CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed. Letters should conform to the same format requirements as other manuscripts.

TO THE EDITORS IN CHIEF:

John Crook, writing on the fiftieth session of the UN Commission on Human Rights, correctly states that it passed the "first official condemnation of anti-Semitism by a UN agency" and that the U.S. delegation and the Western Group worked for its passage "assiduously" (88 AJIL 806, 808 (1994)).

Since yours is a journal of record, I would like to provide context and fill a gap in Crook's recital.

The initiative for the resolution came from the UN Watch, driven by a thirty-year frustration of my effort, beginning in the Human Rights Commission in 1965, to have the United Nations, born in the wake of Hitler's crimes, denounce the evil done his first victims.

Finally, in 1994, I was able to join the Turkish ambassador to the United Nations in my campaign and his delegation introduced the historic resolution.

A special rapporteur was charged to effectuate the resolution and his report to the fifty-first session of the Commission is itself historic in that he has declared *The Protocols of the Elders of Zion,* described in the Encyclopaedia Britannica as "the sacred book of anti-Semites," a "SHAM."

Thus the United Nations, which from 1975 (when the General Assembly declared Zionism is racism) until recently contributed to anti-Semitism, has made one positive contribution to the fight against the oldest extant hatred.

MORRIS B. ABRAM*

TO THE EDITORS IN CHIEF:

Professor Theodor Meron, in an Editorial Comment in this *Journal* (88 AJIL 678 (1994)), argues that the United States should ratify Geneva Protocol I. I strongly disagree.

Professor Meron runs down some of the objections that he attributes to opponents of ratification, and responds to them in convincing fashion. But the objections he mentions are unattributed.

He notes that the provisions of Protocol I have entered the mainstream of humanitarian law concepts, terminology and scholarship. He fails to note that the terms of the Universal Declaration of Human Rights have also entered the mainstream of human rights concepts, terminology and scholarship, but nobody pretends that the Declaration is a treaty, should be regarded as directly binding or made into a treaty in disregard of superseding events, such as the conclusion of the 1966 Human Rights Covenants, which materially changed some of the terms of the Declaration. He does not explain why the preferences of experts should be taken as the basis for positive law commitments by statesmen.

He argues that a new clear statement of U.S. interpretations and reservations is necessary. Such a statement would be necessary only if the United States decides to ratify

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subject to those interpretations and reservations. In my opinion, the objections to the Protocol go far beyond the point at which interpretations and reservations can justify ratification.

Professor Meron seems to argue that the primary objection to Articles 1(4) and 96, which authorize the leaders of national liberation movements to bring the Protocol's terms into force for their struggles, rests on the apprehension that they will exercise that authority. He observes that they have never exercised that authority and thus that apprehensions about it are groundless. But the true objection does not rest on concerns that the laws of war might apply to rebels; indeed, it is probably in the interest of defending governments that they would. The true objection is that the provisions mentioned give legal authority to well-motivated military activities that is withheld from less well-motivated soldiers in an otherwise identical factual situation; they confuse the *jus ad bellum* with the *jus in bello.* I had thought the issue settled by the Lieber Code in 1863, when the United States defined the laws it would apply regardless of the moral iniquities it attached to slavery and those fighting to support that "peculiar institution." Is that issue to be reopened now? Should leaders of movements of which the international community approves have legal powers denied to leaders of less popular movements, *whether or not* they exercise discretion to exert that extra authority? To allow this distinction between virtuous political goals and nonvirtuous political goals is to imply that atrocities in the name of virtue are less horrible than atrocities in the name of nonvirtue. Maybe that is so to some moralists. But since the laws of war apply by definition to armed conflicts in which people on all sides are willing to die for a cause, it is hard to understand how the horrors of war can be mitigated by adopting that position as a matter of law.

Professor Meron argues that the Red Cross has met one of the U.S. concerns regarding terrorists by officially interpreting Articles 43–44 as requiring a liberation movement's armed forces to comply with international law at the risk of disqualification. But war crimes are not a matter of group liability; they are a matter of individual responsibility. The codification and purported progressive development of the laws of war in Protocol I digs deeper the pit first dug when prisoner-of-war status (and usually prisoner-of-war treatment) was denied to those answering the call of a *levée en masse.* This is not the place to go into detail.[1] But it is odd to see a position taken by the ICRC cited as if persuasive regarding a document to which the ICRC is very much a party in interest.

And it is a position that seems to rest on a misapprehension of law. Disqualifying rebels from the application of the laws of war on any grounds cannot enhance humanitarian values; rebels or terrorists who commit atrocities under the laws of war, if given the status of soldiers in an armed conflict, are war criminals and subject to being hunted down and punished as such regardless of their political motivations and goals. If the laws of war do not apply, political offense exceptions to extradition obligations can protect them. Denying them the "protection" of the laws of war would hardly seem to increase their chance of being captured and punished. And it is difficult to understand how the protection of the laws of war gives them much more than the protection all accused criminals have under human rights law in general, unless protecting power presence at the trial and ICRC oversight are regarded as inhibiting a fair trial. As far as I know, no government has ever taken that position. Indeed, since enemy soldiers can be held for the duration of the conflict, an indeterminate period, as prisoners of war under the laws of war even if they have done nothing overt to support their side, and

[1] I have traced this history briefly elsewhere. Alfred P. Rubin, *Terrorism and the Laws of War,* 12 DENV. J. INT'L L. & POL'Y 219, esp. 220–28 (1983). *See also* Alfred P. Rubin, *The Status of Rebels under the Geneva Conventions of 1949,* 21 INT'L & COMP. L.Q. 472 (1972). Although not dealing directly with this point, the indispensable review of the laws of war applied to prisoners of war is HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 34–36, 44–59 (Naval War College International Law Studies No. 59, 1977). Professor Levie seems to miss the point a bit by claiming that members of units that disregard the laws of war are not in a position morally or legally to argue that they should be accorded the protection of the rules they themselves have disregarded. *Id.* at 50–51. If the laws of war apply, those who violate them become war criminals even if entitled to prisoner-of-war status. It is hard to see how those who commit atrocities would be protected by the law any more than criminals in a municipal law system.

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civilians who are silent supporters of rebellion cannot normally be detained at all, the entire logic of the discussion seems odd.

This raises other problems not noted by Professor Meron. First, the 1977 Protocol I does give a special place to the ICRC. It is an oversight role that jeopardizes the impartiality of that magnificent organization. I do not understand why any person concerned with humanitarian law should want to do that.

Second, the mixture of so-called Geneva rules relating to the victims of armed conflict and Hague rules relating to the laws of warfare is seamless in Protocol I. Overlap is doubtless unavoidable, but in view of the extra authority granted the ICRC, I doubt that it is desirable.

Third, as has been repeatedly pointed out by some commentators[2] and ignored by proponents of ratification of Protocol I, the distinction between international armed conflicts and armed conflicts not of an international character is not based on logic. It is a nod in the direction of purported political realities; countries are unwilling to attach legal words of art that might confer any degree of respectability on their domestic enemies' soldiers. The separation of Protocol I and Protocol II emphasizes this distinction, which appears also in Articles 2 and 3 common to the four Geneva Conventions of 1949. But the advance of humanitarian law requires that the distinction be reexamined or, at least, that questions of status not be construed to diminish the humanitarian treatment that the victims of armed conflict should have. Protocol I from this point of view is a retrograde step in humanitarian law.

Readers may recall that these issues were expressed previously in this *Journal.*[3]

ALFRED P. RUBIN

[2] Most compellingly in the *Report of the Committee on Armed Conflict,* AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, PROCEEDINGS AND COMMITTEE REPORTS 1979–1980, at 38 (1980). I was chairman and reporter for the committee, which was composed of as wide a spectrum of views as I could entice from among the most eminent U.S. authorities on the laws of war. The committee was split narrowly on the question of whether the United States should ratify the 1977 Protocols. As far as I could tell, it was unanimous on the recitation of history and confusion in the Protocols.

[3] George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions,* 85 AJIL 1 (1991); Alfred P. Rubin and George H. Aldrich, Correspondence, 85 AJIL 662, 663, respectively (1991). Professor Meron cites the first of these, but not the correspondence in which the critical points were raised. In his surrebuttal, Ambassador Aldrich wrote that my criticisms were not identified "with sufficient clarity to permit an answer." Indeed, in my opinion he did not answer them. I cannot be clearer.

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