants in the fields and tile workers in the arms-factories — in order to supply the troops, to serve the front line. The people's armed forces were the regular army and the regional troops and guerrilla units. With the slogan "the whole nation in arms" each person was a soldier, each village a fortress, each Party branch and Resistance committee a staff. It was so in the free zones and all the more so in the enemy-occupied zones.[15]

Guerrilla warfare, the communist strategists wrote, necessarily required this connection:

> The people are the eyes and ears of the army, they feed and keep our soldiers. It is they who help the army in sabotage and in battle. The people are the water and our army the fish. The people constitute an inexhaustible source of strength for the army.[16]

Guerrilla warfare may have been prohibited under the laws of war, but this was not the criteria by which the communists assessed the justice of their cause. "Just wars", the North Vietnamese communist leader and theoretician Truong Chinh wrote, "are wars fought against oppressors and conquerors to safeguard the freedom and independence of peoples."[17] For North Vietnam, and other socialist and third world states, the Diplomatic Conferences were an opportunity to make a statement about the justice of such wars and provide extra protection for the people who fought in them.

The Provisions

These different expectations led to extensive controversy and prolonged negotiation at the Diplomatic Conferences. The first session was preoccupied by questions about the status and justice of wars of national liberation. This was eventually resolved, but the question of combatant status became equally controversial. The United States and other western delegations were ready to write new laws to fill what they saw as a gap, but they also believed that for civilians to be protected combatants must distinguish themselves. As the US delegate stated:

[15] Võ Nguyên Giáp, *People's War, People's Army* (Foreign Languages Publishing House, 1961), 48.

[16] Truong Chinh, "The Resistance will Win" in *Selected Writings* (Foreign Languages Publishing House, 1977), 112.

[17] Truong Chinh, "The Resistance will Win," 103.

> 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...[18]

In contrast North Vietnam, together with some other postcolonial states, argued that members of national liberation movements should *never* have to distinguish themselves.[19] It was simply not fair, they said, to expect ill-armed, repressed groups, fighting against imperialist aggression to have to comply with such restrictions. As for the protection of civilians, North Vietnam added, the requirement for distinction did not help them. It simply gave the imperialists an excuse to attack them, in reprisal for unavoidable infringements of the law.[20] In another statement, 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.

The question of when and how combatants should distinguish themselves consumed weeks of negotiations. Finally, "after two years of hard work, official and unofficial contacts and prolonged discussion and mediation"[21] and what others described as the tireless energy of the American rapporteurs,[22] a compromise article was produced. It avoided 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

[18] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Vol 14 (Hein, 1981), 477.

[19] *Official Records of the Diplomatic Conference*, Vol 14, 344, 324, 531.

[20] *Official Records of the Diplomatic Conference*, Vol 14, 466.

[21] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva* (1974–1977), Vol 15 (Hein, 1981), 155.

[22] *Official Records of the Diplomatic Conference*, Vol 15, see Mr Sokirkin (USSR) at 119, Sir David Hughes-Morgan (UK) at 156, and various other governments at 224, thanking the American rapporteurs for their efforts.

what "deployment" meant and Aldrich suggests that this very ambiguity made the term acceptable to all the delegates.[23] Moreover, paragraph 4 of the draft article stated that even if a combatant fails to meet these requirements, he should still be given protection equal to those given to prisoners of war.

These confusing provisions were enough of a compromise to be adopted by 66 votes to 2 with 18 abstentions,[24] but too much of a compromise for anyone to be satisfied. All the delegates recognised that it was a less than satisfactory result and they referred to it as a compromise when explaining their votes. Many states complained about the ambiguity of the provision;[25] others were concerned that it had reduced the protection for civilians;[26] North Vietnam regretted that it did not go far enough in protecting guerrillas.[27] Nevertheless, the article was accepted and written into Additional Protocol I.

The definition and the general principle of protection for civilians did not garner the same sort of controversy. The ICRC produced a draft article that defined civilians as any person who was not a combatant. Although the ICRC recognised that this negative formula was novel and that there were other ways of thinking of civilians,[28] the article was easily accepted by the delegates. In the same manner, the draft article that provided for the principle of distinction and protection of civilians was accepted and proclaimed as a reaffirmation of customary international law. There was less consensus when it came to the details of protection; nevertheless, the Conference succeeded in providing unprecedented protection for civilians — including protection from starvation and reprisals.

In this way, the diplomatic conferences reshaped the legal meaning and protection of civilians and combatants, but it did so in a way that was ambiguous and paradoxical. Civilians were defined as not being combatants

[23] George H Aldrich, "Guerrilla Combatants and Prisoner of War Status," *American University Law Review* 31 (1981–1982): 871, 878–879.

[24] Brazil and Israel voted against; New Zealand, Nicaragua, Spain, Thailand, the United Kingdom, Uruguay, Argentina, Australia, Bolivia, Canada, Chile, Colombia, Denmark, Guatemala, Holy See, Ireland, Italy and Japan abstained. *Official Records of the Diplomatic Conference*, Vol 14, 155.

[25] *Official Records of the Diplomatic Conference*, Vol 14, see Greece at 170, Netherlands at 171, Sweden at 174.

[26] *Official Records of the Diplomatic Conference*, Vol 14, see Austria at 163, Mexico at 162.

[27] *Official Records of the Diplomatic Conference*, Vol 14, see North Vietnam at 169.

[28] Claude Pilloud et al, *Commentary on the Additional Protocols*, 610.

and granted increased protection, yet at the same time combatants were defined in a way that meant that they could also be civilians, at least some of the time. In this way, Additional Protocol I, which aimed at expanding the protection of the civilian, simultaneously obscured civilian status and, with it, claims to protection. These paradoxes were largely due to the divergent conceptualisations of the purpose and nature of international law that had emerged through conflicts like Vietnam, and the consequent inability of western states to defend the traditional precepts of the law.

The diplomatic conferences reshaped the legal meaning and protection of civilians and combatants, but … in a way that was ambiguous and paradoxical. Civilians were defined as not being combatants and granted increased protection, yet at the same time combatants were defined in a way that meant that they could also be civilians, at least some of the time.

These problems in Additional Protocol I soon became apparent. Many states, particularly military states, refused to ratify it. President Reagan described it as fundamentally and irreconcilably flawed.[29] Nevertheless, despite this long opposition, by the end of the 20th century, ratifications increased and legal commentators and the ICRC began to describe the Protocol as customary international law. As such, these provisions, drafted in the context of the conflicts and concerns of the 1970s, have become entrenched in international humanitarian law.

[29] Ronald Reagan, "Letter of Transmittal," *American Journal of International Law* 81 (1987): 910, 911.

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Cover Image:
A Bell UH-1 Iroquois, more commonly known as "Huey", deployed during the Vietnam War.

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