

# Making Endless War

THE VIETNAM  
AND ARAB-ISRAELI  
CONFLICTS IN  
THE HISTORY OF  
INTERNATIONAL LAW



**Brian Cuddy & Victor Kattan, Editors**

Cuddy, Brian, and Victor Kattan. *Making Endless War: The Vietnam and Arab-Israeli Conflicts In the History of International Law*.  
E-book, Ann Arbor, MI: University of Michigan Press, 2023, <https://doi.org/10.3998/mpub.12584508>.

Downloaded on behalf of Australian Catholic University

## Making Endless War

## Law, Meaning, and Violence

The scope of Law, Meaning, and Violence is defined by the wide-ranging scholarly debates signaled by each of the words in the title. Those debates have taken place among and between lawyers, anthropologists, political theorists, sociologists, and historians, as well as literary and cultural critics. This series is intended to recognize the importance of such ongoing conversations about law, meaning, and violence as well as to encourage and further them.

Series Editors: Martha Minow, Harvard Law School  
Austin Sarat, Amherst College

### RECENT TITLES IN THE SERIES

*Making Endless War: The Vietnam and Arab-Israeli Conflicts in the History of International Law*  
edited by Brian Cuddy and Victor Kattan

*Bad Boys: Public Schools in the Making of Black Masculinity*  
(with a new Foreword by Pedro A. Noguera)  
by Ann Arnett Ferguson

*The Truth Machines: Policing, Violence, and Scientific Interrogations in India*  
by Jinee Lokaneeta

*Keeping Hold of Justice: Encounters between Law and Colonialism*  
by Jennifer Balint, Julie Evans, Mark McMillan, and Nesam McMillan

*The Jurisprudence of Emergency: Colonialism and the Rule of Law*  
(with new Foreword and Preface)  
by Nasser Hussain

*Archiving Sovereignty: Law, History, Violence*  
by Stewart Motha

*The Holocaust, Corporations, and the Law: Unfinished Business*  
by Leora Bilsky

*Curating Community: Museums, Constitutionalism, and the Taming of the Political,*  
by Stacy Douglas

*Refining Child Pornography Law: Crime, Language, and Social Consequences,*  
edited by Carissa Byrne Hessick

*The First Global Prosecutor: Promise and Constraints,*  
edited by Martha Minow, C. Cora True-Frost, and Alex Whiting

*Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia,*  
by John D. Ciorciari and Anne Heindel

*The Justice of Mercy,* by Linda Ross Meyer

*Dying Inside: The HIV/AIDS Ward at Limestone Prison,*  
by Benjamin Fleury-Steiner with Carla Crowder

*Sacred Violence: Torture, Terror, and Sovereignty,* by Paul W. Kahn

*Punishment and Political Order,* by Keally McBride

*Lives of Lawyers Revisited: Transformation and Resilience in the Organizations of Practice,*  
by Michael J. Kelly

# MAKING ENDLESS WAR

---

*The Vietnam and Arab-Israeli Conflicts  
in the History of International Law*

Edited by Brian Cuddy and Victor Kattan

University of Michigan Press  
Ann Arbor

Copyright © 2023 by Brian Cuddy and Victor Kattan  
Some rights reserved



This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License. *Note to users:* A Creative Commons license is only valid when it is applied by the person or entity that holds rights to the licensed work. Works may contain components (e.g., photographs, illustrations, or quotations) to which the rightsholder in the work cannot apply the license. It is ultimately your responsibility to independently evaluate the copyright status of any work or component part of a work you use, in light of your intended use. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-nd/4.0/>

For questions or permissions, please contact [um.press.perms@umich.edu](mailto:um.press.perms@umich.edu)

Published in the United States of America by the  
University of Michigan Press  
Manufactured in the United States of America  
Printed on acid-free paper  
First published August 2023

A CIP catalog record for this book is available from the British Library.

Library of Congress Control Number: 2023003902  
LC record available at <https://lccn.loc.gov/2023003902>

ISBN 978-0-472-07587-4 (hardcover : alk. paper)  
ISBN 978-0-472-05587-6 (paper : alk. paper)  
ISBN 978-0-472-90319-1 (open access ebook)

DOI: <https://doi.org/10.3998/mpub.12584508>

An electronic version of this book is freely available, thanks in part to the support of libraries working with Knowledge Unlatched (KU). KU is a collaborative initiative designed to make high quality books Open Access for the public good. More information about the initiative and links to the Open Access version can be found at [www.knowledgeunlatched.org](http://www.knowledgeunlatched.org).

The University of Michigan Press's open access publishing program is made possible thanks to additional funding from the University of Michigan Office of the Provost and the generous support of contributing libraries.

Cover illustrations: Vietnam Army Pith Helmet on bamboo pole in rice field, courtesy Shutterstock.com / Aaron Herron. Palestinian Intifada boy with rocks in hands ready for fight, courtesy Shutterstock.com / Zurijeta.

*For our children,  
Lara, Gabrielle, and Rosemary,  
and  
Zachariah*



# Contents

Foreword: How International Law Evolves— Norms, Precedents, and Geopolitics <i>Richard Falk</i>	ix
1 The Transformation of International Law and War between the Middle East and Vietnam <i>Brian Cuddy and Victor Kattan</i>	1
2 From Retaliation to Anticipation: Reconciling Reprisals and Self-Defense in the Middle East and Vietnam, 1949–65 <i>Brian Cuddy</i>	26
3 Public Discourses of International Law: US Debates on Military Intervention in Vietnam, 1965–67 <i>Madelaine Chiam and Brian Cuddy</i>	56
4 Legality of Military Action by Egypt and Syria in October 1973 <i>John Quigley</i>	87
5 Revolutionary War and the Development of International Humanitarian Law <i>Amanda Alexander</i>	112
6 The War Against the People and the People’s War: Palestine and the Additional Protocols to the Geneva Conventions <i>Ihab Shalbak and Jessica Whyte</i>	145



7	“The Third World Is a Problem”: Arguments about the Laws of War in the United States after the Fall of Saigon <i>Victor Kattan</i>	173
8	Operationalizing International Law: From Vietnam to Gaza <i>Craig Jones</i>	207
9	From Vietnam to Palestine: Peoples’ Tribunals and the Juridification of Resistance <i>Tor Krever</i>	233
10	War and the Shaping of International Law: From the Cold War to the War on Terror <i>Brian Cuddy and Victor Kattan</i>	261
	<i>Acknowledgments</i>	291
	<i>Contributors</i>	293
	<i>Index</i>	295

## Revolutionary War and the Development of International Humanitarian Law

Amanda Alexander

The distinction between civilians and combatants and the protection of civilians are perhaps the central precepts of international humanitarian law today. In the International Committee of the Red Cross' (ICRC) list of customary rules of IHL, the principle of distinction is Rule 1.<sup>1</sup> 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.<sup>2</sup> Under Rule 106, combatants must identify themselves preparatory to attack to be eligible for prisoner of war status.

These Rules reflect the provisions of the 1977 Additional Protocol I to the Geneva Conventions. As such, the Protocol's provisions can now be considered customary, as well as treaty, law. Yet when they were 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 that resulted from these years of negotiations were viewed at the time by many of the parties as flawed compromises. Moreover, the ambiguous definition of combatants and civilians contained within the Protocol continues to be problematic—a cause for ongoing explanations and concerns.<sup>3</sup>

In this chapter, I address the way the Vietnam and Arab-Israeli wars informed some of the positions on these issues and ultimately contributed to the awkward shape of the provisions. These were not the only conflicts

to influence the drafting of the Protocols, but Vietnam served as the archetype of the contemporary conflicts that had prompted the ICRC to draft new laws. When the ICRC began calling 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.<sup>4</sup> It was also troubled by the rise of a “truly enormous tidal wave of guerrilla activity” that had not been anticipated by earlier conventions.<sup>5</sup> The Vietnam War was the consummate example of these concerns. Moreover, the Vietnam War informed the drafting process by challenging the traditional Western understanding of the laws of armed conflict. The revolutionary writings on people’s war, put into practice in Vietnam, shaped a new language and paradigm of a just war, while advocating for the legitimacy of guerrilla warfare.

This language was adopted by Palestinian movements, which presented their struggle as analogous to the Vietnamese people’s war. Support for the Palestinians and the Palestine Liberation Organization led to a series of United Nations resolutions, proclaiming the rights of national liberation movements and their fighters in a quasi-legal language that would later be repeated at the Diplomatic Conferences.

There was also growing support for the Palestinian and the Vietnamese resistance in the West. Wars against imperial powers were increasingly accepted as just and the means used to oppose them seemed shocking. Popular and academic commentary in the West questioned the lawfulness of counterinsurgency techniques, in particular attacks on civilians. These discourses were reflected in the debates at the Diplomatic Conference and ultimately in the provisions of the Additional Protocol I.

### The Traditional Laws of Armed Conflict

In order to appreciate the changes wrought by the Additional Protocol I, it is necessary to understand the legal position before the conferences of the 1970s. Although the ICRC and other commentators claimed that there were longstanding principles protecting civilians and a regrettable lack of law concerning guerrilla warfare,<sup>6</sup> this was something of a misrepresentation of the existing state of the laws of armed conflict.<sup>7</sup>

Guerrilla warfare and people’s wars, or “irregular warfare,” were familiar concerns in both military and legal circles from the nineteenth century. The term “guerrilla” dates back to the Spanish irregular forces in the Napoleonic wars,<sup>8</sup> but guerrilla tactics have been used by both regular and

irregular forces for much longer.<sup>9</sup> The German experience in the Franco-Prussian war and the British experience in the Anglo-Boer war were perhaps the most pivotal in shaping the understanding of irregular warfare in the late nineteenth century and informing the attitudes of the military states at the Hague Conferences in 1899 and 1907.<sup>10</sup>

Experience with these wars meant that during the Hague Peace Conferences, most delegates agreed that there was a strong likelihood that citizens would take up arms. For some delegates, in particular the representatives of Switzerland and Belgium, this was an admirable display of patriotism.<sup>11</sup> Colonel Künzli from Switzerland spoke proudly of his people's fight for independence and freedom in *levées en masse*. He emphasized that not "only able-bodied men but also old men, children and women took part in the battles."<sup>12</sup> The response of British general Sir John Ardagh was to suggest adding an article that stated that the Convention should not be read as diminishing or suppressing the right that belongs to the population of an invaded country to fulfill its duty of opposing to the invaders, by every legitimate means, the most energetic patriotic resistance.<sup>13</sup>

Germany and the Netherlands, however, opposed this approach. Germany acknowledged the value of patriotism, but stated that nothing prevented patriots from entering the army, from organizing themselves properly with a leader and a distinctive sign.<sup>14</sup> Moreover, Germany pointed out that soldiers too needed to be thought of:

[S]oldiers also are men, and have a right to be treated with humanity. Soldiers who, exhausted by fatigue after a long march or a battle, come to rest in a village have a right to be sure that the peaceful inhabitants shall not change suddenly into furious enemies.<sup>15</sup>

This dispute was resolved by the Martens clause. Fyodor Martens, presiding over the Second Commission at the First Hague Peace Conference, made a declaration that while it was desirable that the usages of war should be defined and regulated, it would not be possible to agree on all cases.<sup>16</sup> Therefore, in cases not agreed upon, populations and belligerents should "remain under the protection and empire of principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."<sup>17</sup>

The clause, Martens suggested, would leave the door open to patriotic acts, since "a heroic nation is, like heroes, above codes, rules, and facts."<sup>18</sup> This proposition allayed some of Belgium's fears about the treatment of irregular fighters. However, in practice, it meant that Germany and the

other Great Powers had their way in this debate.<sup>19</sup> Indeed, Martens's statement suggests that any irregular fighting would take place outside law and in the face of law.

Little was added to this debate at the Second Peace Conference, besides the further insistence by Germany that members of a *levée en masse* bear arms openly.<sup>20</sup> The result was that the 1907 Hague Convention required that legitimate belligerents *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.<sup>21</sup> Article 2 of the Hague regulations stated that members of a *levée en masse* would be regarded as belligerents if they rose up before being occupied, carried arms openly, and respected the laws and customs of war. There was no right to resistance once occupied. This was made clear at the Conference. As Germany pointed out, occupied inhabitants could not be allowed to attack the occupier's lines of communication because without lines of communication an army cannot exist.<sup>22</sup> Any provisions that protected citizens would depend on their being peaceful. If not, the German delegate continued, most of the guarantees lose their reason for existence.<sup>23</sup> This is also made clear in Martens's writings.<sup>24</sup>

The 1949 Geneva Conventions did little to change these requirements, except for extending them to organized resistance movements.<sup>25</sup> Members of such movements still had to distinguish themselves.<sup>26</sup> Indeed, the ICRC commentary on the Geneva Convention stresses the importance of a distinctive sign:

[F]or partisans a distinctive sign replaces a uniform; it is therefore an essential factor of loyalty in the struggle and must be worn constantly, in all circumstances. During the Second World War, this rule was not always respected by the resistance organizations but there should be no room for doubt on this matter.<sup>27</sup>

Thus irregular warfare had been comprehensively considered and regulated before the 1970s and the law was clear. Combatants were expected to distinguish themselves. Citizens who became involved in the war outside these strictures were liable to be executed, while the rest of the population could be subjected to reprisals.<sup>28</sup>

In contrast, the protection of civilians had not been clearly discussed or provided for. There was little protection in the Hague Convention. The only clear provision can be found in Article 25, which prohibits the bombardment of undefended towns, villages, dwellings, or buildings. Article

26 requires the attacking force to warn the besieged city of an impending bombardment if possible, and Article 27 encourages attackers to avoid damaging buildings dedicated to religion, art, science, or charitable purposes; historic monuments; hospitals; and places where the sick and wounded are collected.

Besides these provisions, the noncombatant population was exposed to the exigencies of war. There was no requirement to allow noncombatants—“useless mouths”—to leave a besieged town.<sup>29</sup> Civilians could be killed by bombardment or starvation.<sup>30</sup> Whole regions could be devastated if it was necessary for military success.<sup>31</sup> As aerial warfare became a possibility, it was understood that it was likely to be used to kill civilians, or at the least strike at their morale.<sup>32</sup> Attempts to limit the use of aerial warfare failed in the 1920s and again in the 1950s.<sup>33</sup> It was generally accepted that citizens of an enemy state are enemies too and if it was possible to bring a war to a speedier conclusion by harming them, then it should be done so as a necessity of war.<sup>34</sup>

The 1949 *Geneva Convention IV* was drafted to provide protection for civilians, but it still did little to protect civilians during warfare. It did not include any new constraints on aerial warfare, reprisals against civilians, scorched earth tactics, or the starvation of civilians. Rather it focused on the protection of civilians in occupied territories; its goal was to prohibit the more extreme depredations practiced by the Nazi regime against occupied populations. Thus the 1949 Convention insists that occupied civilians should be humanely treated, that their persons, family rights, religious practices, manners and customs should be respected.<sup>35</sup> This protection is dependent on civilians remaining passive. Article 5 states clearly that those who engage in hostile activities will lose the rights of protected persons. Moreover, even the protection offered to passive civilians is contingent on military imperatives. After listing the rights of protected persons, Article 27 acknowledges that the parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war. It also, while prohibiting mass forcible transfers, accepts that an occupying power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.<sup>36</sup>

The 1949 Convention envisages that governments may manage their own populations in the same manner. It provides for parties to set up separate, “neutralized” zones to shelter noncombatants.<sup>37</sup> The commentary explains this is only for noncombatants—civilians taking part in hostilities will be naturally excluded.<sup>38</sup> Thus the protection offered to civilians by the

1949 Geneva Convention is predicated on a clear distinction between civilians and combatants in both legal and spatial terms.

These provisions reflect a common military strategy that had been used before and after the drafting of these provisions. The separation of “civilian” populations from the combatants that they might support—whether willingly or under duress—had been undertaken during a range of conflicts from the end of the nineteenth century onwards. The destruction of Boer farms and the relocation of their inhabitants in concentration camps is one of the most familiar examples.<sup>39</sup> However, there were similar movements of civilians during in the Spanish-American War in Cuba,<sup>40</sup> and in the Philippines during the American intervention.<sup>41</sup> Later, similar approaches were taken by Japan in Manchuria,<sup>42</sup> Portugal in Angola,<sup>43</sup> and Britain in Malaya and Kenya.<sup>44</sup> In all these cases, the aim was to separate guerrillas from any support from the population.<sup>45</sup> In South Vietnam, President Diem started moving rural communities to constructed agrovilles from 1959, in an attempt to separate peasants from revolutionaries.<sup>46</sup> Later this turned, with British and American input, into the Strategic Hamlet program.<sup>47</sup> Under this system, thousands of fortified hamlets were constructed. The aim, again, was to concentrate and shelter the rural population in hamlets, relocating villagers when necessary. It was hoped the program would produce villagers who actively supported the South Vietnamese government, while cutting off support to the guerrillas.<sup>48</sup>

This method of moving and resettling populations in camps and similar institutions has been recently described by a number of scholars as a technique of liberal empire—a biopolitical attempt to govern, domesticate, and deny political agency to colonial populations.<sup>49</sup> Although this description seems to rather overstate the liberal aspect of this strategy, it does seem clear that the intention of these laws was to limit political and military agency through a juridical and spatial separation of civilian and combatant.

### Revolutionary War in Vietnam and Palestine

Thus despite experiences with irregular warfare, the prevailing idea of war, the theories, the war games,<sup>50</sup> and the laws of war were shaped by an ideal of orderly soldiers in uniform, of citizens subdued, separated, and demilitarized. Over the course of the twentieth century, however, an alternative imaginary of war and approach to law was formulated and articulated—an approach that was exemplified by the war in Vietnam and embraced by Palestinian movements.

The alternative model was a revolutionary people's war, a war where there was no separation between people and army, a war that unapologetically employed guerrilla tactics. As I have argued, guerrilla warfare was an old technique, but during this period it became associated with revolutionary ideology.<sup>51</sup> Mao's writings, and his success in China, were one of the main sources of this alternative approach. It provided a model for a revolutionary people's war that was referenced by a variety of movements that sought to overturn imperial or oppressive governments—even when it may not have been entirely appropriate.<sup>52</sup> Principles from the Maoist model were followed in Malaya, Burma, Algeria, Rhodesia, and Cuba.<sup>53</sup> One of the clearest associations, however, was with the communist movement in Vietnam. Truong Chinh, the secretary general of the Indochinese Communist Party, and Vo Nguyen Giáp, commander in chief of the Viet Minh and minister of the interior in the Democratic Republic of Vietnam, wrote their own accounts of people's war that showed the influence of Maoist theory.<sup>54</sup> The success of the Vietnamese strategy further inspired other movements, including Palestinian organizations. After the 1967 war shattered Palestinian hopes for liberation through traditional warfare,<sup>55</sup> Palestinian movements explicitly characterized their struggle as a revolutionary, people's war in the manner of Vietnam.<sup>56</sup> The communist Popular Front for the Liberation of Palestine (PFLP) followed Mao's teachings closely. Fatah took a less rigorous and more eclectic approach to revolutionary theory,<sup>57</sup> but it echoed the general themes of the Maoist approach.<sup>58</sup> This was the case even though, as was noted at the time, there were significant differences between the Chinese or Vietnamese and Palestinian conditions. Some observers also found it difficult to reconcile Palestinian tactics with the prevailing understanding of guerrilla warfare.<sup>59</sup> Nevertheless, by conceptualizing the Palestinian struggle as a "second Vietnam,"<sup>60</sup> it became situated within the global movement that was reshaping the vision of justifiable warfare. In time, the Palestinian arguments would strengthen and develop that vision.

Mao's model for revolutionary war was developed in several writings from the 1930s.<sup>61</sup> It adapted Marxist-Leninist theory to Chinese conditions by emphasizing the role of the peasantry in a prolonged people's war.<sup>62</sup> Mao's strategy moved through three phases: the mobilization of the peasantry; the gaining of their support in a people's war employing guerrilla strategies; and finally the move toward conventional warfare.<sup>63</sup>

Mao, his general Lin Piao, Giáp, and Truong Chinh all stressed that the first phase, the mobilization of the people, was essential for victory.<sup>64</sup> Lin Piao attributed Mao's victories to the support of the people—"the fullest



mobilization of the basic masses as well as the unity of all the forces that can be united.”<sup>65</sup> Giáp described the war in Vietnam in the same way:

The war of liberation of the Vietnamese people proves that, in the face of an enemy as powerful as he is cruel, victory is possible only by uniting the whole people within the bosom of a firm and wide national united front based on the worker-peasant alliance.<sup>66</sup>

The importance of the population had led Mao to introduce rules and discipline to avoid alienating the people and to maintain a supportive and even symbiotic relationship between the people and the troops.<sup>67</sup> Mao says, “It is only undisciplined troops who make the people their enemies and who, like the fish out of its native element, cannot live.”<sup>68</sup> Lin Piao writes:

Our army men strictly observed the Three Main Rules of Discipline and the Eight Points for Attention, (2) carried out campaigns to “support the government and cherish the people,” and did good deeds for the people everywhere. They also made use of every possibility to engage in production themselves so as to overcome economic difficulties, better their own livelihood and lighten the people’s burden. By their exemplary conduct they won the whole-hearted support of the masses, who affectionately called them “our own boys.”<sup>69</sup>

The Palestinian movements also emphasized that the support of the population would be their greatest advantage;<sup>70</sup> the masses were considered to be “a revolutionary power capable of liquidating direct colonialism and occupation.”<sup>71</sup> The overriding need to gain the support of the population meant, for the communist PFLP, overlooking class differences and engaging even the petit bourgeois class.<sup>72</sup>

Yet the role of the people went far beyond mere support. In this image of revolutionary war there is no necessary separation between civilian roles and combatant roles; it is possible and appropriate to be both. As Mao writes:

[T]here are those who say: “I am a farmer,” or, “I am a student”; “I can discuss literature but not military arts.” This is incorrect. There is no profound difference between the farmer and the soldier. You must have courage. You simply leave your farms and become soldiers. That you are farmers is of no difference, and if you have education, that is so much the better. When you take

your arms in hand, you become soldiers; when you are organized, you become military units.<sup>73</sup>

Or, as Truong Chinh puts it: “When the enemy comes, we fight, when he goes, we plough.”<sup>74</sup>

This approach disavows the controlled and passive population imagined by the Geneva Conventions, limited to peaceful pursuits. Such an oppressed class, Giáp writes, citing Lenin, only deserves to be treated as slaves if they do not choose to learn to use arms.<sup>75</sup> Indeed, for the Palestinian movements, the transformation of Palestinians from refugees to revolutionaries was regarded as “a therapeutic measure toward ‘healing’ Palestinian society,”<sup>76</sup> a cultural renaissance. “Armed struggle,” Sayigh writes, “was the source of political legitimacy and national identity, the new substance of the ‘imagined community’ of the Palestinians.”<sup>77</sup>

A people’s war will necessarily involve guerrilla warfare—at least in the first phases. Revolutionary doctrine described guerrilla tactics as the obvious weapon of the weak against a more powerful opponent.<sup>78</sup> Guerrilla warfare also allowed for the mobilization of the whole strength of the people against the enemy. By using guerrilla tactics, a people’s army could wear out its opponent until it was possible to transition to conventional warfare.

Guerrilla warfare is the only way to mobilize and apply the whole strength of the people against the enemy, the only way to expand our forces in the course of the war, deplete and weaken the enemy, gradually change the balance of forces between the enemy and ourselves, switch from guerrilla to mobile warfare, and finally defeat the enemy.<sup>79</sup>

Thus there is no suggestion in this literature that guerrilla warfare is ethically or legally problematic. It is described as a sensible and strategic approach. Mao declared, “We should honestly admit the guerrilla character of the Red Army. It is no use being ashamed of this. On the contrary, this guerrilla character is precisely our distinguishing feature, or strong point, and our means of defeating the enemy.”<sup>80</sup> Indeed, guerrilla warfare is more than a pragmatic strategy in this literature. Guerrilla warfare is depicted as a heroic and romantic enterprise, with an established history.<sup>81</sup> The superhuman heroism and bravery and self-sacrifice of guerrilla fighters is emphasized.<sup>82</sup> This is a depiction that had resonance both among subjugated peoples and in the West.<sup>83</sup>

Moreover, these guerrilla fighters were justified because they were

engaged in just wars, fought against imperialism and unjust aggression. American imperialism, Lin Piao writes:

is bullying and enslaving various peoples, plundering their wealth, encroaching upon their countries' sovereignty and interfering in their internal affairs. It is the most rabid aggressor in human history and the most ferocious common enemy of the people of the world. Every people or country in the world that wants revolution, independence and peace cannot but direct the spearhead of its struggle against U.S. imperialism.<sup>84</sup>

The fighters in these wars, Giáp states, stand against this to safeguard the freedom and independence of people.<sup>85</sup>

The Palestinian movements characterized their cause as part of this global fight against imperialism, analogous to the Vietnamese struggle.<sup>86</sup> Palestinian movements argued that Israel, which had previously been regarded in many quarters as a beset nation,<sup>87</sup> was an imperialist base, carrying out a program of colonization and dispossession.<sup>88</sup>

The crux of the Palestine Problem is . . . the piecemeal conquest and continued seizure of the entire country by military force. It is the forcible dispossession and displacement of the bulk of the indigenous population, and the subjugation of the rest. It is also the massive importation of alien colonists to replace the evicted, and to lord it over the conquered. And it is, the colonization, by the foreign settlers, of both the expropriated private land and the seized national resources of the overpowered people.<sup>89</sup>

This particular view of imperialism, and the legitimacy of the struggle against it, achieved growing recognition and repetition in the United Nations General Assembly as the influence of decolonized nations grew.<sup>90</sup> A series of General Assembly resolutions asserted that all peoples have the right to self-determination,<sup>91</sup> especially those fighting alien domination—a term created to cover the Palestinian situation.<sup>92</sup> In 1970, Resolution 2649 specifically condemned the denial of that right to the people of Palestine. Resolution 3103, in 1973, reaffirmed that colonialism was a crime and that colonial peoples had the right to struggle against colonial powers and alien domination, using all necessary means at their disposal. Such conflicts were, the Resolution stated, to be viewed as international armed conflicts and combatants were to be accorded the status of prisoners of war.

This understanding of imperialism as a crime that justified the use of all necessary means of opposition was shown not only in defense of guerilla warfare but also in the debates about terrorism at the United Nations. When UN Secretary General Kurt Waldheim tried to introduce an item entitled “Measures to Prevent International Terrorism” in the General Assembly, following events at the Munich Olympics, it was changed to include a study of “the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.”<sup>93</sup> The discussion that ensued was described by a contemporary as a debate on the Arab-Israeli conflict—a debate that pitted the alternatives as state terrorism or individual terrorism.<sup>94</sup> Or, as Chamberlin puts it, a debate that revealed the growing divide between the proponents of “national liberation” and the enemies of “international terrorism.”<sup>95</sup> The result, as shown in the General Assembly Resolution that set up the ad hoc Committee for International Terrorism, was a reaffirmation of the legitimacy of the struggle for self-determination and national liberation.<sup>96</sup>

The recognition of the Palestinian cause in the General Assembly culminated in 1974, when it invited Arafat to address the General Assembly and passed Resolutions 3236 and 3237, which reiterated the Palestinian right to self-determination and granted the PLO observer status at the United Nations.<sup>97</sup> These resolutions gave the arguments for national liberation more legitimacy and a quasi-legal appearance. Nevertheless, traditional commentators insisted that General Assembly statements were politics not law,<sup>98</sup> and they decried the danger that democracy in the General Assembly could derail the traditions of international law.<sup>99</sup> Even when a sympathetic lawyer like Abi-Saab asserted the view of decolonized states that national liberation movements were a form of self-defense and that insurgent leaders should be recognized,<sup>100</sup> he noted that this was a political challenge to the existing law.<sup>101</sup> As such, the alternative view of war had garnered a great deal of political legitimacy, but its legal status was still controversial.

### Revolutionary War and the West

The theory of the people’s war provided a stark alternative to the traditional view of warfare. As such, some of the fundamental aspects of the doctrine, such as the status of national liberation wars, continued to appear

legally problematic and ethically suspect to Western experts. Nevertheless, these conflicts did shape a more subtle shift in the interpretation of the laws of armed conflict in the West. The bulk of the discussion around Israel tended to focus on the justice of Israeli and Palestinian claims to nationhood, territory, and belligerency.<sup>102</sup> Nevertheless, there was growing disapproval of Israeli counterinsurgency tactics—in particular, reprisals against individuals or states for supporting guerrilla or terrorist actions. Western international lawyers and states began to question the legality of such operations, especially when they were directed at civilian objects and when they appeared disproportionate.<sup>103</sup>

The anti-Vietnam War movement launched a more comprehensive attack on the way that the United States was fighting the war, arguing that it was immoral and possibly illegal. Popular protests and media reports drew attention to the violence and depravity of the war, the attacks on civilians and children.<sup>104</sup> Intellectuals and journalists produced inquiries into these acts; they staged trials judging the US campaign.<sup>105</sup> Although the influence of the protest movement has been queried,<sup>106</sup> it is possible to see a change in the legal discourse by the start of the Diplomatic Conferences.

Many of the critics of the war echoed the depiction of the people's war made in the revolutionary literature. The Vietnamese national resistance forces were described as being on the side of right, and even of law, defending the “principles of international law and their right to self-determination, political independence, territorial integrity and national unity.”<sup>107</sup> “The people of Vietnam are heroic,” wrote Bertrand Russell, “and their struggle is epic: a stirring and permanent reminder of the incredible spirit of which men are capable when they are dedicated to a noble ideal.”<sup>108</sup>

The United States, in contrast, stood as the representative of imperialism or neocolonialism. It was the “universal empire of evil,”<sup>109</sup> its rapacious imperialism made it the “common destroyer of Peace and Justice” and the greatest threat to the world.<sup>110</sup> Critics frequently compared the United States to Nazi Germany,<sup>111</sup> or even suggested it was unprecedented in its imperialist aggression:

In the course of history there have been many cruel and rapacious empires and systems of imperialist exploitation, but none before have had the power at the disposal of the United States' imperialists.<sup>112</sup>

After 1967, the characterization of Israel as an imperialist power, akin to the United States in Vietnam,<sup>113</sup> gave the Palestinian cause credibility as an ethical and just fight.<sup>114</sup> Left-wing groups and thinkers who had, until

1967, supported Israel, became supporters of the Palestinians.<sup>115</sup> Contemporaries partly attributed this shift to the Vietnam War, which had changed the political consciousness among many Western observers.<sup>116</sup>

Critics of imperialist war agreed with the revolutionary literature that the development of a people's army and the use of guerrilla warfare was the logical response to such overbearing imperialism. As Sartre explained for Russell's staged International War Crimes Tribunal,<sup>117</sup> colonialism kindled the hatred of the civilian population and made civilians potential rebels. This then determined the characteristics of the struggle. The colonialists had the superior weapons; the indigenous population had to make use of its advantage of number. Nor, in the minds of some critics, should a resistance movement, confronted with the power of an imperialist opponent, be expected to comply with the requirements of distinction.<sup>118</sup>

A people's war might be a reasonable and justified response to imperialism. Unfortunately, it led to an obvious response. . . .

As it was the unity of an entire people which held the conventional army at bay, the only anti-guerrilla strategy which could work was the destruction of this people, in other words, of civilians, of women and children.<sup>119</sup>

Thus the imperialist, or neocolonial, response to a people's war of liberation could become genocidal.<sup>120</sup> Falk made a similar point, arguing that the battlefield tactics of high-technology counterinsurgency warfare plus the aggressive war character of the enterprise led to genocide.<sup>121</sup>

The strategic hamlet program, which critics also noted was a pragmatic response to a people's war, was attacked in similar terms. The strategic hamlets were presented by the administration as a way of protecting the peasants,<sup>122</sup> in a form not far from what might have been envisaged by the Geneva Convention. Critics acknowledged that this was a way of "protecting" the peasant masses from communism,<sup>123</sup> and they understood that the separation of guerrillas from their support base was a logical form of counterinsurgency.<sup>124</sup> Nevertheless, critics said any support in the Geneva Conventions was a juridical fiction.<sup>125</sup> They emphasized the depredations of the strategic hamlet program: the massive dislocation of people from their homes;<sup>126</sup> the presence of spikes, moats, machine gun turrets, patrols;<sup>127</sup> the use of forced labor.<sup>128</sup> These hamlets were nothing other than concentration camps,<sup>129</sup> designed with genocidal intent.<sup>130</sup>

Thus while these critiques acknowledged that these extreme forms of counterinsurgency were the result of a people's war—just as previous

international lawyers had warned—the legitimacy of the people’s war juxtaposed against the illegitimacy of an imperialist, Nazi-like regime, made the response immoral. It was a clear betrayal of all the principles that the United States purported to uphold:

In the name of freedom pregnant women were ripped open, and the electorate did not rebel. Every American who voted Republican or Democratic shares the guilt of these sanguinary deeds. America, the self-proclaimed champion of freedom to torture and kill women and children for the crime of wishing to go on living in their homes.<sup>131</sup>

In much the same way, Israeli critics of the policy of occupation feared that it was, or would lead to, the destruction of Israeli democratic values.<sup>132</sup> It could only create further resistance and repression.<sup>133</sup>

The immorality and illegitimacy of the US campaign was elided into a strong implication, and even statement, of illegality. This claim was not always justified but, as the war continued, critics started to make technical arguments that the bombing of civilians was a breach of the laws of armed conflict.<sup>134</sup> As I have discussed, there were no clear provisions that protected civilians from aerial bombardment before the drafting of the Additional Protocols, so this argument did require some interpretative work. In the Russell Tribunal, bombing was described as a crime of aggression.<sup>135</sup> The use of napalm, in particular, was described as a breach of the Hague articles that prohibited causing unnecessary suffering and prohibiting bombardment of undefended places.<sup>136</sup> Franck argued that there was a principle in international law that required a distinction between combatants and the civilian population—a principle that the US leadership had disregarded.<sup>137</sup> He also argued that bombing civilians was in breach of the 1949 *Geneva Convention IV*, although he did not explain how the convention prohibited this.<sup>138</sup>

Franck and some other commentators also referred back to the Hague distinction between defended and undefended places, to argue that the United States was in breach of the 1907 Hague Convention for attacking undefended places.<sup>139</sup> Another argument was that the illegality of bombing could be extrapolated from the prohibition on killing civilians face to face.<sup>140</sup> Finally, critics increasingly argued that the bombing was illegal because it targeted places that did not have military importance or, when they were military objectives, nevertheless resulted in disproportionate casualties.<sup>141</sup>

Other lawyers, even those who were against the war, were more cautious about these arguments. Telford Taylor pointed out that unfortunately

there was nothing in the Nuremberg principles or the laws of war to confirm that bombing civilians was illegal.<sup>142</sup> Yet toward the end of the war this language began to be taken on by supporters of government policy as well as critics. After the 1972 Christmas Bombing—the most concerted bombing campaign of the war—sparked outrage in Hanoi and the international and American press, defenders of the campaign tried to show that it had not caused excessive civilian casualties.<sup>143</sup> Burrus Carnahan stated that all the targets were carefully verified to be military objectives and that one was rejected because it was in a highly populated area.<sup>144</sup> He also argued that there was an attempt to keep civilian casualties to a minimum, even when this meant risking pilots' lives.<sup>145</sup> The result of these impressive efforts, Carnahan states, was a remarkably small number of civilian casualties that were certainly not disproportionate to military advantage.<sup>146</sup>

Thus the outrage over the Vietnam War shows a shift in the understanding of legitimate and lawful war. A people's war for liberation had a certain claim to legitimacy, and the counterinsurgency techniques seemed so illegitimate that it was becoming impossible to see them as lawful. Attacks on civilians, even when those civilians could not be distinguished from combatants, were becoming difficult to defend. The limited protection outlined by existing international law was starting to be understood as requiring a distinction between military and civilian objectives and the protection of civilians.

### Revolutionary War at the Diplomatic Conferences

The shifting understanding of just war and the laws of war can be seen in the debates at diplomatic conferences to draft the Additional Protocols in the 1970s. These debates, in turn, left their mark on the Additional Protocol I.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts took place from 1974–1977 under the auspices of the ICRC. I have traced the background to these conferences more thoroughly elsewhere;<sup>147</sup> but, by the time the Conference began, it was seen as a way to bring the “new” types of war, the kind of war that Vietnam exemplified, within the purview of international law. The ICRC wanted the Conference to find a way to incorporate wars for national liberation, to regulate guerrilla warfare, and to “reaffirm” a distinction between civilians and combatants, that was being threatened by these new wars.<sup>148</sup>



These aims show that, even before the Conference, conflicts like those in Vietnam and Israel had affected the understanding of the laws of war. As discussed above, there were clear existing laws dealing with (that is, prohibiting) guerrilla warfare and very few laws protecting civilians. This existing regime, however, no longer seemed appropriate once guerrilla wars became wars of national liberation—wars that had a claim to legitimacy and whose fighters had a claim to justice. At the same time, the counterinsurgency techniques directed at civilians in these conflicts now appeared immoral or illegal breaches of principles that were presumed to protect them. Specific techniques that were associated with Vietnam were considered candidates for targeted regulation. Napalm, the ICRC acknowledged, had aroused such reprobation in public opinion that, according to some jurists, the conditions would be favorable for obtaining complete prohibition.<sup>149</sup> Several proposals from states at this point specifically prohibited napalm and other incendiary weapons.<sup>150</sup> There were also some suggestions made about preventing the concentration of the population in strategic villages.<sup>151</sup>

The ICRC may have intended some changes to the law, but it did not foresee the extent to which the Conference would focus on and transform the rights of national liberation movements and fighters.<sup>152</sup> Indeed, as Abi-Saab noted, the ICRC had attempted to bypass this issue in its preparation for the conference:

In spite of all the indications as to the great importance which a very large majority of States attached to the issues of wars of national liberation, not only in UN resolutions and reports, but also during the Istanbul and the Government Experts Conference, the draft protocols submitted by the ICRC to the Diplomatic Conference to serve as bases for discussions practically evaded the issue; an issue which was soon to dominate the work of the first session of the conference.<sup>153</sup>

This first session was marked by an opening speech by President Ould Dada of Mauritania, who spoke of the millions of men suffering from colonial oppression and stripped of their rights.<sup>154</sup> He insisted that it was undeniable that these were just wars and that the freedom fighters who engaged in them should be granted the same protection as their oppressors.<sup>155</sup>

The Conference then turned to the question of the inclusion of national liberation movements in the debates, including the PLO and the Provisional Revolutionary Government of the Republic of South Viet-Nam—or the Vietcong, as the Republic of South Vietnam explained.<sup>156</sup> The inclusion

of these movements meant recognizing the legitimacy of their causes, as well as providing voices that could provide evidence of the atrocities committed by imperialists<sup>157</sup> and arguments for the revision of international law. Amaly of the PLO stated that he hoped to advance certain principles, such as confirmation of the international character of wars fought by national liberation movements; recognition of the prisoner-of-war status of combatants in national liberation movements; protection of the civilian population against the atrocities committed by colonialist and racist powers, such as arbitrary detention, collective reprisals, forcible displacements of persons, destruction of dwellings, or any other objects having no military value; and use of cruel weapons.<sup>158</sup>

Israel opposed the admission of the PLO, arguing that it was a body that had perpetrated atrocious crimes of terrorism against civilians and had no place at a conference on humanitarian law.<sup>159</sup> In response, states such as Pakistan, Syria, and Tanzania argued that it was Israel that was the perpetrator of terrorism, thereby replaying the United Nations' battle over terrorism as a feature of imperialist states or individual actors. This debate was won, again, by the supporters of national liberation movements, and the PLO was admitted to the conference.

The inclusion of the Vietcong was more controversial. Many states argued that the Provisional Revolutionary Government should be admitted, as the legitimate representative of the people of South Vietnam.<sup>160</sup> More importantly, it had been a victim of aggression; it had seen its country destroyed, its people decimated,<sup>161</sup> and subjected to genocide by American imperialists.<sup>162</sup> The response of the Republic of South Vietnam was that it was the Vietcong who were the imperialists, waging a war of communist imperialist expansion.<sup>163</sup> This response shows that imperialism was generally deployed as a sign of illegitimacy. Nevertheless, the vote to admit the Provisional Revolutionary Government was narrowly lost by 38 votes to 37, with 33 abstentions.

When these debates were resolved, the conference turned to the still contentious matter of the status of wars of national liberation as international armed conflicts. Despite the arguments of the Third World and revolutionary movements, the ICRC and Western international lawyers held fast to the view that such wars were internal conflicts. In the ICRC's report on the First Conference of Government Experts in 1971, the ICRC acknowledged that this was a contentious issue; nevertheless, it still placed its account of the debate in the section on internal war.<sup>164</sup> This account noted that some experts had pointed to the authority of the General Assembly resolutions that asserted that national liberation wars

were international conflicts. Other experts, however, had responded that “the resolutions on the subject adopted by the General Assembly or other organs of the United Nations were no more than the concrete expression of certain aspirations and did not sanction a generally recognized principle of international law or reflect the practice of States.”<sup>165</sup>

The Diplomatic Conference now provided an opportunity to inscribe these aspirational resolutions, and their vision of legitimate warfare, into law. Third World states argued that the new law of war should recognize and enable the natural rights of people to recover the security and freedom that had been denied to them by imperialism.<sup>166</sup> Imperialism, whether American or sometimes Soviet, was described as political, military, and economic aggression perpetrated by the two super powers against peace-loving peoples in Europe, the Middle East, Asia, Africa, and Latin America.<sup>167</sup> It was these imperialist, colonialist, and racist forces that were responsible for armed conflicts and for the violation of human rights and fundamental freedoms that followed.<sup>168</sup> The people fighting wars against such imperialism were lawfully justified.<sup>169</sup> They were fighting for their inalienable right to self-determination and national independence upheld in the Charter of the United Nations and in many General Assembly resolutions.<sup>170</sup> Moreover, the national liberation movements were the first to respect the principles of humanitarian law because they were well aware of the misery and suffering caused by the armed conflicts of which they were the victims.<sup>171</sup>

Since these wars were justified, it was also suggested that they should be treated differently under the laws of war. The laws of war should be drafted to distinguish between the oppressed and the oppressor, to help the oppressed and to punish the oppressor.<sup>172</sup>

Many Western states and commentators were appalled by these suggestions, considering that they undermined the language and values of existing international law. They argued that introducing a distinction between just and unjust wars would rupture the structure of modern international humanitarian law—a structure that appeared to be based on an apolitical, neutral legality.<sup>173</sup> Hess, for Israel, also made this point, arguing that any reference to the motives and cause for which belligerents were fighting was in clear contradiction to the spirit and accepted norms of international humanitarian law.<sup>174</sup>

Despite these concerns about the structure of international law, the amendment to recognize national liberation conflicts as international conflicts was eventually passed in committee, with 70 in favor, 21 against, and 13 abstentions.<sup>175</sup>

It was feared that the Western delegations might walk out of the conference after the vote, but this did not come to pass.<sup>176</sup> Perhaps, Lysaght suggests, they decided that the vote would not affect them significantly; the decolonization movement was essentially over and very few places would be affected by the new law.<sup>177</sup> One place, however, that the law *was* designed to impact, was Israel. As Amaly said, Palestine “fell within all three of the categories mentioned in paragraph 4: they were under colonial domination; their territory was under foreign occupation, despite the assertions of the terrorist Begin; and they were suffering under a racist regime, since Zionism had been recognized in a United Nations resolution as a form of racism.”<sup>178</sup>

Israel, therefore, continued to object to the provision, rejecting the United States’ attempts to have the new article adopted by consensus in 1977. By this point, however, those Western states that were uneasy about the provision had given up fighting for this issue. They did not want the Conference to fail on their account.<sup>179</sup> Nor, as Mantilla suggests, did they want to appear racist or to share the pariah status of Israel or South Africa.<sup>180</sup> The most they were prepared to do was to abstain, quietly restating their concerns about the neutrality and clarity of international law.

Thus the new provision was passed with only one vote against—a vote which could now be dismissed as being completely isolated from the civilized world.<sup>181</sup> This was a legal and political achievement for the Third World and national liberation movements. It was also a discursive triumph, clearly bringing the “political” language of justice from revolutionary literature into the laws of war. This language and perspective continued to be of importance in the subsequent debate about the rights of the fighters of such wars.

The debate about guerrilla fighters demonstrates again the division between traditional and revolutionary concepts of warfare. In the Draft Protocol, which the ICRC prepared for the Conference, combatant status relied on fulfilling essentially the same requirements as the 1949 Geneva Conventions: combatants must distinguish themselves during military engagements, must follow the laws of war, and must be under a responsible command.<sup>182</sup> To take a different approach, the ICRC stated, would be to risk destroying the essential distinction between combatant and civilian.<sup>183</sup> Under this system, guerrilla fighters in a people’s war would be unlikely to receive prisoner of war status.

For the supporters of people’s war and national liberation movements at the Conference, this result was unacceptable. They described the “guerrillas” who fought these wars as freedom fighters, fighting just wars against colonial and racist oppression. All fighters in such conflicts should

be treated as prisoners of war;<sup>184</sup> they were deserving of equal,<sup>185</sup> if not more protection, than regular combatants.<sup>186</sup> The new laws drawn up by the Conference should reflect this; they should acknowledge the reality in which unarmed or ill-armed and underdeveloped peoples confronted an imperialistic aggressor equipped with the most up-to-date and cruel weapons.<sup>187</sup> Such movements were handicapped in their confrontation with imperialist power; their fighters could not be expected to distinguish themselves.<sup>188</sup> Indeed, North Vietnam questioned the principle of distinction itself in the new wars of liberation:

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

All the world knows that in guerrilla warfare a combatant must operate under the cover of night in order not to be a target of the modern weapons of the adversary. In such circumstances, does the spirit of humanity compel them to wear emblems of uniforms in order to distinguish themselves from the civilian population?<sup>189</sup>

Aldrich, the head of the US delegation, had some sympathy for this approach. He later wrote:

A rule that requires a guerrilla to distinguish himself at all times from the civilian population will simply make him an outlaw; he cannot respect it and hope to survive. It is like telling him to go around at all times with a bull's eye pinned to his chest.<sup>190</sup>

Most Western states, however, maintained that the three conditions needed to be met.<sup>191</sup> In particular, they felt it was important to maintain some distinction between combatants and civilians, in order to protect civilians.<sup>192</sup> Israel made this argument particularly strenuously. Reciting expert statements on the matter, Israel quoted Draper of the United Kingdom as saying that to bring "the man with the bomb who is a civilian in all outward appearances" within the framework of the protection given to regular armed combatants would mean that no civilian would henceforth be safe.<sup>193</sup>

Aldrich worked hard to find a way to resolve this fundamental difference about whether combatants should distinguish themselves. After "two

years of hard work, official and unofficial contacts and prolonged discussion and mediation,”<sup>194</sup> he was able to present a compromise draft article at the beginning of the fourth session. His solution was to only require combatants to distinguish themselves during each military engagement and during military deployment. There was no shared understanding of what “deployment” meant—an ambiguity that, as Aldrich acknowledged, made the term acceptable to more delegates.<sup>195</sup>

Many Western delegations were still skeptical about the provisions and uneasy about granting combatant rights to guerrillas. Nevertheless, once again, they found it more politically palatable to abstain than to stand with Israel in voting against the new rule.<sup>196</sup> As a result, the provisions were adopted by 66 votes to 2 with 18 abstentions.<sup>197</sup> Many of the delegates spoke of their misgivings about the new article when explaining their vote and referred to it as a compromise.<sup>198</sup> The ICRC commentary also acknowledged that the article was a compromise but, it added, probably the best compromise that could have been achieved at the time.<sup>199</sup>

Yet, through this compromise, the Diplomatic Conference had reshaped the legal understanding and imagery of the combatant. Combatants were no longer just the regular military in their conventional uniforms; guerrillas, revolutionaries, and peasant armies could be counted as combatants. They did not have to be one thing; they could be a peasant by day and a guerrilla by night—or Mao’s scholar and fighter. Heroes and patriots would no longer fight outside the law, as understood at the Hague Conferences; they were brought under its umbrella. To a large extent, the symbiosis of people and army in the revolutionary literature was achieved by these new provisions.

Yet while these sections appeared to diminish the difference between civilian and combatant, the Additional Protocol I also defined civilians, for the first time in international law. Article 50 of Additional Protocol I stated that a civilian was any person who was not a combatant, as described by Article 43 and the 1949 Geneva Convention on Prisoners of War.<sup>200</sup> The ICRC noted that there were many possible ways of defining civilians, but it considered that this negative definition was the most satisfactory.<sup>201</sup> Article 50(3) states that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. Abi-Saab later noted that this stipulation was directly relevant to guerrilla warfare.<sup>202</sup> Yet despite this acknowledgement, and despite the novelty of Article 50, these provisions did not spark any controversy.<sup>203</sup>

Delegates were also happy to accept Article 51, which states that the

civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.<sup>204</sup> This section prohibits indiscriminate attacks, specifically area bombardment. Such a rule had never been stated before in international humanitarian law; Hays Parks would later argue that it was a new and unacceptable restriction on air warfare, intended to constrain the airpower of Israel and the superpowers.<sup>205</sup> Nevertheless, it was universally acclaimed as a codification of customary, existing rules of international law.<sup>206</sup> This perception of the provision suggests that the antiwar campaigns, that had highlighted the immorality of attacking civilians, had affected the understanding of the law. It had certainly affected what could be said about the law.

The delegates were less unanimous when it came to the details of civilian protection.<sup>207</sup> Nevertheless, the Conference did manage to prohibit many forms of warfare against civilians that were previously considered acceptable, such as the starvation of civilians or reprisals against civilians.<sup>208</sup> Moreover, it introduced a host of other provisions that attempted to protect civilians, such as precautions to be taken before attacks,<sup>209</sup> protection of the natural environment,<sup>210</sup> and protection of works containing dangerous forces.<sup>211</sup>

In this way, the Diplomatic Conference reshaped the laws regarding civilians and combatants. Civilians were defined as not being combatants, as a vulnerable population granted increased protection, while combatants were defined in a way that meant that they could also be civilians—at least some of the time. These definitions and images of the identities involved in war clearly owe much to the various discourses around revolutionary war. The result of these discourses is that the new laws were somewhat paradoxical; they introduced complexity and ambiguities into international humanitarian law.

These complexities were reflected in the subsequent reception of the Additional Protocol I. Although the US delegates left the conference feeling fairly satisfied with what they had achieved and confident of ratification,<sup>212</sup> their hopes were not to be realized. As Kattan shows in “The Third World Is a Problem” in this volume, the change in the US administration and the increasing influence of neoconservative international lawyers and Vietnam War veterans led to concerns about the implications of Additional Protocol I. One of those lawyers, Hays Parks, later wrote a comprehensive critique of the Additional Protocol I, arguing, among other points, that the Protocol’s attempt to protect both civilians and irregular combatants was unworkable.<sup>213</sup> Many other military powers also initially refused to ratify Additional Protocol I, including India, Indonesia, Iran, Iraq, Israel,

Malaysia, Morocco, Pakistan, the Philippines, Singapore, Sri Lanka, Sudan, Thailand, the United States, and the Soviet Union.<sup>214</sup>

By the end of the twentieth century, however, opposition to the Protocol started to wane. More states began to ratify the Protocol and, despite the ongoing opposition from the United States and Israel, it became common to see the Protocol referred to as customary international law.<sup>215</sup> Indeed, the ICRC's study of Customary International Law cleaves very closely to the Additional Protocols, as was shown in the rules on combatancy cited above. This translation into customary international law has not resolved the paradoxes of the Additional Protocol; experts are still grappling with them, as the recent debate on "Direct Participation in Hostilities" shows.<sup>216</sup> It does mean, however, that these paradoxes, and the competing visions of war and law that shaped them at the Diplomatic Conferences, have become embedded in international law. In this way, a new vision of war, represented by the Vietnam and Arab-Israeli conflicts, was transformed into a law that affects all states.

### Conclusion

The laws of war reflect imaginaries of war—the narratives that are told of war by strategists, humanitarians, lawyers, and politicians. For much of the history of the modern laws of warfare, the dominant image of a proper war was that of an orderly war between uniformed men. In the twentieth century, however, Mao and his followers described another form of war—a revolutionary people's war, a war that involved an entire, heroic, people, fighting for a just cause against imperialist oppression. This type of war was epitomized by the Vietnam War and then by the Palestinian struggle, as it reshaped itself according to the Vietnamese model. These causes appeared just—and not only to the colonial and postcolonial world. Western observers increasingly supported these battles against imperialism. Moreover, they decried the counterinsurgency techniques and attacks on civilians that were used to oppose people's wars. As these techniques lost legitimacy, they also started to look illegal.

The result, at the Diplomatic Conference, was a recognition of the justice of people's wars and an acknowledgment of their participants as combatants. At the same time, the Conference allowed combatants to move between civilian and combatant roles, while considerably increasing the protection owed to civilians. These developments represented a fundamental change to the rules and the understanding of warfare—a change



that, despite the long resistance from military states, has now become central to international humanitarian law.

NOTES

1. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1 (Cambridge: Cambridge University Press, 2005), 3.
2. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 17.
3. See, e.g., Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009).
4. Claude Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (M. Nijhoff, 1987), 509.
5. Pilloud et al., *Commentary on the Additional Protocols*, 384.
6. See, e.g., James E. Bond, "Protection of Non-Combatants in Guerrilla Wars," *William and Mary Law Review* 12 (1970-1971): 787, 797; W. T. Mallison and R. A. Jabri, "The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity," *George Washington Law Review* 42 (1973-74): 185, 205.
7. See Amanda Alexander, "A Short History of International Humanitarian Law," *European Journal of International Law* 26 (2015): 109.
8. J. Bowyer Bell, *The Myth of the Guerrilla* (New York: Knopf, 1971), 3.
9. Bell, *The Myth of the Guerrilla*, 3.
10. Lester Nurick and Roger W. Barrett, "Legality of Guerrilla Forces under the Laws of War," *American Journal of International Law* 40 (1946): 578-79.
11. James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts: The Conference of 1899* (New York: Oxford University Press, 1920), 551; William I. Hull, *The Two Hague Peace Conferences* (Boston: Ginn and Co., 1909), 216.
12. Scott, *The Proceedings of the Hague Peace Conferences*, 551.
13. Hull, *The Two Hague Peace Conferences*, 218.
14. Scott, *The Proceedings of the Hague Peace Conferences*, 552.
15. Hull, *The Two Hague Peace Conferences*, 222.
16. Scott, *The Proceedings of the Hague Peace Conferences*, 548.
17. Scott, *The Proceedings of the Hague Peace Conferences*, 548.
18. Scott, *The Proceedings of the Hague Peace Conferences*, 547.
19. A. Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?" *European Journal of International Law* (2000) 11: 197-98.
20. Scott, *The Hague Peace Conferences of 1899 and 1907*.
21. *Convention (IV) Respecting the Laws and Customs of War on Land*, The Hague, October 18, 1907, art 1.
22. Scott, *The Proceedings of the Hague Peace Conferences*, 553.
23. Scott, *The Proceedings of the Hague Peace Conferences*, 552.
24. Cassese, "The Martens Clause," 198.
25. *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, August 12, 1949, art 4(2).

26. *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, Geneva, August 12, 1949, art 4(2).
27. Jean Pictet, ed., *The Geneva Conventions of 12 August 1949: Commentary: Geneva Convention III Relative to the Treatment of Prisoners of War* (Geneva: International Committee of the Red Cross, 1960), 60.
28. Arnold Fraleigh, "The Algerian Revolution as a Case Study in International Law," in Quincy Wright and Richard A Falk, eds., *The International Law of Civil War* (Baltimore: Johns Hopkins Press, 1971), 196, 202; Henry Wheaton, *Elements of International Law* 5th ed., revised by Coleman Phillipson (London: Stevens and Sons, 1916), 475, 480.
29. John Westlake, *International Law* 2nd ed. (Cambridge: Cambridge University Press, 1910–1913), 89; Coleman Phillipson, *International Law and the Great War* (London: T. Fisher Unwin, Sweet & Maxwell, 1915), 19.
30. William Edward Hall, *A Treatise on International Law* 4th ed. (Oxford: Clarendon Press, 1895), 575.
31. Wheaton, *Elements of International Law*, 487.
32. Amanda Alexander, "The 'Good War': Preparations for a War against Civilians," *Law, Culture and the Humanities* (2019) 15: 227–52.
33. Alexander, "A Short History of International Humanitarian Law," 117; Amanda Alexander, "The Genesis of the Civilian," *Leiden Journal of International Law* 20 (2007): 375.
34. Wheaton, *Elements of International Law*, 479–80; J. H. Morgan, *The German War Book: Being "The Usages of War on Land" Issued by the Great General Staff of the German Army* (London: John Murray, 1915), 18; Westlake, *International Law*, 36; Phillipson, *International Law and the Great War*, 19.
35. Article 27 Geneva Protocol IV.
36. Article 49.
37. Article 15.
38. Jean Pictet, ed., *The Geneva Conventions of 12 August 1949: Commentary: Geneva Convention IV Relative to the Protection of Civilians* (Geneva: International Committee of the Red Cross, 1960), 131–32 commentary.
39. James Robbins Jewell, "Using Barbaric Methods in South Africa: The British Concentration Camp Policy during the Anglo-Boer War," *Scientia Militaria* 31 (2012): 8–9.
40. Dan Stone, *Concentration Camps: A Very Short Introduction* (Oxford: Oxford University Press, 2019), 13.
41. Stone, *Concentration Camps*, 13.
42. Anthony James Joes, *Resisting Rebellion: The History and Politics of Counterinsurgency* (Lexington: University Press of Kentucky, 2004), 111.
43. Joes, *Resisting Rebellion*, 113.
44. Stone, *Concentration Camps*, 85.
45. Andrew Mumford, *The Counter-Insurgency Myth: The British Experience of Irregular Warfare* (London: Routledge, 2011), 32; Joes, *Resisting Rebellion*, 106; Karl Hack, "The Malayan Emergency as Counter-Insurgency Paradigm," *Journal of Strategic Studies* 32 no. 3 (2009): 383–414, 388.
46. P. Busch, "Killing the 'Vietcong': The British Advisory Mission and the Strategic Hamlet Programme," *Journal of Strategic Studies* 25, no. 1 (2002): 135–62, 137;

- William S. Turley, *The Second Indochina War: A Concise Political and Military History* (Lanham, MD: Rowman & Littlefield, 2008), 70.
47. P. Busch, "Killing the 'Vietcong,'" 155; Turley, *The Second Indochina War*, 71.
  48. Turley, *The Second Indochina War*, 71.
  49. Laleh Khalili, *Time in the Shadows: Confinement in Counterinsurgencies* (Stanford: Stanford University Press, 2012), 4; Patricia Owens, *Economy of Force* (Cambridge: Cambridge University Press, Kindle ed.), 9. Aidan Forth, *Barbed-Wire Imperialism: Britain's Empire of Camps, 1876–1903* (Oakland: University of California Press, 2017), 10.
  50. Bell, *The Myth of the Guerrilla*, 4.
  51. Bell, *The Myth of the Guerrilla*, 17.
  52. Bell, *The Myth of the Guerrilla*, 57.
  53. Ian F. Beckett, *Modern Insurgencies and Counter-Insurgencies: Guerrillas and Their Opponents Since 1750* (London: Routledge, 2001), 79.
  54. Beckett, *Modern Insurgencies and Counter-Insurgencies*, 79.
  55. Yezid Sayigh, *Armed Struggle and the Search for State: The Palestinian National Movement, 1949–1993* (Oxford: Oxford University Press, 1999), 200; Yoav Di-Capua, "The Slow Revolution: May 1968 in the Arab World," *American Historical Review* 123, no. 3 (2018): 737.
  56. Sayigh, *Armed Struggle and the Search for State*, 176; Paul Thomas Chamberlin, *The Global Offensive: The United States, the Palestine Liberation Organization, and the Making of the Post-Cold War Order* (Oxford: Oxford University Press, 2012).
  57. Hisham Sharabi, "Palestinian Guerrillas: Their Credibility and Effectiveness" (The Centre for Strategic and International studies, Georgetown University, 1970), 26–27.
  58. Faris Giacaman, "Political Representation and Armed Struggle," *Journal of Palestine Studies* 43, no. 1 (2013): 26.
  59. D. A. Heradstveit, "A Profile of the Palestine Guerrillas," *Cooperation and Conflict*, VII (1972): 26; Sayigh, *Armed Struggle and the Search for State*, 200.
  60. Chamberlin, *The Global Offensive*, 26; Sayigh, *Armed Struggle and the Search for State*, 200.
  61. Beckett, *Modern Insurgencies and Counter-Insurgencies*, 76.
  62. Bell, *The Myth of the Guerrilla*, 19–21; J. L. S. Girling, *People's War: The Conditions and the Consequences in China and in South-East Asia* (London: Allen and Unwin, 1969), 52–57.
  63. Brigadier General Samuel B. Griffith, "Introduction," in Mao Tse-tung, *On Guerrilla Warfare*, Brigadier General Samuel B. Griffith, trans. (Fleet Marine Force Reference Publication), 12–18, 21.
  64. Lin Piao, *Long Live the Victory of People's War!* (Peking: Foreign Languages, 1967), 2.
  65. Lin Piao, *Long Live the Victory of People's War!*, 12, also see 26.
  66. General Võ Nguyên Giáp, *People's War, People's Army* (Ha Noi: The Gioi Publishers, 2004), 28.
  67. Beckett, *Modern Insurgencies and Counter-Insurgencies*, 74.
  68. Mao Tse-tung, *On Guerrilla Warfare*, 93.
  69. Lin Piao, *Long Live the Victory of People's War!*, 29.

70. Sayigh, *Armed Struggle and the Search for State*, 197.
71. Giacaman, "Political Representation and Armed Struggle," 28.
72. *Basic Political Documents of the Armed Palestinian Resistance Movement*, selected, translated, and introduced by Leila S Kadi (Beirut: Palestine Liberation Organization Research Centre, 1969), 32.
73. Mao Tse-tung, *On Guerrilla Warfare*, 73.
74. Cited in Girling, *People's War*, 132.
75. Giáp, *People's War*, 110.
76. Giacaman, "Political Representation and Armed Struggle," 30.
77. Sayigh, *Armed Struggle and the Search for State*, 195.
78. Mao Tse-tung, *On Guerrilla Warfare*, 42; Giáp, *People's War*, 47–48.
79. Lin Piao, *Long Live the Victory of People's War!*, 32.
80. Cited in Girling, *People's War*, 77.
81. Sayigh, *Armed Struggle and the Search for State*, 195.
82. Lin Piao, *Long Live the Victory of People's War!*, 27–28; Mao Tse-tung, *On Guerrilla Warfare*, 85–86; Giáp, *People's War*, 22, 47–48.
83. Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010), 116.
84. Lin Piao, *Long Live the Victory of People's War!*, 52–53.
85. Giáp, *People's War*, 29.
86. Chamberlin, *The Global Offensive*, 20.
87. Di-Capua, "The Slow Revolution," 735.
88. Sayigh, *Armed Struggle and the Search for State*, 198.
89. Fayez A. Sayegh, "A Palestinian View," 2nd World Conference on Palestine, Amman, September 26, 1970, [http://www.freedomarchives.org/Documents/Find er/DOC12\\_scans/12.palestinian.view.pdf](http://www.freedomarchives.org/Documents/Find%20er/DOC12_scans/12.palestinian.view.pdf)
90. Ardi Imseis, "Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020," *European Journal of International Law* 31, no. 3 (2020): 1058.
91. Imseis, "Negotiating the Illegal," 1058.
92. Helmut Freudenschuss, "Legal and Political Aspects of the Recognition of National Liberation Movements," *Millennium* 11, no. 2 (1982): 116.
93. Malvina Halberstam, "The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed," *Columbia Journal of Transnational Law* 41 (2003): 573.
94. Luigi Migliorino, "International Terrorism in the United Nations Debates," *Italian Yearbook of International Law* 2 (1976): 116.
95. Chamberlin, *The Global Offensive*, 176.
96. Halberstam, "The Evolution of the United Nations Position on Terrorism," 573–74.
97. Chamberlin, *The Global Offensive*, 248.
98. Theodor Meron, "Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy," *Nordisk Tidsskrift for International Ret* 40 (1970): 53.
99. Sanford R. Silverburg, "The Palestine Liberation Organization in the United Nations: Implications for International Law and Relations," *Israel Law Review* 12 (1977): 390.

100. Georges M. Abi-Saab, "The Newly Independent States and the Rules of International Law: An Outline," *Howard Law Journal* 8 (1962): 112.
101. Abi-Saab, "The Newly Independent States and the Rules of International Law," 112.
102. See, e.g., Henry Cattan, *Palestine and International Law* (London: Longman, 1973), 281; Quincy Wright and M. Khadduri, "The Palestine Conflict in International Law," in M. Khadduri, ed., *Major Middle Eastern Problems in International Law* (Washington, DC: American Enterprise Institute for Public Policy Research, 1972), 13–33.
103. See, e.g., William W. Orbach, *To Keep the Peace: The United Nations Condemnatory Resolution* (Lexington: University Press of Kentucky, 2014), 95; Richard A. Falk, "The Beirut Raid and the International Law of Retaliation," *American Journal of International Law* 63, no. 3 (1969); Derek Bowett, "Reprisals Involving Recourse to Armed Force," *American Journal of International Law* 66 (1972): 11–12.
104. N. L. Zaroulis and Gerald Sullivan, *Who Spoke Up? American Protest Against the War in Vietnam, 1963–1975* (New York: Doubleday, 1984), 56.
105. See, e.g., Frank Browning and Dorothy Forman, eds., *The Wasted Nations: Report of the International Commission of Enquiry into United States Crimes in Indochina, June 20–25, 1971* (New York: Harper & Row, 1972); Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970); John Duffett, *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal* (Stockholm: O'Hare Books, 1968).
106. John E. Mueller, *War, Presidents, and Public Opinion* (New York: John Wiley & Sons, 1973), 63.
107. Hans Goran Franck, "International Law and the US War in Indochina," in Browning and Forman, eds., *The Wasted Nations*, 322.
108. Bertrand Russell, "Peace through Resistance to US Imperialism," in Bertrand Russell, *War Crimes in Vietnam* (New York: Allen & Unwin, 1967), 99.
109. Russell, *War Crimes in Vietnam*, 73.
110. Russell, *War Crimes in Vietnam*, 94.
111. Russell, *War Crimes in Vietnam*, 102, 117; Taylor, *Nuremberg and Vietnam*, 207.
112. Russell, *War Crimes in Vietnam*, 99.
113. Eryn Lê Espiritu, "Cold War Entanglements, Third World Solidarities: Vietnam and Palestine, 1967–75," *Canadian Review of American Studies* 48, no. 3 (2018): 365.
114. Di-Capua, "The Slow Revolution," 735; Sharabi, "Palestinian Guerrillas: Their Credibility and Effectiveness," 1; Di-Capua, *Palestine comes to Paris*, 23.
115. Espiritu, "Cold War Entanglements," 365; Chamberlin, *The Global Offensive*, 40.
116. Sharabi, "Palestinian Guerrillas: Their Credibility and Effectiveness," 3.
117. Sartre, "On Genocide," in Duffett, *The Crime of Silence*, 617.
118. Telford Taylor, refers to Falk and other lawyers, 137.
119. Sartre, "On Genocide," in Duffett, *The Crime of Silence*, 617.
120. Sartre, "On Genocide," in Duffett, *The Crime of Silence*, 617.
121. Falk, "Introduction," in Browning and Forman, *The Wasted Nations*, xv.
122. Theodore J. C. Heavner, "The Viet-Nam Situation" (1963). Department of State Bulletin, 49, 385, 396–97.

123. Russell, *War Crimes in Vietnam*, 61.
124. Russell, *War Crimes in Vietnam*, 46.
125. Yves Jouffe, "Report on the Laws of War," in Duffett, *The Crime of Silence*, 398.
126. "Report from Indochina," in Browning and Forman, eds., *The Wasted Nations*, 260; Franck, "International Law and the US War in Indochina," in Browning and Forman, eds., *The Wasted Nations*, 296.
127. Russell, *War Crimes in Vietnam*, 59.
128. Russell, *War Crimes in Vietnam*, 59.
129. "Report from Indochina," in Browning and Forman, eds., *The Wasted Nations*, 254, 260; Franck, "International Law and the US War in Indochina," in Browning and Forman, eds., *The Wasted Nations*, 296.
130. Lelio Basso, "Summation on Genocide," in Duffett, *The Crime of Silence*, 634; Sartre, "On Genocide," in Duffett, *The Crime of Silence*, 621.
131. Russell, *War Crimes in Vietnam*, 63.
132. Noam Chomsky, *Peace in the Middle East? Reflections on Justice and Nationhood* (New York: Vintage Books, 1974), 61.
133. Chomsky, *Peace in the Middle East?*, 61.
134. Task Force Report in Browning and Forman, eds., *The Wasted Nations*, 90.
135. Lelio Basso in Duffett, *The Crime of Silence*, 297.
136. Yves Jouffe, "Report on the Laws of War," in Duffett, *The Crime of Silence*, 326.
137. Franck, "International Law and the US War in Indochina," in Browning and Forman, eds., *The Wasted Nations*, 294.
138. Franck, "International Law and the US War in Indochina," in Browning and Forman, eds., *The Wasted Nations*, 295.
139. Fred Branfman, "Bombing in Laos—A Crime Against Humanity," in Browning and Forman, eds., *The Wasted Nations*, 74; Franck, "International Law and the US War in Indochina," in Browning and Forman, eds., *The Wasted Nations*, 294.
140. Erwin Knoll, Judith Nies McFadden, and the Congressional Conference on War and National Responsibility Washington, *War Crimes and the American Conscience* (New York: Holt Rinehart and Winston, 1970), 75.
141. See, e.g., Ekberg et al., "Task Force Report," in Browning and Forman, eds., *The Wasted Nations*, 90; Branfman, "Bombing in Laos—A Crime Against Humanity," in Browning and Forman, eds., *The Wasted Nations*, 76.
142. Telford Taylor, 142.
143. See Martin Florian Herz and Leslie Rider, *The Prestige Press and the Christmas Bombing, 1972: Images and Reality in Vietnam* (Washington, DC: Ethics and Public Policy Center, 1980), 54.
144. Burrus M. Carnahan, "'Linebacker II' and Protocol I: The Convergence of Law and Professionalism," in "Civilian Immunity and the Principle of Distinction," *American University Law Review* 31 (1981–1982): 861, 865.
145. Carnahan, "'Linebacker II' and Protocol I," 866.
146. Carnahan, "'Linebacker II' and Protocol I," 867.
147. Amanda Alexander, "International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol," *Melbourne Journal of International Law* 17 (2017).
148. Claude Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Leiden: M. Nijhoff, 1987) 586–87;

Waldemar A. Solf and W. George Grandison, "International Humanitarian Law Applicable in Armed Conflict," *Journal of International Law and Economics* 10 (1975): 567, 569.

149. International Committee of the Red Cross, "XXIst International Conference of the Red Cross: Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts" (Geneva, 1969), 60.

150. See, e.g., Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May—12 June 1971), *Report on the Work of the Council* (Geneva, 1971); "Outline of an Instrument on the Protection of the Civilian Population against the Danger of Hostilities," working paper submitted by the experts of Mexico, Sweden, Switzerland, United Arab Republic, and the Netherlands at 97; proposal submitted by the experts of the Netherlands at 56; proposal submitted by the experts of Egypt, Finland, Mexico, Norway, Sweden, Switzerland, and Yugoslavia at 57; proposal submitted by the experts of Spain at 61.

151. See, e.g., Plaka (Albania), *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)* (Hein, 1981), vol. 5, 147.

152. Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Leiden: Martinus Nijhoff, 1982), 40; Keith Suter, *An International Law of Guerrilla Warfare* (London: Pinter, 1984), 142–43.

153. Abi-Saab, 374.

154. *Official Records of the Diplomatic Conference*, vol. 5, 13.

155. *Official Records of the Diplomatic Conference*, vol. 5, 13–14.

156. *Official Records of the Diplomatic Conference*, vol. 5, 47.

157. *Official Records of the Diplomatic Conference*, vol. 5, 63.

158. *Official Records of the Diplomatic Conference*, vol. 5, 205.

159. *Official Records of the Diplomatic Conference*, vol. 5, 57.

160. See, e.g., *Official Records of the Diplomatic Conference*, vol. 5, Balken (Federal Republic of Germany), Seuk Djoun Kim (Democratic People's Republic of Korea), Cristescu (Romania) at 46; Chowdhury (Bangladesh), Witek (Poland) at 45.

161. See, e.g., Lechuga (Cuba), Griбанov (Union of Soviet Socialist Republics) at 15; Plaka (Albania) at 21, *Official Records of the Diplomatic Conference*, vol. 5.

162. Plaka (Albania), *Official Records of the Diplomatic Conference*, vol. 5, 21.

163. Le Van Loi (Republic of Viet-Nam), *Official Records of the Diplomatic Conference*, vol. 5, 47–48.

164. See Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May—12 June 1971), paras 312–56.

165. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May—12 June 1971), 53.

166. Boudjakdji (Algeria), *Official Records of the Diplomatic Conference*, vol. 5, 38.

167. Plaka (Albania), *Official Records of the Diplomatic Conference*, vol. 5, 146.

168. Dugersuren (Mongolia), *Official Records of the Diplomatic Conference*, vol. 5, 191.

169. Plaka (Albania), *Official Records of the Diplomatic Conference*, vol. 5, 146.
170. Dugersuren (Mongolia), *Official Records of the Diplomatic Conference*, vol. 5, 191.
171. Mishra (India) *Official Records of the Diplomatic Conference*, vol. 5, 198.
172. Mishra (India) *Official Records of the Diplomatic Conference*, vol. 5, 198; Namibia, Mishra (India), *Official Records of the Diplomatic Conference*, vol. 5, 204; Boudjakdji (Algeria), *Official Records of the Diplomatic Conference*, vol. 5, 38.
173. See, e.g., Forsythe, "The 1974 Diplomatic Conference on Humanitarian Law," 80; R. R. Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law," *Harvard International Law Journal* 16, no. 1 (1975): 17; John F. DePue, "The Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949—Its Impact Upon Humanitarian Constraints Governing Armed Conflict," *Military Law Review* 75 (1977): 75, 97.
174. *Official Records of the Diplomatic Conference*, vol. 6, 41.
175. Bothe, Partsch, and Solf, *New Rules for Victims of Armed Conflicts*, 43.
176. Charles Lysaght, "The Attitude of Western Countries," in Antonio Cassese, ed., *The New Humanitarian Law of Armed Conflict* (Naples: Editoriale Scientifica, 1979), 354.
177. Charles Lysaght, "The Attitude of Western Countries," 354.
178. *Official Records of the Diplomatic Conference*, vol. 6, 53.
179. Giovanni Mantilla, *Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict* (Ithaca: Cornell University Press, 2020), 151.
180. Mantilla, *Lawmaking under Pressure*, 150. Hays Parks makes much the same argument, W Hays Parks, "Air War and the Law of War," *Air Force Law Review* 1 (1990): 79.
181. El Fattal (Syrian Arab Republic), *Official Records of the Diplomatic Conference*, vol. 6, 51.
182. *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary* (Geneva, October 1973), 47.
183. *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary* (Geneva, October 1973), 49.
184. Moun Seun Jang (Democratic People's Republic of Korea), *Official Records of the Diplomatic Conference*, vol. 5, 368.
185. Dugersuren (Mongolia), *Official Records of the Diplomatic Conference*, vol. 5, 191; Chowdhury (Bangladesh), *Official Records of the Diplomatic Conference*, vol. 5, 187.
186. Dugersuren (Mongolia), *Official Records of the Diplomatic Conference*, vol. 5, 191.
187. Abada (Algeria) *Official Records of the Diplomatic Conference*, vol. 5, 148.
188. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)* (Hein, 1981) vol. 14, at 344, 324, 531. North Vietnam, Nigeria, North Korea, Pakistan, Ghana, and Lesotho.
189. *Official Records of the Diplomatic Conference*, vol. 14, at 466.
190. George H Aldrich, "Guerrilla Combatants and Prisoner of War Status," *American University Law Review* 31 (1981–1982): 872.



191. *Official Records of the Diplomatic Conference*, vol. 14. See the United States at 475, Brazil at 507, Switzerland at 508, Federal Republic of Germany at 515, Australia at 525, United Kingdom, Israel, and the Netherlands at 526. Belgium was an exception.
192. *Official Records of the Diplomatic Conference*, vol. 14, 477. Reed (US) speaking.
193. *Official Records of the Diplomatic Conference*, vol. 14, 535.
194. *Official Records of the Diplomatic Conference*, vol. 15, above n74, 155; H. Sultan (Egypt) speaking.
195. Aldrich, "Guerrilla Combatants and Prisoner of War Status," 878–79.
196. Mantilla, *Lawmaking under Pressure*, 161.
197. Brazil and Israel voted against. New Zealand, Nicaragua, Spain, Thailand, United Kingdom, Uruguay, Argentina, Australia, Bolivia, Canada, Chile, Colombia, Denmark, Guatemala, Holy See, Ireland, Italy, Japan abstained from the vote. *Official Records of the Diplomatic Conference*, vol. 15, above n74, 155.
198. *Official Records of the Diplomatic Conference*, vol. 15, see respective states at 177, 180, 182, 185.
199. Pilloud Claude Pilloud et al., *Commentary on the Additional Protocols*, 522.
200. *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, August 12, 1949.
201. Claude Pilloud et al., *Commentary on the Additional Protocols*, 610.
202. Georges Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols," *Recueil des Cours: Collected Course of the Hague Academy of International Law*, vol. 165 (Leiden: Brill, 1979), 429.
203. Amanda Alexander, "International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol," *Melbourne Journal of International Law* 17 (2017): 30.
204. Alexander, "International Humanitarian Law," 30.
205. Hays Parks, *Air War and the Law of War*, 164.
206. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)* (Hein, 1981), vol. 6, see Mexico at 193; *Official Records of the Diplomatic Conference*, vol. 6, 164. Freeland (United Kingdom); Claude Pilloud et al., *Commentary on the Additional Protocols*, 615.
207. See Alexander, "International Humanitarian Law," 30–35.
208. George H. Aldrich, "New Life for the Laws of War," *American Journal of International Law* 75 (1981): 778.
209. *Additional Protocol I*, above n3, art 57.
210. *Additional Protocol I*, art 55.
211. *Additional Protocol I*, art 56.
212. Aldrich, "New Life for the Laws of War," 778.
213. W. Hays Parks, "Air War and the Law of War," *Air Force Law Review* 1 (1990): 140.
214. Alexander, *A Short History of International Humanitarian Law*, 127.
215. Alexander, *A Short History of International Humanitarian Law*, 137. See also the rules cited above from the ICRC study on customary international law, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*.
216. This can be seen in the recent spate of works on direct participation in hos-

tilities, e.g., Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009); W. Hays Parks, "Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect," *N.Y.U. J. Int'l L. & Pol.* (2010): 42, 769; A. P. V. Rogers, "Direct Participation in Hostilities: Some Personal Reflections," *Mil. L. & L. War Rev.* (2009): 48, 143.