SESSION ONE: THE UNITED STATES POSITION ON THE
RELATION OF CUSTOMARY INTERNATIONAL LAW TO
THE 1977 PROTOCOLS ADDITIONAL TO THE 1949 GENEVA
CONVENTIONS

REMARKS OF MICHAEL J. MATHESON

I appreciate the opportunity to offer this distinguished group a presenta-
tion on the United States position concerning the relation of cus-
tomary international law to the 1977 Protocols Additional to the 1949
Geneva Conventions. This question is not an academic one, but has
considerable practical importance under present circumstances. As you
may well know, the executive branch has now completed an extensive
review of the Additional Protocols, both from the viewpoint of military
considerations and from the viewpoint of national policy. The result
of that review has been a recommendation that Protocol II, which deals
with non-international conflicts, be submitted to the Senate for advice
and consent to ratification with appropriate understandings and reser-
vations, but that Protocol I, which deals with international conflicts, not
be submitted to the Senate. Judge Sofaer, the State Department Leg-
ral Adviser, will describe the reasons for those conclusions. Let me
not get into those reasons, but simply note the effect this fact has upon
the subject that we are dealing with today. I agree entirely with the

8. Deputy Legal Adviser, United States Department of State. These remarks are a
combination of Mr. Matheson's prepared text and his substantive modifications to that
text as presented at the Workshop, supplemented with footnotes where necessary.
9. See supra note 4 (referring to Protocol I which relates to the protection of vic-
tims of international armed conflicts, and Protocol II, which relates to victims of non-
international armed conflicts).
10. Reagan, President's Message to the Senate Transmitting the Protocol, 23
WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987) [hereinafter President's Message]. The
President stated that the United States objective for codification of the Additional Pro-
tocols is to assure the greatest protection to victims of conflicts while satisfying legiti-
mate military requirements. Id. He stated that ratification of Protocol II should also
allow the United States to continue its leadership in the international community. Id.
11. Id. The President transmitted Protocol II to the Senate for its advice, consent,
and ratification. Id. The administration views Protocol II as an expansion of the funda-
mental humanitarian provisions contained in the 1949 Geneva Conventions with re-
spect to non-international armed conflicts, including humane treatment and basic due
process for detained persons, protection of wounded, sick, medical units, and noncom-
batants. Id. The President concluded that the United States cannot ratify Protocol I
because it is "fundamentally flawed." Id. Provisions that undermine humanitarian law
include treating wars of national liberation as international conflicts and granting irreg-
ular forces combatant status even if they do not distinguish themselves from civilians. Id.
12. See infra text accompanying notes 114-56 (presenting Judge Sofaer's discus-
sion of the rationale behind the position of the United States Department of State on
the Protocols).
distinguished representative of the ICRC that those topics are of considerable importance now, although we may have somewhat different reasons for saying so.

With respect to Protocol I, several important facts flow from this situation. First, the United States will consider itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law, either now or as it may develop in the future. Therefore, legal advisors within the United States Government will have to make a judgment on this, if they are to advise policy makers and commanders as to what legal constraints will apply to United States military options in the course of present or future conflicts. This, of course, is not a new problem, in that Protocol I has now been in existence for almost ten years without United States ratification, but the administration's decision not to submit Protocol I to the Senate puts the question in clearer focus and makes clear that it will not go away. To the extent that other governments follow the lead of the United States in this regard, it will pose the same questions for them.

Second, Protocol I now cannot serve in itself as the baseline for the establishment of common rules to govern the operations of military alliances in which United States forces participate. To establish a basis for such common rules, the United States and its friends must now decide which of the rules in Protocol I either reflect current customary law or should be adhered to by free world forces as a predicate for their ultimate recognition as customary law.

Third, Protocol I cannot now be looked to by actual or potential adversaries of the United States or its allies as a definitive indication of the rules that United States forces will observe in the event of armed conflict and will expect its adversaries to observe. To fill this gap, the United States and its friends would have to give some alternative clear indication of which rules they consider binding or otherwise propose to observe.

Finally, Protocol I now will not be universally seen as the next stage in the development of humanitarian law for international armed conflict, particularly if other governments follow the lead of the United States in rejecting the Protocol. It follows from this that those who want to advance the codification and development of international humanitarian law will need to know what elements of Protocol I still com-

13. See supra notes 10-11 (referring to the President's recommendation that the new rules governing the conduct of the United States and its allies should include the positive provisions of Protocol I that relate to customary international law).
mand the support of the United States and other like-minded governments, and therefore hopefully constitute a common foundation for the development and observance of rules which improve upon the 1949 Geneva Conventions and other generally recognized statements of law in this field.14

For all these reasons, it is important for both the United States government and the United States scholarly community to devote attention to determining which elements in Protocol I deserve recognition as customary international law, either now or in the future. This Workshop, therefore, is an important and timely exercise, particularly for those of us who must help to decide where the United States government and its friends should go from here.

The executive branch is well aware of the need to make decisions and to take action on these issues. We know from our conversations with our allies that there is a shared perception, particularly among North Atlantic Treaty Organization (NATO) countries, of a strong military need for common rules to govern allied operations and a political need for common principles to demonstrate our mutual commitment to humanitarian values. We recognize that certain provisions of Protocol I reflect customary international law or are positive new developments, which should in time become part of that law.

We therefore intend to consult with our allies to develop appropriate methods of incorporating these provisions into rules that govern our military operations, with the intention that they will in time win recognition as customary international law. One obvious possible way of doing this is to develop common principles that might be incorporated into or serve as the framework for individual national military manuals. There may be other means of accomplishing the same objectives. The United States is not wedded to any particular approach and intends to listen to all reasonable suggestions.

Having described the reasons why I believe that the topic of this Workshop is important and very relevant to decisions currently being taken with respect to Protocol I in the United States and other governments, it is of course much more difficult to say exactly which of the rules contained in the Protocol currently are in fact a part of customary law. As I am sure you all appreciate quite well, there is no clear line drawn in the dust for all to see between those principles that are now customary law and those which have not yet attained the degree of

14. See President's Message, supra note 10 (stating that the Reagan administration is consulting with its allies to devise an alternative reference for the positive provisions of Protocol I).
acceptance and observance that might make them customary law. Instead, there are degrees of acceptance and degrees of observance, and the judgment as to what degree of each is sufficient for establishment as customary law is inherently subjective and hard to define precisely. In addition, it may be possible in many cases to say that a general principle is an accepted part of customary law, but to have considerable disagreement as to the precise statement of that general principle.

In terms of our dealings with our alliance partners, it would typically be difficult if not impossible to achieve a complete consensus among various governments, even those with similar interests and outlooks, on precisely which of the many rules in the Protocol have at any given time passed over the line into customary law and which have not. Even within the NATO Alliance, there are substantial differences in the general readiness of government lawyers to recognize that a new rule of warfare has come into customary law, quite apart from the substance of the rule in question.

As a result, in our discussions with our allies to date we have not attempted to reach an agreement on which rules are presently customary law, but instead have focused on which principles are in our common interests and therefore should be observed and in due course recognized as customary law, whether they are presently part of that law or not. Apart from being easier to deal with, this approach has the added advantage of focusing attention on the substantive merits of the various rules, as opposed to their precise current legal status.

Of course, this process itself can have a substantial influence on the creation of customary law. The United States and other governments, particularly those with significant military forces, can advance the process of recognition of principles as customary law by stating that they are prepared to observe them in armed conflict and desire them to be recognized in due course as customary law. Such statements could also serve as a basis for future work in codifying rules in future negotiations on law of war agreements.

With that background, let me then review the principles that we believe should be observed and in due course recognized as customary law, even if they have not already achieved that status and their relationship to the provisions of the Protocol. Although I will not be stating in each case whether the executive branch believes a principle to have already become customary law, the other executive branch participants in this Workshop will no doubt be getting into that later in these proceedings. Usually this sort of analysis is done by parsing each of the articles and paragraphs of the Protocol and indicating one's view of each in turn. For the sake of variety and perhaps comprehensibility, I
would like instead to list the main principles we support and indicate briefly how each relates to the provisions of the Protocol. Because of the limits of time and human endurance, I will be speaking on the level of general principles for the most part, but during the course of this Workshop, no doubt we will be going into various principles in much greater detail.

Let me start with the protection of the wounded, sick, and shipwrecked, an area in which the Protocol does contain some useful codifications or improvements of existing rules.\textsuperscript{15} We support the principle that all the wounded, sick, and shipwrecked be respected and protected, and not be made the object of attacks or reprisals, regardless of the party to the conflict to which they belong, as well as the principle that when such persons are given medical treatment, no distinction among them be based on any grounds other than medical ones. These principles are contained in article 10 of Protocol I.\textsuperscript{16}

We support the principle reflected in article 11 that the physical or mental health and integrity of persons under the control of a party to the conflict not be endangered by any unjustified act or omission and not be subjected to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards. This principle is reflected in article 11. We also support the principle that medical units, including properly authorized civilian medical units,\textsuperscript{17} be respected and protected at all times and not be the object of attacks or reprisals,\textsuperscript{18} as well as the principle that civilian medical and religious personnel likewise be respected and protected.\textsuperscript{19} These principles can be found, of course with considerable elaboration, in articles 12 through 20 of the Protocol.

Further, we support the principle that the relevant provisions of the 1949 Geneva Conventions be applied to all properly authorized medical vehicles,\textsuperscript{20} hospital ships, and other medical ships and craft,\textsuperscript{21} regardless of the identity of the wounded, sick, and shipwrecked that they serve. This is, in effect, a distillation of much of what appears in articles 18 through 23. We support the principle that known medical aircraft be respected and protected when performing their humanitarian

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\textsuperscript{15} Protocol I, supra note 4, arts. 8, 10(1), (2).
\textsuperscript{16} Id. art. 10(1), (2).
\textsuperscript{17} Id. arts. 12-13.
\textsuperscript{18} Id. art. 20.
\textsuperscript{19} Id. art. 15.
\textsuperscript{20} Id. art. 21.
\textsuperscript{21} Id. art. 22.
functions.\textsuperscript{22} That is a rather general statement of what is reflected in many, but not all, aspects of the detailed rules in articles 24 through 31, which include some of the more useful innovations in the Protocol.

Next, let me turn to the treatment of the missing and remains of the dead.\textsuperscript{23} Again, this is an area in which the Protocol includes some useful innovations. We support the principles that families have a right to know the fate of their relatives and that each party to a conflict should search areas under its control for persons reported missing, when circumstances permit, and at the latest from the end of active hostilities. These useful principles are reflected in articles 32 and 33 of the Protocol.

We likewise support the principles that each party to a conflict permit teams to search for, identify, and recover the dead from battlefield areas, and that the remains of the dead be respected, maintained, and marked.\textsuperscript{24} We support the principle that as soon as circumstances permit, arrangements be made to facilitate access to grave sites by relatives, to protect and maintain such sites permanently, and to facilitate the return of the remains when requested. These principles can be found in article 34.

Thus far, the general principles I have stated more or less parallel the general content of the Protocol. In the next sections, however, you will observe significant differences or omissions, reflecting the fact that the executive branch has serious problems with a number of items in the next sections of the Protocol. As I mentioned earlier, Judge Sofaer will be commenting on many of these problems in his remarks.\textsuperscript{25}

With respect to methods and means of warfare,\textsuperscript{26} we support the principle that the permissible means of injuring the enemy are not unlimited and that parties to a conflict not use weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. These principles are contained in article 35. We, however, consider that another principle in article 35, which also appears later in the Protocol, namely that the prohibition of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment,\textsuperscript{27} is too broad and ambiguous and is not a part of customary law.

\textsuperscript{22} Id. art. 24.
\textsuperscript{23} Id. arts. 32-34.
\textsuperscript{24} Id. art. 34(1).
\textsuperscript{25} See infra text accompanying notes 114-56 (discussing the complications revolving around the Protocols).
\textsuperscript{26} Protocol 1, supra note 4, part III.
\textsuperscript{27} Id. art. 35(3).
We support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy, and that internationally recognized protective emblems, such as the red cross, not be improperly used. Those principles are reflected in articles 37 and 38. But we do not support the prohibition in article 39 of the use of enemy emblems and uniforms during military operations.

We support the principle that no order be given that there shall be no survivors nor an adversary be threatened with such an order or hostilities be conducted on that basis. This is contained in article 40. We also support the principle that persons, other than airborne troops, parachuting from an aircraft in distress, not be made the object of attack. This is, of course, contained in article 42.

Next, with respect to combatant and prisoner-of-war status, we support the principle that persons entitled to combatant status be treated as prisoners of war in accordance with the 1949 Geneva Conventions, as well as the principle that combatant personnel distinguish themselves from the civilian populations while engaged in military operations. These statements are, of course, related to but different from the content of articles 44 and 45, which relax the requirements of the Fourth Geneva Convention concerning prisoner-of-war treatment for irregulars, and, in particular, include a special dispensation allowing individuals who are said to be unable to observe this rule in some circumstances to retain combatant status, if they carry their arms openly during engagements and deployments preceding the launching of attacks. As Judge Sofafi will explain, the executive branch regards this provision as highly undesirable and potentially dangerous to the civilian population and of course does not recognize it as customary law or deserving of such status. It probably goes without saying that we likewise do not favor the provision of article 1(4) of Protocol I concerning wars of national liberation and do not accept it as customary law.

On the other hand, we do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the

28. _Id._ art. 37.
29. _Id._ art. 44.
30. See infra text accompanying notes 124-56 (presenting the viewpoint of the State Department on the problems contained in Protocol I).
31. Protocol I, _supra_ note 4, art. 1(4). This provision provides that the Protocol shall apply to armed conflicts in which people are fighting against colonial domination and alien occupation, as well as against racist regimes in the exercise of their rights of self-determination. _Id._
power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Those principles are found in article 45. We do not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of article 47 to be part of current customary law.

The next section of the Protocol deals with the critical subject of the protection of the civilian population,\textsuperscript{32} which was the focus of much of the work of the Diplomatic Conference. Here again, much of this part of the Protocol is useful and deserving of treatment as customary law, although certain provisions present serious problems and do not merit such treatment. We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them, and that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage. These fundamental principles can be found in article 51.

We also support the principle that the civilian population not be used to shield military objectives or operations from attack, and that immunity not be extended to civilians who are taking part in hostilities. This corresponds to provisions in articles 51 and 52. On the other hand, we do not support the prohibition on reprisals in article 51 and subsequent articles,\textsuperscript{33} again for reasons that Judge Sofiaer will explain later,\textsuperscript{34} and do not consider it a part of customary law.

We support the principle that starvation of civilians not be used as a method of warfare, and subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged. These principles can be found, though in a somewhat different form, in articles 54 and 70. We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and

\textsuperscript{32} See id. part IV (asserting the protections of cultural and religious objects and the protections against the effects of hostilities on the civilian population, which prohibit parties to a conflict from directing their activities against the civilian population, attacking civilians indiscriminately, or engaging in reprisals against civilians).

\textsuperscript{33} See id. arts. 52-56 (listing civilian objects that according to the Protocol are not subject to attacks or reprisals, in particular the protections of works and installations containing dangerous forces).

\textsuperscript{34} See infra text accompanying notes 146-52 (discussing the problems inherent in article 51).
damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit. We also support the principle that attacks not be made against appropriately declared or agreed non-defended localities or agreed demilitarized zones. These various principles are reflected in articles 57 through 60. On the other hand, we do not support the provisions of article 56, concerning dams, dykes, and nuclear power stations, for reasons that again Judge Sofaer will discuss, and nor do we consider them to be customary law.

Turning now to the field of civil defense, we support the principle that civilian civil defense organizations and their personnel be respected and protected as civilians and be permitted to perform their civil defense tasks except in cases of imperative military necessity. We also support the principle that in occupied territories, civilians receive from the appropriate authorities, as practicable, the facilities necessary for the performance of their tasks. These principles reflect, in general terms, many of the detailed provisions in articles 62 and 63.

Moving next to the subject of persons in the power of a party to the conflict, we support the principle that persons who were considered as refugees or stateless persons before the beginning of hostilities nonetheless be treated as protected persons under the Fourth Geneva Convention, and that states facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and encourage, in particular, the work of humanitarian organizations engaged in this task. These rules are found in articles 73 and 74.

We support in particular the fundamental guarantees contained in article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction based upon race, sex, language, religion or belief, political or other opinion, national or social origin, or any similar criteria.

We support the principle that these persons not be subjected to violence to life, health, or physical or mental well-being, outrages upon personal dignity, the taking of hostages, or collective punishments, and that no sentence be passed and no penalty executed except pursuant to

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35. See infra text accompanying notes 146-50 (stating the reasons why Judge Sofaer is not in favor of article 56).
36. Protocol I, supra note 4, arts. 72-79.
38. Protocol I, supra note 4, art. 75(1).
conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.  

Likewise, we support the principle that women and children be the object of special respect and protection, that women be protected against rape and indecent assault, and that all feasible measures be taken in order that children under the age of fifteen do not take a direct part in hostilities.  We support the principle that no state arrange for the evacuation of children except for temporary evacuation where compelling reasons of the health or medical treatment of the children or their safety, except in occupied territory, so require. These principles are contained in articles 76, 77, and 78. We also support the principle that journalists be protected as civilians under the Conventions, provided they take no action adversely affecting such status. This principle can be found in article 79.

The final part of Protocol I deals with the implementation of the Conventions and the Protocol. Although many of these provisions are procedural in character, certain of the principles contained in this part also merit acceptance as customary law. We support the principle that all necessary measures for the implementation of the rules of humanitarian law be taken without delay, and that the ICRC and the relevant Red Cross or Red Crescent organizations be granted all necessary facilities and access to enable them to carry out their humanitarian functions. Likewise, we support the principle that legal advisors be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles, and that their study be included in programs of military instruction. These principles are found in articles 80 through 85.

We support the principle that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, take all appropriate steps to bring to justice any persons who have willfully committed such acts, and make good faith efforts to cooperate with one another in this regard. These principles are contained, though of course in more detailed form, in articles 85 through 89.

Finally, we strongly support the principle that Protecting Powers be

39. *Id.* art. 75(2), (4).
40. *Id.* arts. 75(5), 76-77.
41. *See id.* arts. 78-89 (addressing the measures for the execution of obligations and the repression of breaches of the Conventions and the Protocol).
42. *Id.* art. 81.
43. *Id.* arts. 82-83(1).
designated and accepted without delay from the beginning of any conflict. This principle is contained in article 5, but with the important difference that as stated in that article, it is not unequivocal and is still subject, in the last instance, to refusal by the state in question.

Turning now to Protocol II, the situation is of course somewhat different. Because the executive branch intends to submit this Protocol to the Senate for advice and consent to ratification, with certain understandings and reservations, it will in due course define the legal obligations of the United States with respect to non-international armed conflicts. Our friends can look to it as a common baseline defining the minimum standards of conduct that will be observed in cooperative military operations that are subject to the Protocol. Potential adversaries can look to it as a clear indication of the minimum rules that United States forces expect to observe and to be observed by our opponents. The international community hopefully can look to the Protocol as the accepted baseline for future improvements in the law of non-international conflict. This does not mean, however, that it is simply an academic exercise to inquire as to which parts of Protocol II currently constitute, or should in the future constitute, customary international law. This remains a practical question for several reasons.

First, it is not clear whether Protocol II will achieve the same sort of universal adherence that the 1949 Geneva Conventions have achieved over the years. Already, a number of Third World governments that have ratified Protocol I have at the same time declined to ratify Protocol II, apparently for fear that this could in some fashion give legal or at least political legitimacy to current or future insurgent or secessionist movements within their territories or perhaps be used to justify outside intervention on behalf of such movements. This perception is of course contrary to the express terms of the Protocol, which state that nothing in the Protocol can be invoked to affect the national sovereignty or authority of any state or to justify external intervention. Nonetheless, there may, in the end, be a number of States that decline to become party to Protocol II. To judge the legality of the conduct of
their behavior, it is necessary to determine which parts of the Protocol are binding on them as a matter of customary law.

Second, as finally adopted, Protocol II does not cover all non-international conflicts as traditionally understood and applied in common article 3 of the four 1949 Geneva Conventions. Specifically, it applies by its terms only to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of national territory as to carry out sustained and concerted military operations. This is a narrower scope than we and other Western delegations would have desired and it has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. In addition, because Protocol II by its own terms excludes conflicts covered by Protocol I, technically it does not apply to the category of so-called wars of national liberation that are covered by article 1(4) of Protocol I.

Because of these limitations, we have recommended that United States ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by common article 3 of the 1949 Conventions, thus including all non-international armed conflicts as traditionally defined. We will likewise encourage other states to take the same step. Nonetheless, we of course cannot unilaterally bind others to apply the Protocol to all such conflicts. Therefore, it will be important to decide, with respect to such conflicts that are not technically within the scope of the Protocol, which of its provisions are nonetheless binding as a matter of customary law.

Third, there are other situations of internal violence that even fall below the threshold of common article 3. These are referred to in Protocol II as “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”47 It is unclear to what extent some of the principles or concepts contained in Protocol II should apply to such situations. In any attempt to further develop and codify the law that might apply in such cases, however, it would be very useful to know, as a possible starting point, which of the provisions of Protocol II already apply to internal armed conflicts as a matter of customary law.

The executive branch has not attempted to evaluate which provisions of Protocol II are part of current customary law to the same degree that it has done with respect to Protocol I. The basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Conventions and

47. Protocol II, supra note 4, art. 1(2).
therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence toward persons taking no active part in hostilities, hostage-taking, degrading treatment, and punishment without due process. On the other hand, certain parts of Protocol II are obviously new to the law of non-international armed conflict, although they are generally meritorious and hopefully will in due course become part of customary law. We in the executive branch will be listening with considerable interest to the discussion of the customary law content of Protocol II that is scheduled for later in this Workshop.

That is the end of my prepared comments. I know it would be impossible to discuss all of the aspects of the areas that I have briefly covered, but I am sure that later in the Workshop the details will be explored at considerable length. Some general discussion about the approach the United States is taking would be useful now, and I certainly invite your comments, criticisms, and questions. Thank you.

DISCUSSION

Opening the discussion, Professor Covey T. Oliver asked Mr. Matheson whether the Reagan administration had proposed ratification of Protocol II with understandings or reservations. Mr. Matheson replied that the administration was recommending both understandings and reservations. Major General George S. Fruchter asked whether the government planned to publish the military review mentioned in Mr. Matheson's remarks. Mr. Matheson responded that he was referring to an extensive classified military review the Joint Chiefs of Staff conducted. The materials that the administration plans to submit to the Senate will include an extensive explanation of the position of the Joint Chiefs of Staff and will set forth those positions during the course of testimony in ratification hearings. The administration will communicate the substance of that study, designated unclassified, although it is unlikely they will publish the study.

Professor Howard S. Levine noted that Mr. Matheson had mentioned only the administration's position on Protocol II to the Senate and wondered if the Reagan administration planned to release the reasons why the Joint Chiefs of Staff opposed ratification of Protocol I.

49. Major General (retired), former Judge Advocate General of the United States Army and Delegate to the Diplomatic Conference.
50. See supra notes 10-11 and accompanying text (describing the executive branch's review of the Protocols).
51. Professor of Law Emeritus, Saint Louis University School of Law.
Mr. Matheson replied that the State Department intended to send to the Senate information covering the positions of the Joint Chiefs of Staff on Protocol I and Protocol II. Commander William J. Fenrick, \textsuperscript{52} referring to Mr. Matheson's statement on the interest of the United States in sharing with its allies a common position on Protocol II, \textsuperscript{53} asked Mr. Matheson whether the United States envisages any situations where Protocol II will apply outside the boundaries of the United States. Mr. Matheson replied that this situation might arise where a friendly foreign government, engaged in an internal, non-international armed conflict, has requested and received various kinds of support, such as training or material, from the United States. In such a case, if the other government were a party to Protocol II, the United States would want to encourage respect for its provisions. Therefore, knowing the content of those rules as well as gaining the support of the United States for those rules is useful to the world and especially the adversarial nations involved.

Professor Theodor Meron\textsuperscript{54} found two of Mr. Matheson's points extremely important. First, Professor Meron noted Mr. Matheson's statement that the United States basically supports the principles and fundamental guarantees articulated in article 75 of Protocol I.\textsuperscript{55} This statement is of major significance because article 75 contains a minicatalogue of some of the major tenets of the basic human rights norms that the United States has not yet ratified in any of the human rights instruments to which it is a party. By recognizing this catalogue as a part of customary international law, the United States government could help develop both humanitarian and human rights law.

Second, Professor Meron found the Reagan administration's approach to the threshold of applicability of Protocol II\textsuperscript{56} quite important. Protocol II, under article 1, is supposed to follow the principles of applicability stated in common article 3 of the Geneva Conventions of 1949. On closer inspection, however, Protocol II raises the threshold of applicability of the system of norms with regard to internal armed conflicts to a higher level than common article 3. Thus, while there is a considerable improvement in the applicable norms themselves, the rais-
ing of the applicability threshold renders the prospect of states' actual application of those improved norms improbable. The Reagan administration's proposal to apply unilaterally Protocol II in all common article 3 situations should become a model for all countries, especially developing countries, to follow.

Mr. Matheson, agreeing with Professor Meron's statement, noted that it is useful to know what is now recognized as customary international law in internal conflicts as a starting point for the future development of principles below these existing thresholds. Captain J. Ashley Roach\textsuperscript{57} asked Mr. Matheson what the position of the United States would be if an alliance conflict erupted where Protocol I bound some members of the alliance and not others. Mr. Matheson admitted that this question raised a serious problem and was the focus of much discussion within the NATO alliance. He indicated that such a case exemplifies the need for a common baseline of principles and rules that everyone must observe in the conduct of military operations. Some members of the NATO alliance, of course, will have ratified Protocol I and may thus have incurred some additional obligations. Mr. Matheson recognized, however, that this point is not a serious impediment to military cooperation. The United States and the NATO alliance are currently studying the issue in light of the necessity for a mutual understanding of which rules each country will observe.

Professor Sohn then presented a hypothetical situation related to Mr. Matheson's explanation. Noting that the United States has objected to the reprisal provisions of the Protocol,\textsuperscript{58} Professor Sohn wondered what would happen if Italy, which has ratified the Protocol, refused to participate in certain reprisals that the United States wants to take. Mr. Matheson replied that the United States has looked at the reprisal question primarily in terms of determining the extent that the United States should reserve concerning the option of responding to attacks on allied civilian populations. He further stated that the ability of the United States to take a reprisal action depends on the existence of a request by an actual ally to take such an action on its behalf. Additionally, the ally making the request must legally have the opportunity to take reprisal action itself. Some members of the NATO alliance believe that they may call upon the United States to help with a reprisal and others do not.

Captain Roach asked Mr. Matheson to explain the position of the

\textsuperscript{57} Captain, Office of the Judge Advocate General, United States Navy.

\textsuperscript{58} Protocol I, \textit{supra} note 4, arts. 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4) (prohibiting reprisals against civilian targets).
United States regarding irregulars in the territory of a state that has ratified Protocol I. Mr. MATHESON explained that this issue is not a practical problem because it presupposes that the movement of the irregulars satisfies all the standards under article 1(4), which is unlikely.

Professor HAMILTON DESAUSSURE\textsuperscript{59} asked for an explanation of the apparent inconsistency between the United States rejection of the provisions in article 56 of Protocol I, relating to dams and dykes, and the simultaneous acceptance of article 15 of Protocol II, which contains similar provisions. Mr. MATHESON replied that the United States military based its objections on a pragmatic, real-world estimation of the difference between the two situations. The military perceives that in international conflicts, many situations may arise where it is important to attack and destroy parts of an electric power grid, such as a nuclear or hydroelectric generating station. In internal conflicts, on the other hand, such a significant real-world need will not exist. Preserving the military option in international conflicts where such facilities are more likely to become an object of military attack, therefore, is very important.

Professor SOHN interjected that there is a difference between dams and dykes, on the one hand, and electric power generating stations, particularly nuclear ones, on the other. He asked Mr. Matheson how the United States could possibly reserve the option to destroy nuclear power plants when the repercussions might occur all over the world and not just locally, as the Chernobyl disaster aptly demonstrated.

Mr. MATHESON responded that all other rules of war designed for the protection of civilian populations, such as the rule of proportionality and the rule of reasonable precautions apply and advanced warning, govern these attacks. The United States maintains the position that it cannot accept the almost total prohibition on such attacks contained in article 56. In any case, in situations where the United States military targets a part of the power grid connected to a hydroelectric or nuclear facility, the United States would have to consider the possible effects on the civilian population and strive to obtain its military objective in ways that would not inflict drastic effects on that population.

Mr. DIETER FLECK\textsuperscript{60} asked Mr. Matheson for a clarification of whether the United States held the position that the general rule of proportionality would govern attacks on dams, dykes, and nuclear generating stations in any given situation. Mr. MATHESON concluded that

\textsuperscript{59} Professor of Law, University of Akron, School of Law.
\textsuperscript{60} Leiter Des Völkerrechtsreferat, Bundesministerium Der Verteidigung, Bonn, Federal Republic of Germany.
the rule does not apply where the military advantages are not proportionate to the risk to the civilian population. Professor SOHN then asked if the rule of proportionality would forbid an attack on a dam above a valley that would kill many people in the valley. Mr. MATHESON agreed that the risks to civilians would outweigh the military advantage in that case if the dam were contributing little electrical power, such as when the dam was either shutdown or malfunctioning.

Professor WALDEMAR A. SOLT\textsuperscript{61} found it difficult to reconcile the United States objections to article 39 of Protocol I, which restricts the use of enemy uniforms in military operations, with the United States objections to article 44(3), which gives irregulars protection even though they are not in uniform. He found the objections of conventional military combatants to article 44(3) understandable in that the civilian population is thereby more protected because the article prevents the use of civilian disguise to achieve surprise. He therefore focused his question on why the United States allows the use of enemy uniforms to achieve surprise.

Mr. MATHESON replied that it was a question of priority. The United States military contends that there are certain adversarial forces that would use enemy uniforms in their operations in any case; therefore, it is important from the beginning to preserve that option for the United States as well. At the same time, the need to protect the civilian population from the dangers associated with irregulars who fight among that population, without distinguishing themselves, mandates the opposition to article 44(3).

Major General PRUGH asked for an explanation of the reasons why the Reagan administration objects to article 44(3) in view of the established policy that Edward W. Haughney\textsuperscript{62} and he had assisted in formulating. He explained that this policy extended the prisoner of war status "to the little kid in black pants down at the end of the trail who might have had a gun in his hand a few minutes ago."

Mr. MATHESON responded that the administration believes that the civilian population is at a considerable risk if irregulars operate among them without distinguishing themselves, except in very extreme situations when they are actually conducting their operations. He pointed out that the kinds of organizations operating in this fashion are typically perceived as unlikely to adhere to the rules of warfare. Under

\textsuperscript{61} Adjunct Professor of Law and Senior Fellow, Washington College of Law Institute; Member, United States Delegation to the Diplomatic Conference on International Humanitarian Law, 1974-1977 (deceased).

\textsuperscript{62} Professor of Law, Dickinson School of Law.
present conditions, the balance swings away from the positions taken during the Vietnam War. Mr. MATHESON, thus, concluded that the decision is largely a matter of historical development and an appreciation of the current world situation.

Mr. HANS-PETER GASSER concluded the discussion portion of session one with a question regarding the position of the United States on the new rules protecting civilian and cultural objects as well as the environment. Mr. MATHESON replied that the application of the major rules, such as the rule of proportionality and the rule against attack, would include civilian and cultural objects. He indicated that the United States has no great concern over the new definition of “military objective” set forth in article 52(2) of Protocol I. The United States, however, considers the rule on the protection of the environment contained in article 55 of Protocol I as too broad and too ambiguous for effective use in military operations. He concluded that the means and methods of warfare that have such a severe effect on the natural environment so as to endanger the civilian population may be inconsistent with the other general principles, such as the rule of proportionality.

SESSION TWO: THE FORMULATION OF GENERAL INTERNATIONAL LAW: HOW IS IT GENERATED? HOW IS THE EXISTENCE OF ITS NORMS ASCERTAINED?

Professor Louis B. Sohn, the moderator for session two, asked Mr. Gasser to give a short overview of the current official status of the Geneva Conventions and the Protocols. Mr. Gasser reported that 165 states were party to all four Geneva Conventions of 1949. In addition, 102 states signed the Final Act of the 1977 Diplomatic Conference. Sixty-two states signed Protocol I, and fifty-eight states signed Protocol II within the one year period open for signature, under article 92 of Protocol I and article 20 of Protocol II, respectively. Sixty-six states have ratified Protocol I, and sixty have ratified Protocol II as of the

63. Legal Advisor to the Directorate, International Committee of the Red Cross.