

ADDITIONAL PROTOCOL I AS AN EXPRESSION OF CUSTOMARY INTERNATIONAL LAW

The following is a summary of the comments of Mr. Michael Matheson, then U.S. Dept. of State Deputy Legal Advisor, presented to the Sixth Annual American Red Cross-Washington College of Law Conference on International, Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, reported in 2 AM. U. J. INT'L L. & POLICY 419 (1987). He expounded on the provisions of Protocol I which the U.S. considers (and, where noted, does not consider) expressions of customary international law.

Art. 1(4) – We do not support the applicability of Protocol I to wars of national liberation; this is not an expression of customary international law.

Art. 5 – Protecting powers shall be designated and accepted without delay from the beginning of any conflict, but, this principle is not unequivocal and is still subject, in the last instance, to refusal by the state in question.

Art. 10 – All wounded, sick, and shipwrecked will be respected and protected, and not be made the object of attacks or reprisals; such persons are to be given medical treatment, and no distinction is to be made based on any grounds other than medical.

Art. 11 – Physical or mental health and integrity of persons under the control of a party to a conflict shall not be endangered by any unjustified act or omission and shall not be subjected to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards.

Arts. 12 through 20 – Medical units, including properly authorized civilian medical units, shall be respected and protected at all times and shall not be made the object of attacks or reprisals; civilian medical and religious personnel likewise shall be respected and protected.

Arts. 18 through 23 – The relevant provisions of the 1949 Geneva Conventions apply to all properly authorized medical vehicles, hospital ships, and other medical ships and craft, regardless of the identity of the wounded, sick, and shipwrecked that they serve.

Arts. 24 through 31 – Known medical aircraft shall be respected and protected when performing their humanitarian functions.

Arts. 32 and 33 – Families have the right to know the fate of their relatives and each party to a conflict should search areas circumstances permit.

Art. 34 – Each party to conflict shall permit teams to search for, identify, and recover the dead for the battlefield areas, and the remains of the dead shall be respected, maintained, and marked; as soon as circumstances permit, arrangements shall be made to facilitate access to grave-sites by relatives, to protect and maintain such sites permanently, and facilitate the return of the remains, when requested.

Art. 35 – The methods and means of conducting warfare and of injuring the enemy are not unlimited and the parties to a conflict may not use weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. We do not support the prohibition on use of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment; this prohibition is too broad and ambiguous and is not part of customary international law.

Art. 37 and 38 – Individual combatants shall not kill, injure, or capture enemy personnel by resort to perfidy; internationally recognized protective emblems, e.g., the Red Cross, shall not be improperly used.

Art. 39 – We do not support the prohibition on the use of enemy emblems and uniforms during military operations.

Art. 40 – No order shall be given that there will be no survivors taken nor may an adversary be threatened with such an order or hostilities conducted on that basis.

Art. 42 – Persons, other than airborne troops, parachuting from an aircraft in distress shall not be made the object of attack.

Arts. 44 and 45 – We do not support the relaxation of requirements contained in the Third Geneva Convention concerning POW treatment for irregular forces. We do believe persons entitled to combatant status should be treated as prisoners of war in accordance with the 1949 Geneva Conventions; combatant personnel must distinguish themselves from the civilian population while engaged in military operations. We do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he shall be so treated until his status has been determined by a competent tribunal; if a person who has fallen into the hands of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he shall have the right to assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated.

Art. 47 – We do not support the prohibition on the use of mercenaries; this is not an expression of customary international law.

Arts. 51 and 52 – Civilian populations and individual citizens shall not be made the object of acts or threats of violence, the primary purpose of which is to spread terror among them; attacks shall not be carried out which would clearly result in collateral civilian casualties disproportionate to the expected military advantage. The civilian population shall not be used to shield military objectives or operations from attack, and immunity shall not be extended to civilians who are taking part in the hostilities. We do not support the portion of Art. 51 and subsequent articles prohibiting the use of reprisals; this is not an expression of customary international law.

Arts. 54 and 70 – Starvation of civilians shall not be used as a method of warfare, and, subject to the requirements of imperative military necessity, impartial relief actions necessary for the survival of the civilian population shall be permitted and encouraged.

Arts. 57 through 60 – All practicable precautions, taking into account military and humanitarian considerations, shall be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit; attacks shall not be made against appropriately declared or agreed non-defended localities or agreed demilitarized zones.

Art. 56 – We do not support the prohibition on targeting dikes, dams, and nuclear power stations.

Arts. 62 and 63 – Civilian defense organizations and their personnel shall be respected and protected as civilians and shall be permitted to perform their civil defense tasks, except in cases of imperative military necessity; in occupied territories, civilians shall receive from the appropriate authorities, as practicable, the facilities necessary for the performance of their tasks.

Arts. 73 and 74 – Persons who were considered as refugees or stateless persons before the beginning of hostilities shall nonetheless be treated as protected persons under the Geneva Convention; states shall facilitate the reunion of families dispersed as a result of armed conflicts and will encourage, in particular, the work of humanitarian organizations engaged in this work.

Art. 75 – All persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions shall be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction based upon race, sex, language, religion or belief, political or other opinion,

national or social origin, or an similar criteria. These persons shall not be subjected to violence to life, health, or physical or mental well-being, outrages upon personal dignity, the taking of hostages, or collective punishments, and no sentence may be passed and no penalty executed except pursuant to conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.

Arts. 76 through 78 – Women and children shall be the object of special respect and protection, and women will be protected against rape and indecent assault, and all feasible measures shall be taken to ensure that children under the age of fifteen do not take a direct part in hostilities. No state shall arrange for the evacuation of children except for temporary evacuation where compelling reasons of the health or medical treatment of the children or their safety exist, except in occupied territory, so require.

Art. 79 – Journalists shall be protected as civilians under the Conventions, provided they take no actions adversely affecting such status.

Art. 80 through 85 – All necessary measures for the implementation of the rules of humanitarian law shall be taken without delay, and the ICRC and the relevant Red Cross or Red Crescent organizations will be granted all necessary facilities and access to enable them to carry out their humanitarian functions; legal advisors shall be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles, and their study shall be included in programs of military instruction.

Arts. 85 through 89 – Appropriate authorities shall take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, and shall take all appropriate steps to bring to justice all persons who have willfully committed such acts, and will make good faith efforts to cooperate with one another in this regard.

MEMORANDUM FOR MR. JOHN H. McNEILL, ASSISTANT GENERAL COUNSEL (INTERNATIONAL), OSD

SUBJECT: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications

This is in reply to your memorandum of 26 March 1986, same subject, to the undersigned. In that memo you asked our views on which articles of the Protocol are currently recognized as customary international law, and which should be supported for eventual incorporation into that law. Our views were to be based on the list of provisions provided by OJCS.

We view the following provisions as already part of customary international law:

- a. Medical activities: Articles 10; 12, paragraphs 1 (as it applies to military medical activities) and 4; 15, paragraph 1; and 18, paragraphs 1, 2, 4 and 7 (as it applies to military medical activities). We do not believe any reference to "signals" represents customary international law.
- b. Medical aircraft: Articles 24 (except reference to "this Part"); 28, paragraph 1; and 31, subject to there being a reasonable basis for assuming that the party ordering a landing will respect the Geneva Conventions and Articles 30 and 31 of the Protocol.
- c. Basic principles: Article 35, paragraphs 1 and 2.
- d. Quarter: Article 40.
- e. Parachutists: Article 42.
- f. Persons who have taken part in hostilities: Article 45, paragraph 3, first sentence.
- g. Civilians: Articles 51, paragraph 2; 52, paragraphs 1 and 2 (except for the reference to "reprisals"); and 57, paragraphs 1, 2(c) and 4.
- h. undefended localities and demilitarized zones: Articles 59 and 60.
- i. Refugees: We regard Article 73 as a correct and authoritative interpretation of Article 4 of the Fourth Geneva Convention of 1949.
- j. Fundamental guarantees: Article 75.
- k. Women and children: Article 76, paragraph 1, and 77, paragraph 1.

We regard the following provisions as supportable for inclusion in customary law through state practice:

- a. Medical activities: Article 12, paragraphs 1 (as applicable to civilian medical activities), 2 and 3; 13; 14; 15, paragraph 5; 18, paragraph 3, and 20. Also, adding identification guidelines for civilian medical activities is acceptable as provided for in paragraph 1, 2 and 4 of Article 18. We do not support inclusion of "signals" in customary law.
- b. Medical transportation: Article 21; 25-27; 28, paragraphs 2 (except the first sentence), 3 and 4; 29 and 30. Support for the provisions pertaining to aircraft is also subject to the general conditions that the duties of aircraft shall depend on control of airspace rather than control of the surface overflow, and that a summons to land need not be respected unless there is a reasonable basis to believe that a party ordering the landing will respect the Geneva Convention and Articles 30 and 31 of the Protocol. Also, as to Articles 26 and 27, support is conditioned on the requirement for an agreement between the parties to the conflict concerned.
- c. Missing personnel: Articles 32, 33 and 34.
- d. Persons who have taken part in hostilities: Article 45, paragraphs 1, 2 and the second sentence of 3.
- e. Family reunification: Article 74.
- f. Women and children: Article 76, paragraphs 2 and 3, and 77, paragraphs 2, 3 and 4.
- g. Evacuation of children: Article 78, subject to the right of asylum and compliance with the United Nations Protocol on Refugees.
- h. Journalists: Article 79.
- i. Executions: Article 81, 82 and 83.

The above lists are in the nature of an advisory opinion on our part. As with all such opinions, the actual application of these provisions may vary depending on the concrete factual situation involved.

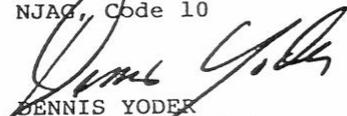
In addition to the undersigned, Lt Col Burrus M. Carnahan, USAF, and CDR John C. W. Bennett, JAGC, USN, participated in preparation of this memo.



W. HAYS PARKS,
Chief, International Law Branch
DAJA-IA



LCDR MICHAEL F. LOHR, JAGC, USN
NJAG, Code 10



DENNIS YODER
Lt Colonel, USAF
AF/JACY



WILLIAM ANDERSON
HQ USMC/JAR