CORRESPONDENCE

TO THE EDITOR IN CHIEF:

In an article in the *American Journal of International Law* (85 AJIL 1 (1991)), Ambassador George Aldrich, formerly head of the United States delegation that negotiated the 1977 Protocols Additional to the 1949 Geneva Conventions relative to the Protection of the Victims of Armed Conflicts, argues that the objections so far made to United States ratification of Protocol I are insubstantial. But since the principal objections to U.S. ratification are ignored by him, his argument seems unpersuasive. Those objections have been raised often and loudly, most notably in the 1979–1980 Report of the Committee on Armed Conflict of the International Law Association, American Branch.[1] The membership of that committee was eminent, widely diverse in experience, and deeply divided in its conclusions.[2]

The overwhelming argument against ratification is the introduction in Protocol I of considerations of the *jus ad bellum*, the justification for taking up arms, as a qualification for the application of the *jus in bello*, the laws that apply to protect the helpless victims of the struggle. Aldrich correctly notes that in Article 1(4) of the Protocol a special category is created for persons engaged in a struggle against colonial domination or racist regimes. Legal powers are granted also in Article 96(3) that are withheld from persons in an identical situation whose motives are less compelling to the other parties to the Protocol. Aldrich does not note the apparent inconsistency between the automatic application of the laws of war to approved rebels under Article 1(4) and the implication of Article 96(3) that those rebels are not bound by the laws of war until the "authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4" undertakes to apply the Convention. The distinctions have nothing to do with whether it is humane or politically desirable to apply the laws of war and prisoner-of-war status to rebels or guerrillas, but whether the laws of war apply reciprocally to all parties to the struggle, and whether a distinction based on the *jus ad bellum* should alter the framework of the laws of war, the *jus in bello*.

A second major area of disagreement ignored by Aldrich is the almost complete intermixture in Protocol I of humanitarian rules aimed at protecting the victims of the struggle no matter what their politics, and the rules aimed at maintaining a level playing field in a struggle in which real people are risking their lives to establish or maintain some public authority.[3] Any rules that might affect the outcome of the struggle are by definition not humanitarian and must reflect other

[1] 1979–80 INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH), PROC. & COMMITTEE REPS. 38–54, plus an erratum sheet made necessary by a last-minute switch in votes in the committee and an error by the editor of the *Proceedings*.

[2] Waldemar Solf and George Prugh are two of the members who were also active participants in the conferences that produced Protocol I. The only significant limitation on membership was to exclude persons still active in government in order to prevent the committee from becoming a mere lobby for positions reached by nonmembers elsewhere; Ambassador Aldrich was kept fully informed of its activities. This is not the place to go into detail, but I have a complete set of the committee's correspondence should there ever be a question about its openness and the expertise represented.

[3] Part III of the Protocol is devoted to "Methods and Means of Warfare, Combatant and Prisoner-of-War Status." Many of the articles in part III are no doubt humanitarian and helpful to victims; others are not.

political preferences adopted by the parties to the Protocol. An illustration of the problem ignored by Aldrich is the application by the UN Security Council of an embargo on food and medicines to Iraq.[4] Another is the almost total lack of enforcement illustrated by the current confusion about Iraqi war crimes and grave breaches, leaving those articles that might have a bearing on the outcome of the struggle to inhibit the law-abiding and not restrict the villainously inclined. This is not the place to spell out the legally complex matter in any detail.

In sum, there might have been confusion in the Reagan administration, as Aldrich asserts, but the issues ignored by Aldrich have been raised and circulated and will be part of the public debate. If senatorial advice and consent to ratifying either of the 1977 Protocols to the 1949 Geneva Convention is ever requested again, Aldrich's article will seem a mere polemic in that forum.

I cannot end this letter without mentioning the repugnance I feel at Aldrich's repeated juxtaposition of opposition to American ratification of Protocol I and an impliedly parochial or even malign Israeli attitude towards the Protocol. I have heard the same views expressed by people associated with the International Committee of the Red Cross in Geneva. Since the effect of wide ratification of the Protocol is great enhancement of the role of the ICRC in nonhumanitarian matters, the confusion of thought in Geneva is humanly understandable, however deplorable. But Aldrich must know better. In these circumstances I feel forced to point out that my own views on the 1977 Protocols were made clear as apprehensions when a study panel of the American Society met under the leadership of Jacques Fremond in the early 1970s to consider whether a revision of the 1949 Conventions should be undertaken. Those views were published in various forms before I had heard of Israeli positions on any of this. Indeed, my fundamental disagreement with the official Israeli position on the applicability of the laws of war to the activities of the Palestine Liberation Organization should be too widely known to those interested in the subject for anybody to suppose me influenced by Israeli dogmas. I find incomprehensible Aldrich's implication that disagreement with an Israeli position is evidence of objectivity regarding American interests.

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George Aldrich replies:

My article in the January 1991 issue of the *Journal* responded to each of the reasons given by the Reagan administration for its decision not to submit the 1977 Geneva Protocol I to the Senate. Professor Rubin finds my arguments unpersuasive, however, for the reasons that, in his view, I have ignored the "principal objections to United States ratification." To the extent that those "objections" were not raised by the Reagan administration, I may indeed have ignored them, but I have to wonder how significant they really are. Unfortunately, Professor Rubin's letter fails to identify them with sufficient clarity to permit an answer. The one objection that is clearly identified, the issue of wars of national liberation (Articles 1(4) and 96(3)), which he characterizes as the "overwhelming argument against ratification," is fully dealt with in my article, as it was a principal objection raised by the Reagan administration. I do not understand how Professor Rubin can say I ignored that objection. Incidentally, it is perfectly clear that, despite the

[4] SC Res. 661, para. 3(c) (Aug. 6, 1990). The exclusion of "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs" appears not to have been applied consistently; nor is it clear what foodstuffs were believed not to involve "humanitarian circumstances." Under Article 54 of Protocol I, there are other limits placed on starvation as a method of warfare that appear to have been ignored by the Security Council.

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