

AGORA: THE U.S. DECISION NOT TO RATIFY PROTOCOL I TO THE GENEVA CONVENTIONS ON THE PROTECTION OF WAR VICTIMS

This Agora consists of President Reagan's message to the Senate transmitting Protocol II to the Geneva Conventions of 1949, in which he states the views of the U.S. Government as to why Protocol I will not be submitted for senatorial advice and consent.

The *Journal* would ordinarily have carried this message in its Contemporary Practice section. However, the decision not to ratify Protocol I and the reasons therefor have generated much interest in both U.S. and foreign legal circles. Consequently, the message is being published here together with a rejoinder by the Legal Adviser to the Directorate, International Committee of the Red Cross. Readers will thus be in a position to judge for themselves.

T. M. F.

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *January 29, 1987.*

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to ratification, Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977. I also enclose for the information of the Senate the report of the Department of State on the Protocol.

The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict, with the objective of giving the greatest possible protection to victims of such conflicts, consistent with legitimate military requirements. The agreement that I am transmitting today is, with certain exceptions, a positive step toward this goal. Its ratification by the United States will assist us in continuing to exercise leadership in the international community in these matters.

The Protocol is described in detail in the attached report of the Department of State. Protocol II to the 1949 Geneva Conventions is essentially an expansion of the fundamental humanitarian provisions contained in the 1949 Geneva Conventions with respect to non-international armed conflicts, including humane treatment and basic due process for detained persons, protection of the wounded, sick and medical units, and protection of noncombatants from attack and deliberate starvation. If these fundamental rules were observed, many of the worst human tragedies of current internal armed conflicts could be avoided. In particular, among other things, the

mass murder of civilians is made illegal, even if such killings would not amount to genocide because they lacked racial or religious motives. Several Senators asked me to keep this objective in mind when adopting the Genocide Convention. I remember my commitment to them. This Protocol makes clear that any deliberate killing of a noncombatant in the course of a non-international armed conflict is a violation of the laws of war and a crime against humanity, and is therefore also punishable as murder.

While I recommend that the Senate grant advice and consent to this agreement, I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. Like all other efforts associated with the International Committee of the Red Cross, this agreement has certain meritorious elements. But Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view. Finally, the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable.

It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.

The time has come for us to devise a solution for this problem, with which the United States is from time to time confronted. In this case, for example, we can reject Protocol I as a reference for humanitarian law, and at the same time devise an alternative reference for the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts. We are therefore in the process of consulting

with our allies to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law. I will advise the Senate of the results of this initiative as soon as it is possible to do so.

I believe that these actions are a significant step in defense of traditional humanitarian law and in opposition to the intense efforts of terrorist organizations and their supporters to promote the legitimacy of their aims and practices. The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

Therefore, I request that the Senate act promptly to give advice and consent to the ratification of the agreement I am transmitting today, subject to the understandings and reservations that are described more fully in the attached report. I would also invite an expression of the sense of the Senate that it shares the view that the United States should not ratify Protocol I, thereby reaffirming its support for traditional humanitarian law, and its opposition to the politicization of that law by groups that employ terrorist practices.

RONALD REAGAN.

AN APPEAL FOR RATIFICATION BY THE UNITED STATES

The President of the United States sent a message to the Senate on January 29, 1987 asking for its consent to the ratification of *Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, adopted on June 8, 1977 by a Diplomatic Conference in Geneva.¹ The decision to recommend this treaty for ratification, subject to certain understandings and reservations, is a welcome contribution to the development of international humanitarian law applicable in *noninternational* armed conflicts. The proposed declaration of understanding to the effect that Protocol II will be applied whenever Article 3 common to the four Geneva Conventions is applicable is a positive step forward that should set an example for other states.

The message also explains why the United States should *not* ratify *Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, adopted by the

¹ Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess., at III (1987), *reprinted supra* p. 910 [hereinafter Letter of Transmittal]. A detailed analysis of the provisions of the Protocol and the text of recommended understandings and reservations are attached. *Id.* at 1.

For the text of Protocol II, see Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Final Act (1977), *reprinted in* S. TREATY DOC. NO. 2, *supra*, at 7, 16 ILM 1442 (1977), INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1977), and D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 619 (1981).