

Q & A: What is Additional Protocol I to the Geneva Conventions and Should the US Ratify It?

Prepared in cooperation with the International Humanitarian Law Committee of the American Branch of the International Law Association, the International Committee of the Red Cross and Professor James Schoettler of Georgetown Law.

The following report is based on an event that took place on 8 April 2015, entitled "Is It Time to Ratify AP I?" The event was co-hosted by Georgetown Law School's Military Law Society and the International Committee of the Red Cross (ICRC).¹

The purpose of this event was to address the US position regarding First Additional Protocol of 1977 ("AP I") to the 1949 Geneva Conventions and to discuss the possibility of US ratification in the future. The panelists made interesting legal and political points, and these observations have been distilled into this Q & A format for those who may not be as familiar with the issues surrounding the ratification of AP I. Not all the speakers agreed amongst themselves as to specific points, and there was a healthy debate about the relative merits of ratification, with some experts in favor and others against. All agreed that US ratification at this time would likely be difficult for reasons unrelated to AP I, but the richness of their comments reflected the value of continuing to discuss the issue.

This Q & A should be understood to be a synthesis of comments offered by various speakers and should not be attributed to any of them in particular.

1) What is the historical background behind the drafting of AP I?

The Four Geneva Conventions of 1949 ("Conventions" or "GCs") were written after the devastation resulting from the experiences of the Second World War, with the content of the Conventions taking into account the experiences of that particular conflict. The Additional Protocols of 1977, on the other hand, were drafted as the colonial wars of the 1950s and 1960s were coming to an end, and as many insurgencies fueled by the Cold War were heating up.

¹ The panel was moderated by Richard Jackson, Special Assistant to Army TJAG for Law of War. The speakers included:

William Lietzau, former Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, US Department of Defense

Chris Harland, Legal Advisor, ICRC Washington

Nicolas Guillou, Justice Attaché, French Embassy to the US

Major-General Blaise Cathcart, Judge Advocate General, Canadian Armed Forces

In light of this historical context of decolonization and other movements geared toward self-determination, AP I included a broader scope of application in which the rules of *international* armed conflict could apply in addition to Common Article 2 to the GCs: “declared war or ... any other armed conflict which may arise” between two or more States.. The three new scenarios that were envisaged by Art. 1(4) of AP I were: armed conflicts in which peoples were fighting against colonial domination, alien occupation, and racist regimes, in the exercise of their right of self-determination under the UN Charter and the 1970 “Friendly Relations Declaration” UN General Assembly Resolution.

Although the United States signed AP I on 12 December 1977, it delayed submitting the treaty for Senate approval.² From 1982-85, the Executive Branch discussed internally and with its allies how to address certain problematic aspects of AP I.³ Of particular concern to the United States was the possibility that AP I would grant non-State groups, in certain circumstances, the same combatant privileges granted to State armed forces in international armed conflict. In 1986, after reviewing the issues laid out below, the US decided not to ratify. President Ronald Reagan confirmed this decision publicly in a 1987 Letter of Transmittal to the Senate in which he asked the Senate to ratify the Second Additional Protocol (on non-international armed conflicts) but in which he described AP I as “fundamentally and irreconcilably flawed.”⁴ Indeed, President Reagan characterized his “repudiation” of AP I as “one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.”⁵ The fundamentally political nature of the U.S. decision not to ratify AP I in 1987 has colored the debate over the treaty ever since.

2) What was new about AP I?

In addition to the broader scope of application of AP I as compared to the scope of application of the Conventions, AP I included a number of new provisions.

² “The constitutional requirement that the Senate approve a treaty with a two-thirds vote means that successful treaties must gain support that overcomes partisan division. The two-thirds requirement adds to the burdens of the Senate leadership, and may also encourage opponents of a treaty to engage in a variety of dilatory tactics in hopes of obtaining sufficient votes to ensure its defeat.

The Senate does not ratify treaties—the Senate approves or rejects a resolution of ratification. If the resolution passes, then ratification takes place when the instruments of ratification are formally exchanged between the United States and the foreign power(s).” “The Senate’s Role in Treaties.” *Senate History*, U.S. Senate Homepage, available at: <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm>

³ Many of these discussions can now be reviewed in their entirety through DoD’s library of FOIA requests. See, e.g., Report by the J-5 to the Joint Chiefs of Staff on JSC Review of the 1977 Protocols Additional to the 1949 Geneva Conventions, dated Sept. 13, 1982, available at:

http://www.dod.mil/pubs/foi/Reading_Room/Special_Collections/13-M-3010.pdf [hereinafter *JSC Review*].

⁴ “Message from the President of the United States: The Protocol Addition to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, Concluded at Geneva on June 10, 1977,” 29 January 1987, available at: http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf [hereinafter *1987 Message from the President*].

⁵ *Id.*

One of the most important developments brought about by AP I was the inclusion of rules on the conduct of hostilities between parties, which merged the previously distinct “Geneva” rules (protections given to those not taking part or no longer taking part in hostilities) and “Hague” rules (on the methods and means of armed conflict). These latter rules included in AP I provided protections for the civilian population against attacks, including indiscriminate or disproportionate attacks, as well as a basic definition of what constituted a military objective. Today, while experts debate the scope of some definitions, these rules are widely applied by all States in hostilities, including in non-international armed conflict, as a matter of customary law as well as treaty law (for those States who have ratified AP I).

AP I also developed existing “Geneva” law by including additional provisions on the Protecting Powers, the medical mission, the collection and providing of information concerning the missing and dead, and fundamental guarantees for individuals in the power of a party to the conflict. Importantly, AP I extended most of the protections of the First and Second Geneva Conventions (on the wounded and sick on land, and at sea, respectively) to include all those hors de combat and not merely those associated with the armed forces.

3) Why did the US not ratify AP I in the first place? Didn't it participate in the negotiations and sign the protocol?

The US fully participated in the negotiations of both AP I and AP II, and signed both treaties on 12 December 1977. While AP II was submitted for the advice and consent of the Senate (but not voted upon), AP I has never been submitted, by the US executive, for Senate approval.

There were a number of provisions in AP I with which the US military in particular took issue. The principal concerns (although there were others not discussed in detail during this event⁶) were with:

- the broadened definition of international armed conflict under Art. 1(4) (which applied AP I and all provisions of the four Geneva Conventions to conflicts in which peoples were fighting against colonial domination, alien occupation, and racist regimes as mentioned above),
- the definition of armed forces of a Party to the conflict under Art. 43 (which failed to adopt the four criteria of Art. 4 of the Third Geneva Convention and specifically excluded the requirement to wear fixed distinctive insignia, recognizable at a distance” even if it did require them to carry their arms openly in order to distinguish themselves from the civilian population), and

⁶ These include various objections or reservations to the Protocols treatment of mercenaries, the natural environment, and objects indispensable to the survival of the civilian population, to name a few. See e.g., *JSC Review*, *supra* note 2.

- the definition of combatant under Art. 44 (which granted Prisoner of War (POW) status to those irregular forces that merely carried their arms openly, in certain limited circumstances)

As mentioned above, Art. 1(4) of AP I expanded the scope of application of the rules of international armed conflicts. The US expressed its concern that this expansion was purely political in nature, and would give terrorist or insurgent groups legitimacy to fight against the state apparatus under the guise of "wars of national liberation."⁷

According to the US, Arts. 43 and 44 changed several of the requirements found in Art. 4A(2) of the Third Geneva Convention of 1949 for POW status to be given to combatants who were not members of State armed forces, but instead were "members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict". Under Art. 4A(2) of the Third Geneva Convention these individuals only qualified for POW status if they fulfilled the four following requirements:

- (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 operations in accordance with the laws and customs of war.

US participants noted that Art. 44 permitted the recognition of POW status even for combatants (defined in Art. 43) who did not meet these four requirements so long as they carried their arms openly a) during each military engagement and b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Another participant stressed the fact that, in any event, under AP I, all combatants were "obliged to distinguish themselves from the civilian population while they are engaged in attack or in a military operation preparatory to an attack", noting that Art. 44(3), permitting this distinction to be done through carrying arms openly, was an exception, and was limited to situations where "owing to the nature of the hostilities" the armed combatant could not so distinguish himself.

The US disagreed with the dispensation in Art. 44 given to combatants who did not distinguish themselves with a fixed distinctive sign and who were seemingly not required to conduct their operations in accordance with the laws of armed conflict, but who would still be entitled to retain their combatant status (and POW treatment). In its official communications, the US expressed its abhorrence for this watering down of the traditional rules on distinction from the civilian population, and it warned that this relaxing of the Third Geneva Convention definitions "would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."⁸

⁷ 1987 Message from the President, *supra* note 3.

⁸ *Id.*

There were also a number of other provisions rejected by the US, including the provisions on mercenaries and reprisals, but these do not seem to be the principal basis on which the US rejected the Protocol in 1987, after having signed it in 1977.

4) What are some of the reasons that the US might want to consider ratifying AP I?

Several experts made the point that there are many viable arguments to be made for the US ratification of AP I, including that it was “the right thing to do” and that a ratification would show commitment to the rule of law. In 1987, there were 62 States Party to AP I. There are now 174, including China, Russia, France and the UK, as well as all NATO countries apart from the US and Turkey. As a global leader, US actions can have a very influential effect on how other States behave. By ratifying AP I, the US would be signaling its commitment to the important principles contained therein.

Of course, ratifying treaties alone does not show commitment to the rule of law. If a State is unable to abide by the terms of the agreement to which it is a party, this may send a negative signal to the international community about the importance of the treaty obligation.

Another reason mentioned in favor of ratifying AP I is that it contains a large number of good and useful provisions, with which the US has no objection, and in fact supports, on a whole range of topics including the marking and protection of grave sites, the prohibition on the misuse of the protective emblem, and new conduct of hostilities rules including proportionality and precautions in attack.

Additionally, much of AP I represents customary international law, even if most but not all States may agree on which provisions are customary, or may disagree about which portions or aspects of individual provisions are customary. In any event, all the speakers agreed that the US itself applies many of the provisions of AP I, at least as a matter of policy.

5) How have other States dealt with some of the concerns expressed by the US about the content of AP I?

The US is not the only State that has expressed concern over certain provisions of AP I, and some US allies took many years before ratifying. Quite a few States joined the US in questioning the definition of combatant found in Articles 43 and 44, and the scope of application found in Art. 1(4),⁹ as well as with other provisions to which the US objected.

⁹ More than a dozen States included reservations on Art. 44(3) of AP I and around ten States included reservations or declarations linked to Art. 1(4) on wars of national liberation. See Julie Gaudreau, *The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims*, 849 INT'L REV. OF THE RED CROSS 11, available at: https://www.icrc.org/eng/assets/files/other/irrc_849_gaudreau-eng.pdf [hereinafter Gaudreau].

While France ratified AP II in 1984, it was not until 2001 that it managed to ratify AP I, and even then it did so with 18 reservations. France had numerous objections to the Protocol, including the concern over the “marriage” between Hague and Geneva Law (with which the US does not seem to have the same concerns), the politicization of decolonization, and the possibility that AP I would be applied to cases of terrorism. France addressed each one of these concerns through an explicit reservation.

Canada also debated many of the same issues, but it ratified AP I in 1990. In order to address the concern of Art. 1(4), for example, Canada made a statement of understanding that the unilateral declaration of a group seeking to be recognized as a national liberation movement under Art. 1(4) was not enough to bring AP I into force, but that States were entitled to decide for themselves whether such a group constituted an authority that could make such a declaration. Canada also used a reservation to narrow the category of individuals to which Art. 44(3) could apply.¹⁰

It is also worth noting that since 1977, there does not appear to have been any instance in which Art. 1(4) was used successfully to expand the scope of application of a non-international armed conflict. The International Committee of the Red Cross (ICRC) does not seem to have publicly classified any situation since 1977 under Art. 1(4), and it does not seem that any international or domestic court has ever recognized a situation in which this provision applied.¹¹

6) Have other nuclear States also ratified the treaty?

Yes. France and the United Kingdom have ratified AP I (in addition to China and Russia) despite being in possession of nuclear weapons. Both States included specific reservations excluding the application of AP I to the possession or use of nuclear weapons.¹² In total, nine States included reservations concerning the use or possession of nuclear weapons.¹³

Nuclear policy was a big concern of both of these States, but there were a number of reasons they considered that their possession of nuclear weapons would still permit them to join AP I. In the case of France, the advisory opinion by the International Court of Justice (ICJ) on the

¹⁰ Reservations of Canada to AP I *available at*:

<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=172FFEC04ADC80F2C1256402003FB314>.

¹¹ This is to the knowledge of the authors of the report and the panelists, but no exhaustive study has been made on this point.

¹² Reservations of the United Kingdom to AP I *available at*:

<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2>; Reservations of France to AP I *available at*:

<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=D8041036B40EBC44C1256A34004897B2>.

¹³ See Gaudreau, *supra* note 8.

Legality of the Threat or Use of Nuclear Weapons, helped France to overcome its concerns regarding ratifying AP I.¹⁴

7) How has the fact that the US has not ratified AP I, when many of its allies have, affected interoperability during coalition military operations?

The US failure to ratify AP I when all but one of its NATO partners has (as well as many of its other allies) does not seem to have created any *insurmountable* interoperability issues (even if the number of legal advisor positions seems to have increased concomitantly!). Numerous challenges were, however, presented as a result of the different legal standards applicable. Easing the situation somewhat, as noted above, the US also applies many (if not most) of the provisions of AP I as a matter of policy, and it has worked with NATO and within its other coalitions to develop “common rules to govern allied operations” and “common principles to demonstrate...mutual commitment to humanitarian values.”¹⁵

An interesting example of a coalition of States with varying obligations under AP I can be found in Operation Enduring Freedom in Afghanistan. Nearly 60 States participated with, or provided support to, the US during this operation, which at its outset constituted an international armed conflict.¹⁶ Any coalition mission requires an immense amount of coordination, including between the application of a wide array of international and domestic legal operations. AP I does not seem to have precluded combined operations between these States.

Part of the reason for this may be, as mentioned above, that in combined operations, rules of engagement take into account the varying obligations of each party, and thus certain non-States Party to AP I may apply the rules of AP I even though they may not be legally bound to do so. This, along with other international legal obligations on the parties to a conflict, and differing mission rules, complicate, but do not seem to prevent, in most cases, mixed operations.

8) How could the US overcome its principal objections to the provisions of API?

As many of its coalition partners have done before it, the US could ratify AP I with reservations, in order to signal its acceptance of the majority of the provisions, with which it agrees. France included 18 reservations when it finally ratified AP I in 2001. The UK included 16. Canada only had 2 but included numerous “statements of understanding” to signal its interpretation of specific provisions.

¹⁴ The ICJ declined to decide whether AP I applied to nuclear weapons when confronted with the question. See ICJ, *Advisory Opinion of 8 July 1996 on the legality of the threat or use of nuclear weapons*, ICJ Reports, 1996, para. 84.

¹⁵ See Remarks of Michael J. Matheson at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. INT'L L. REV. 419 (1987), *available at*: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1660&context=auilr>.

¹⁶ See, e.g., “Operation Enduring Freedom: Foreign Pledges of Military & Intelligence Support,” Congressional Research Service, 17 October 2001, *available at*: <http://fpc.state.gov/documents/organization/6207.pdf>.

An additional question arises, namely at what point the number and content of reservations may undermine the spirit, object and purpose of the treaty.¹⁷

¹⁷ There have not been any formal objections to any of the reservations made by States to the Additional Protocols, although some scholars have noted that this does "not necessarily mean that the reservation is compatible with the object and purpose of the treaty." See Gaudreau, *supra* note 8, at p. 3.