

# Seattle University School of Law Digital Commons

---

Faculty Scholarship

---

1-1-1975

## Amended Article 1 of Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerrilla

James E. Bond

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>



Part of the [International Law Commons](#), and the [Transnational Law Commons](#)

---

### Recommended Citation

James E. Bond, Amended Article 1 of Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerrilla, 32 *WASH. & LEE L. REV.* 65 (1975).

<https://digitalcommons.law.seattleu.edu/faculty/398>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

# AMENDED ARTICLE 1 OF DRAFT PROTOCOL I TO THE 1949 GENEVA CONVENTIONS: THE COMING OF AGE OF THE GUERRILLA\*

JAMES E. BOND\*\*

Writing in this issue of the Washington and Lee Law Review,<sup>1</sup> Captain David Graham savages amended Article 1<sup>2</sup> of draft Protocol I to the 1949 Geneva Conventions.<sup>3</sup> Specifically, he attacks the Article on the following grounds: (1) it is politically motivated by third-worlders determined to remake international law according to their own preferences; (2) it is poorly drafted and therefore cannot be implemented effectively; and (3) it would legitimize wars of national

---

\* This paper was originally prepared for presentation to the International Studies Association panel on "International Law and the Regulation of Armed Conflict" at its annual meeting, February 19-21, 1975.

\*\* Associate Professor of Law, Washington and Lee University. A.B. (1964), Wabash College; J.D. (1967), Harvard University; L.L.M. (1971), S.J.D. (1972), University of Virginia.

<sup>1</sup> Graham, *The 1974 Diplomatic Conference on the Law of War: a Victory for Political Causes and a Return to the Just War Concept of Eleventh Century*, 32 WASH. & LEE L. REV. 25 (1975) [hereinafter cited as Graham].

<sup>2</sup> The text of amended Article 1, approved by a vote of 70 to 21, with 13 abstentions, states:

1. The present Protocol, which supplements the Geneva Conventions of August 12, 1949, for the Protection of War Victims, shall apply in the situations referred to in Article 2 common to these Conventions.

2. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial and alien occupation and racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

3. The High Contracting Parties undertake to respect and to ensure respect for the present protocol in all circumstances.

4. In cases not included in the present Protocol or in other instruments of treaty law, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principle of humanity and from the dictates of public conscience.

<sup>3</sup> Draft Protocol I is a product of several years work by the International Committee of the Red Cross, working with the United Nations Secretariat and "governmental experts" from many countries. It is designed to modernize and update the four Geneva Conventions of 1949, which generally apply to international armed conflict. The text of the protocol may be obtained from The International Committee of the Red Cross.

liberation and lead to discriminatory treatment of combatants. These are serious charges, raised by a serious scholar, whose closeness to the subject and to several members of the United States delegation<sup>4</sup> to the Geneva Conference strongly suggest that his views reflect those of his government;<sup>5</sup> and they merit an equally serious answer.

I shall detail my answer in the following pages. Briefly summarized, it is this. The political motivation behind Article 1 is irrelevant in assessing its wisdom. Its drafting defects, while egregious, are not irremediable. Moreover, fears that Article 1 will compromise the effectiveness of the law of war are exaggerated: adoption of the amended Article will neither legitimize wars of national liberation nor lead to discriminatory treatment of combatants. Article 1, for all its weaknesses, represents a positive development in the evolution of the law of war from a body of law applicable only to international armed conflict to a cohesive legal regime regulating serious armed conflict of all kinds.<sup>6</sup>

### *Political Motivation*

Article 1 quite naturally reflects the political preferences of the third-worlders who constitute the "new majority" in international

---

<sup>4</sup> At the time Captain Graham wrote the article, he was assigned to the Judge Advocate General's School as a professor in international law with responsibilities for teaching the law of war to military lawyers. Both the Judge Advocate General and the Chief of the International Law Section of the Office of the Judge Advocate General were members of the United States delegation.

<sup>5</sup> Many of the points that Captain Graham makes closely parallel those made by Professor Richard Baxter, our most knowledgeable student of the law of war and likewise a member of the United States delegation, in the conference report which he prepared for submission to the Secretary of State by the delegation chief, George Aldrich. See, e.g., Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L LAW J. 1 (1975); Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM. J. OF INT'L LAW 77 (1975).

<sup>6</sup> Colonel G. I. A. D. Draper has observed:

The awareness among the percipient that respect for human rights cannot be fragmented into time of peace and of war and that such rights are under maximum threat in time of war, together with contemporary political and technological developments, led to the following position: The regime of human rights will come in time to be the normal ordering in civil society; if war breaks out, inter- or intra-State, that regime does not dissipate. First, it is there waiting in the background the whole time to take over once the conflict abates. Second, a lower level of that regime then comes into play by way of derogation made strictly necessary by the emergency situation. That lower regime is the Law of Armed Conflicts.

Draper, *The Ethical and Judicial Status of Constraints in War*, 55 MIL. L. REV. 169, 181 (1972).

affairs. What else would one expect now that these peoples have come of age and have assumed voting control of those international institutions that make international law? The rules of any legal system inevitably reflect the political preferences of the predominant group(s) in that community,<sup>7</sup> and the international legal system is no exception.

Does anyone doubt that the customary international law which evolved during the 19th century reflected the political preferences of the European nations and the United States? Only a country with far flung commercial interests would need a rule that permitted it to intervene in a foreign country in order to rescue the local representative of Standard Oil from the native cooking pot. The doctrine of humanitarian intervention served the political interests of the predominant powers and survived so long as those countries dominated the international community.<sup>8</sup> Does anyone doubt that the Americans counseled deference to the decisions of the United Nations so long, and only so long, as they could manage it as the New York subdivision of the United States State Department?<sup>9</sup> The lawfulness of United Nations decisions does not depend, however, on the degree to which they coincide with American political interest. Whatever the law-creating function of the United Nations, it survives fluctuations in the political majorities within it.<sup>10</sup> And today, its decisions reflect the predominant influence of the third-worlders.

Chagrin, disbelief, and anger that these third-worlders should force upon the Americans and their European allies a rule inconsis-

---

<sup>7</sup> See, e.g., Gussfield, *On Legislating Morals: the Symbolic process of Designating Deviancy*, 56 CALIF. L. REV. 54, 59 (1968):

My analysis of the American temperance movement has shown how the issue of drinking and abstinence became a politically significant focus for the conflicts between Protestant and Catholic, rural and urban, native and immigrant, middle class and lower class in American society as an abstinent Protestant middle class attempted to control the public affirmation of morality in drinking. Victory or defeat thus symbolized the status and power of the opposing cultures . . .

<sup>8</sup> I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 348 (2d ed. 1973). The doctrine may have survived in modified form, however. See, e.g., *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (R. Lillich, ed. 1973).

<sup>9</sup> How else does one explain the almost daily news items reporting disenchantment by one prominent American or another over the decisions of the last session of the General Assembly?

<sup>10</sup> The law-creating function of the constituent organs of the United Nations has generated a wide-ranging and continuing debate among scholars. See generally R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963).

ent with Western political preferences permeates Captain Graham's article. At one point he even implies that rules which reflect "their" preferences rather than "ours" are not law:<sup>11</sup>

[A] majority of those states advocating the adoption of amended Article 1 are not concerned with its legal ramifications or the impact these will have on the United Nations Charter and other codified concepts of the Law of War. Many quite candidly state that if adoption of Article 1 causes legal problems, they will belong to the developed, industrialized nations and not to those advocating adoption of the article. Stimulated by the prospect of achieving what they consider to be a stunning political victory, these third world countries' pervasive attitude appears to be "The law be damned—we won."

Perhaps the third-worlders are only saying: "Your law be damned. This is now the law—take it or leave it." The United States and its European allies, though they still exert influence far beyond their numbers in the international community, no longer dominate and therefore cannot dictate the nature of its rules. The rules adopted by treaty or that evolve by custom are nevertheless valid.

The fact that a rule is lawful does not mean that all must abide by it. Fortunately for minorities in the international legal system, most rules bind only those who expressly assent to them.<sup>12</sup> Increasingly then, the United States may have to exercise its "leave it" option: it must ask itself whether non-adherence or non-participation will serve its political and diplomatic interests better than would adherence or participation.<sup>13</sup> Captain Graham advises that "it would be both unwise and unnecessary" to accede to Article 1 in its present

<sup>11</sup> Graham, *supra* note 1, at 61.

<sup>12</sup> Lauterpacht specifically cites the Geneva Conventions as an example of such non-binding rules.

[A state admitted into the community of nations has] the duty to submit to all rules in force, with the sole exception of those which, like the rules of the Geneva Conventions, are binding upon such States only as have concluded, or later on acceded to, a certain international treaty creating the rules concerned.

I OPPENHEIM'S INTERNATIONAL LAW 18 (9th ed. H. Lauterpacht 1955).

<sup>13</sup> The on-going deliberations on the law of the sea constitute another situation in which the United States may face the difficult choice of agreeing to a distasteful legal regime or going it alone. Professor Claude foresaw this dilemma several years ago in his perceptive article, *The United Nations, the United States, and the Maintenance of Peace*, 23 INT'L ORG. 621 (1969).

form or, indeed, in any modified form.<sup>14</sup> His advice is doubtless sound if the Article is as bad as he says it is. But is it?

The fact that the third-worlders have all the votes does not mean that they have all the brains, of course. They may make bad law. Majorities often do. On the other hand, they may make good law. The point, again, is simple enough. All law—bad or good—is politically motivated. We must then evaluate the wisdom or unwisdom of Article 1 by criteria other than the degree to which it was politically motivated.

### *Drafting and Implementation*

Craftsmanship is one such useful criterion. A treaty provision should speak clearly and fit neatly into the larger body of law of which it is a part.<sup>15</sup> If a treaty provision fails in either respect, it creates confusion rather than certainty in the legal system. Unfortunately, Article 1, as presently phrased, fails in both respects.

Through paragraph two of the Article the draftsmen would make all the Geneva conventions applicable to “armed conflicts in which peoples are fighting against colonial and alien occupation and racist regimes in the exercise of their right of self-determination.”<sup>16</sup> Since “colonialist” and “racist” passed into the epithetical language of international diplomacy, they have lost whatever objective meaning they may once have had. The precise nature of a right to self-determination is uncertain,<sup>17</sup> even when construed, as Article 1 dictates, in accordance with the United Nations Charter and the Decla-

<sup>14</sup> Graham, *supra* note 1, at 61.

<sup>15</sup> In respect of these elemental characteristics, a treaty does not differ from a well-drafted statute or contract. Cf. McNAIR, *THE LAW OF TREATIES* 6 (1961). Not surprisingly, the need for a “form book” for treaties has been recognized. See, e.g., *THE TREATY MAKER’S HANDBOOK* (H. Blix & Emerson, eds. 1973).

<sup>16</sup> See note 2 *supra*.

<sup>17</sup> As Professor Emerson observes at the outset of his critical analysis of the doctrine:

Any examination of self-determination runs promptly into the difficulty that while the concept lends itself to simple formulation in words which have a ring of universal applicability and perhaps of revolutionary slogans, when the time comes to put it into operation it turns out to be a complex matter hedged in by limitations and caveats. . . . The most obvious questions which must be asked about self-determination are usually familiar and straightforward but they all tend to suffer from the same common defect of lacking unambiguous answers which can be easily adapted to meet the pressures of political demands and counterdemands.

Emerson, *Self-Determination*, 64 *AM. J. INT’L L.* 459 (1971).

ration on Principles of International Law concerning Friendly Relations and Cooperation among States. The Charter is, after all, a constitutional document filled with high level abstractions; indeed, it refers but once to the principle of self-determination without elaboration. The Declaration on Principles speaks in very general terms as well, and its status as law is doubtful.<sup>18</sup>

The ambiguity of these Article 1 definitions may be illustrated easily. To which of the many armed conflicts presently raging throughout the world would it apply? The guerilla wars in Mozambique and Angola probably represent the clearest cases of application. Unfortunately, they neither typify the kinds of internal conflicts that presently flourish throughout the world nor the kinds of internal conflicts that will flourish in the coming decades.<sup>19</sup> Colonialism is a dying, if not already dead, phenomenon. Yet its demise will not diminish the incidence of internal conflict; and a definition of armed conflict that does not embrace the range of those that one may reasonably anticipate will arise is troublesome.

Cyprus, Northern Ireland, Ethiopia, Yemen, the Middle East and Vietnam typify present and future conflicts. Can one characterize any one of the parties to these disputes as struggling against a colonialist/alien dominated/racist regime? Which one? Can one identify whose right of self-determination is at stake? The Article 1 standards simply do not apply to armed conflicts in which both parties have plausible political, social and economic claims. The definitional gap is unfortunate.

In an Alice-in-Wonderland world, however, partisans may stretch the Article 1 definitions to cover any conflicts in which disputants protest ethnic or racial discrimination. Thus, Captain Graham wonders whether the Indians' take-over at Wounded Knee might fall within the ambit of Article 1.<sup>20</sup> More than one black militant has demanded prisoner of war treatment,<sup>21</sup> and the language of Article 1 may support such claims. Although application of the law of war to

---

<sup>18</sup> Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: a Survey*, 65 AM. J. INT'L L. 713, 735 (1971). But see Graham, *supra* note 1, at 40, who concedes the resolution is "reflective of recognized international law concepts."

<sup>19</sup> Internal conflict in the advanced industrial countries is well within the realm of possibility, for example.

<sup>20</sup> Graham, *supra* note 1, at 51.

<sup>21</sup> Others outside these United States take such claims seriously. The Organization for African Unity, for example, recognized the Student Non-Violent Coordinating Committee as a "Liberation Movement" at the 1967 International Seminar on Apartheid, Racial Discrimination and Colonialism in Southern Africa.

such situations seems ludicrous, one cannot dismiss that possibility so long as Article 1 contains no standards of application other than the disputants' claim to be struggling against colonialist/alien dominated/racist forces.

When treaty language yields results by turns troublesome, unfortunate and ludicrous, the language requires revision. Article 1 needs revision for another reason as well: it is not integrated effectively into the existing legal regime. As a result, the coverage of Article 1 is uncertain even where the conflict is clearly one against a colonialist/alien dominated/racist regime. As Captain Graham points out, common Article 2 of the Geneva Conventions, to which Article 1 is expressly subordinated, covers only "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties" and "all cases of partial or total occupation of the territory of a High Contracting Party."<sup>22</sup> Since national liberation movements will not have signed the 1949 Conventions, they cannot claim the rights ostensibly given them in Article 1. This result, anomalous as it may appear in light of the draftsmen's apparent intent,<sup>23</sup> follows logically from the language of the two Articles when read together as they must be.

Moreover, all the Geneva Convention provisions should not apply to wars of national liberation or other kinds of internal conflict. In the first place, the typical parties to an internal conflict—governor and guerrilla alike—cannot hope to comply with the many detailed provisions of the Geneva Conventions.<sup>24</sup> Given the usual lack of resources and governmental infrastructure in the third-world countries where internal conflicts are most likely to occur, the parties could not fulfill their obligations even if they acted in good faith. It is unwise to demand the impossible: it reduces the law to hypocrisy and invites disregard of the entire legal regime, even those parts with which compliance could be reasonably expected.

The inappropriateness of particular provisions, when applied to internal conflict, is a second reason for rejecting application of the Geneva Conventions in toto. Article 4 of the Prisoner of War Convention<sup>25</sup> illustrates this defect. It specifies the criteria other than mem-

---

<sup>22</sup> Graham, *supra* note 1, at 46-47. The text of the article may be found in [1955] 3 U.S.T. 3114, 3116.

<sup>23</sup> Professor Baxter reports that the proponents of amended Article 1 felt that the Geneva Conventions should apply to wars of national liberation. *Report of the United States Delegation 7* (1974).

<sup>24</sup> Bond, *Protection of Non-Combatants in Guerrilla Wars*, 12 WM. & MARY L. REV. 787, 803-04 (1971).

<sup>25</sup> [1955] 3 U.S.T. 3316, 3320.



bership in the "regular armed forces" for prisoner of war status:

Members . . . of organized resistance movements, [who] fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operation in accordance with the laws and customs of war.

Since guerrilla tactics are widely employed by all parties to an internal conflict, many participants will not qualify as prisoners of war under the Article 4 criteria. "Swabbing on" the Geneva Conventions does not suffice as a solution to the problems of internal conflict.

For all its sins of craftsmanship, Article 1 is not beyond salvation, as I shall shortly demonstrate. More importantly, Article 1 is worth saving. In its awkward way it does specify one useful criterion for determining when participants in an internal conflict should observe at least some of the restraints imposed by the law of war: the purpose, goal or objective of the participants. The criterion is useful because it is often an indicium of a particularly bloody and protracted conflict—precisely the kind of conflict to which the laws of war should apply. Partisans who believe that they are fighting for their freedom against racist and colonial overlords will not meekly flee the field of battle. Such claims also touch the sympathies of many outside the country and often induce their covert assistance, which intensifies the conflict. It is therefore scarcely unrealistic to assert, as did the General Assembly in its Resolution entitled *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*, that "any attempt to suppress the struggle against colonial and alien domination and racist regimes . . . constitutes a threat to internal peace and security."<sup>28</sup> Thus, in societies where the bells toll for racial or ethnic groups, many others outside that society will know that the bells toll for them as well.

Article 1 also represents another evolutionary step in the "internalization" of the rules governing all armed conflict. While Captain Graham correctly asserts that traditional international law did not apply to internal conflicts, he ignores the modern trend toward appli-

---

<sup>28</sup> G. A. Res. 3103 (XXVIII) (Dec. 12, 1973).

cation of at least some parts of the law of war to an ever-increasing range of internal armed conflicts. I have documented this trend elsewhere;<sup>27</sup> here I will only point out that Protocol II,<sup>28</sup> over whose apparent demise Captain Graham weeps crocodile tears, would have extended and expanded common Article 3, which applies to all armed conflict of a non-international nature. Contrary to Captain Graham's protests, there is then nothing revolutionary in the rationale that underlies Article 1. Its extension of the law of war to particular kinds of internal conflicts is but a logical extension of pre-existing legal norms. Its principal defect is not that it goes too far, but that it does not go far enough.

Yet useful as is the purpose criterion, it is not an infallible guide to the kinds of internal conflicts to which the laws of war ought to apply. Loss of property and life and violation of basic human rights—the infliction of the often unnecessary suffering that the law of war seeks to mitigate—are not confined to wars of national liberation.<sup>29</sup> We must then identify those other criteria that, when considered with the goals of the participants, characterize internal conflicts whose destructiveness can be mitigated by application of the law of war.

The duration of the conflict, the use of regular combat troops, and the invocation of emergency governmental powers all measure the intensity of the conflict.<sup>30</sup> As with the purpose criterion, none of these

<sup>27</sup> J. BOND, *THE RULES OF RIOT, INTERNAL CONFLICT AND THE LAW OF WAR* 7-44 (1974).

<sup>28</sup> Draft Protocol II would establish a mini-convention for internal conflict, which is presently governed only by common Article 3 of the Geneva Conventions. The text of the protocol may be obtained from the International Committee of the Red Cross. While I agree that adoption of Draft Protocol II is preferable to application of all the conventions through amendment of Draft Protocol I, I do not believe that the latter course is irresponsible. In light of the United States' historic opposition to broadening greatly the range of conflicts subject to the law of war, one may doubt any implied enthusiasm for draft Protocol II, were its scope of application enlarged as in amended Article I.

<sup>29</sup> *E.g.*, during the recent Nigerian civil war, as many as 2,000,000 Biafrans may have died. *N.Y. Times*, Sept. 27, 1970, § 1, at 22, col. 3. A reporter in Ceylon, covering the 1971 revolt there, filed this report with the Associated Press:

Bodies of young men presumably killed by policemen and soldiers  
have been floating down rivers in groups toward the sea near Colombia  
. . . . Some of them were decapitated and others riddled with bullets,  
their wrists bound behind their backs.

*N.Y. Times*, April 25, 1971, § 1, at 1, col. 6.

<sup>30</sup> INSTITUTE OF WORLD POLITY, *THE LAW OF LIMITED INTERNATIONAL CONFLICT* 48-49 (1965).

is by itself an adequate indicator. For example, governments often call upon regular army units to quell riots; but since riots usually dissipate within a few hours or days, the law of war would not generally apply. Similarly, governments often resort to emergency powers in order to deal effectively with a wide range of problems other than armed resistance of their authority.<sup>31</sup> Where a government does invoke emergency powers to deal with armed conflict, their invocation indicates that the government takes the armed resistance seriously. Moreover, their invocation will necessarily curtail the exercise of rights whose curtailment is often regulated by the law of war.<sup>32</sup> As a general rule, the longer the conflict the greater the need for application of the law of war. Yet even this criterion cannot be relied upon solely. A group of bandits, cloaking its common criminality in political rhetoric, might survive for years without creating a situation to which the law of war should apply. My point is simple enough: multiple criteria must be used to identify those internal conflicts that should be regulated by the law of war.

Remedying the drafting defects outlined above will necessitate radical surgery on the present language of Article 1. Rather than making all the Geneva Conventions applicable to internal conflicts, the Article should make only the general principles common to those conventions applicable; and those principles should be enumerated.<sup>33</sup> A less desirable remedy for the problem of total application would be specification of the Geneva articles that either do or do not apply. Picking and choosing from among the several hundred Geneva articles would prove burdensome and would probably yield unsatisfactory results, however.

Paragraph 2 should be expanded to include criteria other than the objective of the parties. As presently drafted, the range of internal conflicts to which the law of war would apply is too narrow and too uncertain. The addition of several other criteria—the use of regular government troops, the invocation of emergency powers, and the length of the conflict—would clarify and enlarge the cases of application.

---

<sup>31</sup> The government of Bangladesh has, for example, just recently imposed martial law in order to deal with the deteriorating economic conditions in that country.

<sup>32</sup> *E.g.*, Article 49 of the Geneva Convention for the Protection of Civilian Persons regulates relocation of the civilian population during war.

<sup>33</sup> Present Article 3 follows this approach. IV J. PICTET, COMMENTARY, GENEVA CONVENTIONS 30-34 (1958). Its chief weakness is its failure to enumerate the applicable principles in adequate detail.

*Effect of Article 1*

Throughout his article, Captain Graham bemoans the consequences that will attend adoption of Article 1. Specifically, he worries that "the effect that the adoption of amended Article 1 will have on the established concepts of conflict management is substantial." He elaborates:

. . . Reference to struggles for self-determination in the context of an article conferring a preferred status on particular armed conflicts tends to elevate the principle of self-determination to the position of a legal right, justifying the use of armed force by the now-favored liberation movements and perhaps even by third states, despite the fact that neither self-defense nor Security Council action is involved. Thus, where claims of self-determination are espoused, war once again becomes a legally recognized instrument for challenging and changing rights based on existing international law.

As a result, attempts to use the United Nations Charter to prevent unilateral recourse to war may be corrupted to the point that the Charter serves not as a prohibition against, but as a justification for again using armed force as an instrument for carrying out national policy. The adoption of amended Article 1 by a majority of the world's states would clearly demonstrate a desire to refute the basic prohibitions against the use of force contained in the Charter. . . .<sup>34</sup>

Since the wisdom or unwisdom of a treaty provision ought to be judged by the results that will likely follow from its adoption, Captain Graham's assertions on this point—if true—call into question the wisdom of Article 1.

We may put to one side the question whether general international law presently does or in the future ought to sanction wars against colonialist/alien dominated/racist regimes.<sup>35</sup> Teaching at a school named after two traitors, I take a perhaps more sanguine view of such movements than does a career Army officer whose employers acted for more than a decade as if they had a roving commission to

---

<sup>34</sup> Graham, *supra* note 1, at 44.

<sup>35</sup> The degree to which states remain free to use force is much debated. It seems fair to say, I think, that the prohibition on use of force is not so absolute as Captain Graham suggests. Certainly the legal advisor to the United States Secretary of State has always been able to throw some kind of cloak about this country's use of force (though on occasion the cynical have "admired" the emperor's clothes).

suppress revolution everywhere in the world. To repeat, Captain Graham's argument, is not, however, that general international law sanctions such wars; rather, he argues that this specific treaty provision legitimates such wars. I do not agree.

Although I may be like the apocrophal French scholar who read and reread the American Constitution for a month without finding the provision that gave our Supreme Court the power of judicial review, I have pored over the language of Article 1 and have found no clause that legitimates resort to arms. It may be there—by implication from the *travaux préparatoires*, for example<sup>36</sup>—but it is not in the express language of the Article. What is there is a reference to the right *as determined by other extrinsic documents*, those being the Charter and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. In other words, the Article does not itself legitimate any right to take up arms; instead, it recognizes whatever right exists under general international law.

Captain Graham's concern that the article may lead to discriminatory treatment of combatants is less easily refuted, though he himself does concede that the language of Article 1 speaks in neutral terms: "Proponents of Article 1 would no doubt be quick to point out that the provisions of Protocol I would also control the conduct of national liberation groups . . ." His concern is pragmatic rather than theoretical, however: ". . . due to the very nature of these conflicts, there is reason to question both the ability and willingness of such groups to adhere to the Protocol's provisions."<sup>37</sup>

Captain Graham is at least half right. Few guerrilla groups will be able to carry out all their obligations under the Geneva conventions should the whole of the law of war bind them, as it presumably would under amended Article 1. Guerrilla fighters can neither stuff judicial robes into their hip pockets nor transform a mountain cave into a courtroom. The very fact that they are guerrillas rather than governors precludes their acting like the latter; and to the degree that the law of war imposes obligations on governors *qua* governors, the guerrillas will perforce be unable to comply.

Much of the law of war, though formulated with governors rather

---

<sup>36</sup> Professor Baxter reports that proponents of amended Article 1 argued that "peoples under colonial rule or otherwise denied their right to self-determination are entitled to independence [and] that it is proper for them to assert this right through the use of force. . . ." Report of the United States Delegation 7 (1974).

<sup>37</sup> Graham, *supra* note 1, at 45.

than guerrillas in mind as both applier and addressee, nevertheless speaks neutrally. It imposes obligations that all participants can discharge. Guerrilla and governor alike can respect the rights of the sick and wounded. Neither need inflict unnecessary suffering. The control and operation of governmental institutions does not enhance the governor's capacity to comply with these rules. Conversely, the fact that the guerrilla has no government to run does not preclude his compliance.

That both have the capacity to comply does not, of course, mean that either will. Neither governor nor guerrilla has an enviable reputation for fidelity to the law of war.<sup>38</sup> Both have violated its most basic restraints with discouraging frequency. Captain Graham is thus disingenuous when he frets ". . . amended Article 1 would in reality severely limit the defensive efforts of a government, while offering assistance to those individuals engaged in a struggle against it."<sup>39</sup> The record of state practice reduces to the ludicrous any suggestion, such as is implied in the foregoing statement, that governors will hamstring themselves observing the law of war while their unrestrained guerrilla tormentors torture them.<sup>40</sup> It ain't gonna' happen that way, and Captain Graham knows it.

What will happen, then, if amended Article 1 is adopted? While adoption will transform neither the guerrilla nor the governor into law-abiding warriors, it will subject both to pressures to conform their conduct to the applicable legal norms. The utility of the laws of war inheres precisely in their usefulness as a prism for focusing and reinforcing pressure on participants to modify particularly objectionable conduct. By enlarging the scope of conflicts subject to the law of war, Article 1 forces participants to act in a less parochial context: they must act out their drama of horror on the stage of the world.<sup>41</sup> They must take international opinion into account and moderate their conduct accordingly. Guerrillas, who assiduously cultivate international

---

<sup>38</sup> Alone among participants in internal conflicts did Algerians recognize that Article 3 governed their conduct. See generally J. SIOTIS, *LE DROIT DE LA GUERRE ET LES CONFLICTS ARMES D'UN CARACTERE NON-INTERNATIONAL* (1958).

<sup>39</sup> Graham, *supra* note 1, at 45.

<sup>40</sup> What is more likely is that the governors will emulate their guerrilla tormentors. See, e.g., R. TRINQUIER, *MODERN WARFARE* 8 (1961); "Ulster, Ill-Treatment Not Torture," *The Washington Post*, Nov. 17, 1971, at 21, col. 1. The much discussed Phoenix program was a response to Viet Cong Assassinations. See Kelly, *Assassination in War Time*, 30 *MIL. L. REV.* 101, 109 (1965).

<sup>41</sup> One is reminded of Queen Mary's warning to Queen Elizabeth: the theater of the world is wider than the stage of England.

opinion, are presumably as subject to such pressures as are governors.<sup>42</sup>

Because the world will not likely be enraged by a failure to post copies of the Geneva Conventions on a tree in a prison stockade or a refusal to permit prisoner receipt of a box of Granny's homemade fudge, governor and guerrilla alike may safely ignore such Geneva rules. They may not ignore with equal impunity the Geneva rules that prohibit unnecessary destruction and suffering. Torture, starvation, terrorization, or indiscriminate "wasting" may well enrage the world. Guerrilla and governor alike must thus decide whether any possible benefit derived from such tactics justifies the cost in lost good will, respect and, perhaps, external support. Since the Geneva rules which prohibit unnecessary destruction and suffering reflect a pragmatic military judgment that such tactics are counterproductive, both the rational guerrilla and governor ought to decide to observe these Geneva restraints. Unfortunately, rationality is usually the first casualty of war.

I do not naively assume that the world will cry out in a single voice of outrage. Neither do I expect that a righteous world will direct its wrath judiciously at all who violate the laws of war. We cannot escape our human natures simply because we are submerged in a collective called mankind: we all tolerate the excesses of our friends more readily than we do those of our enemies. Still, we may temper our natural impulses in times of crisis by defining the limits of immoral conduct in less heated moments. A code will at least define the scope of any ensuing debate over the permissibility of particular conduct.

More importantly, Article 1 will focus debate on the permissibility of the conduct rather than on the anterior question of application. Guerrillas and governors have almost never claimed that they had the right to violate the Geneva rules; instead, they have argued that the Geneva rules did not apply to them.<sup>43</sup> By expanding and clarifying the scope of coverage, Article 1 will preclude claims of non-application. For the first time participants will have to justify their often outrageous conduct in terms of the Geneva principles. Article 1 may thus serve the cause of humanitarianism tolerably well in an inhumane world.

---

<sup>42</sup> The recently reported decision by the P.L.O. to moderate its terror campaigns has historical parallels. There is evidence that Alexander the Great moderated the ferocity of his campaigns in Asia Minor because the people there thought his conduct barbarian. See H. GROTIUS, *RIGHTS OF WAR AND PEACE* 372-74 (A. Campbell trans. 1901).

<sup>43</sup> *E.g.*, The Viet Cong rejected the idea that it was bound "by the international treaties to which others besides itself subscribed." 5 *INT'L REV. OF THE RED CROSS* 636 (1965).