

special session temporarily and to authorize the President of the latest regular session of the General Assembly to resume its meetings upon request from Member States." Similar provisions are included in the subsequent resolutions concerning the "Question of Palestine": in paragraph 17 of Resolution ES-7/4 of April 28, 1982; in paragraph 10 of Resolution ES-7/5 of June 26, 1982; in paragraph 12 of Resolution ES-7/6 of August 19, 1982; and finally (so far), in paragraph 10 of Resolution ES-7/9 of September 24, 1982. These resolutions have generated the simplified procedure for calling follow-up meetings of the seventh emergency special session by the President of the latest regular session of the General Assembly, replacing at the same time the indefinite wording "as and when necessary" with the formula "upon request from Member States." The obligation of the President of the General Assembly is derived from Article 36 of its Rules of Procedure, which states: "The President of the General Assembly performing his function remains within the jurisdiction of the General Assembly." (Cf. in this connection, for instance, the statement of Ismat T. Kittani, President of the 36th session of the General Assembly in April 1982, that the resumption of the session "had been specifically provided for by the resolution adopted in July 1980.")¹

Up to this point, I have tried to analyze the question of emergency special sessions only in connection with its relation, or lack thereof, to the "Uniting for Peace" Resolution, but not from the standpoint of the Rules of Procedure of the General Assembly, which were supplemented with new articles as a consequence of the adoption of that resolution in 1950. These new articles, namely, Articles 8(b), 9(b), and 85, create the possibility of calling emergency special sessions of the General Assembly *exclusively* on the basis of the "Uniting for Peace" Resolution. What if an emergency special session of the General Assembly is called *without reference* to the resolution? In such a situation, it is absolutely out of the question to use the provisions of the Rules of Procedure added in 1950 because these are "reserved" *solely* for the emergency sessions called by reference to Resolution 377A (V). However, analysis of the new type of emergency special sessions unrelated to that resolution shows that *the contents* of the rules (i.e., the requirements for convening an emergency special session, the time factor, and the mono-thematic character of the session) are also applied to these sessions. This situation represents a natural reflection of this new kind of emergency special session of the General Assembly in the procedural aspect of the matter.

JÁN KLUČKA*

TO THE EDITOR IN CHIEF:

Jan. 1, 1989

In his answer to my *Appeal for Ratification by the United States of Protocol I Additional to the Geneva Conventions of 12 August 1949*,¹ the Legal Ad-

¹ UN CHRON., September 1982, at 27.

* Faculty of Law, P. J. Šafárik University, Košice, Czechoslovakia.

¹ *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal (of Protocol II) from President Reagan*. 81 AJIL 910 (1987), followed by my *An Appeal for Ratification by the United States*, *id.* at 912.

viser of the Department of State, Judge Abraham D. Sofaer,² raises diverse issues which my article already dealt with. One of his objections, however, asks for further clarification.

Judge Sofaer writes that Protocol I

eliminates one of the basic existing requirements that irregular groups must meet to qualify for combatant and POW status: that the group as such generally conduct its operations in accordance with the laws and customs of war. Instead, Protocol I provides that individual members of such groups must be accorded POW benefits (with very limited exceptions) even if the group as such (e.g., the PLO) displays a callous and systematic disregard for the law. This means in effect that liberation groups can enjoy many of the benefits of the law of war without fulfilling its duties, and with the confidence that the belligerent state has no real remedy under the Protocol to deal with this matter.³

This statement gives the erroneous impression that the armed forces of a liberation movement which are involved in an armed conflict of the kind specified by Article 1(4) of Protocol I are not at all, or only to a lesser extent, bound to respect the law of war. Judge Sofaer also reports the views of the Joint Chiefs of Staff according to which "the Protocol grants irregulars a legal status which is at times superior to that accorded regular forces."⁴ This statement makes the reader believe that "irregulars" (which presumably means fighters of a liberation movement) do not have to respect the same standards as members of a government's armed forces.

This presentation does not reflect the new law as it is commonly understood. A short comment is therefore necessary.

For the first time in the history of the law of armed conflict, Protocol I defines the notion of "armed forces." Part of the definition reads as follows: "Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."⁵ It is important to realize that Protocol I speaks of armed forces in general and makes no distinction between the armed forces of a state and those of a liberation movement.⁶

It is correct to say that respect for humanitarian law is not a prerequisite, a condition for acquiring (or maintaining) the status of an armed force.⁷

² *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)*: Sofaer, *The Rationale for the United States Decision*, 82 AJIL 784 (1988).

³ *Id.* at 786.

⁴ *Id.* at 785. The JCS report is classified and therefore not available for academic scrutiny.

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 43(1), *reprinted in* 16 ILM 1391 (1977) [hereinafter Protocol I].

⁶ For the history of the rule, see 14 DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, OFFICIAL RECORDS 318-34 (1978); M. BOTHE, K. J. PARTSCH & W. A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 236, para. 2.2.2 (1982) (Commentary (by Solf) to Art. 43); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 506, para. 1659 ff. (Y. Sandoz, Ch. Swinarski & B. Zimmermann eds. 1987) (Commentary to Art. 43).

⁷ M. BOTHE, K. J. PARTSCH & W. A. SOLF, *supra* note 6, at 238, para. 2.3.2; and Mallison & Mallison, *The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning*

Thus, it would clearly not be permissible to deny POW status to a captured combatant on the sole ground that the armed forces to which he belongs were allegedly violating the law of armed conflicts.⁸ *That rule holds true for either type of armed forces.* However, to say that respect for the law is not a prerequisite for a liberation movement to acquire the status of armed forces does not mean that such movements are under no constraints in the conduct of their operations. Would it make sense to say, as Article 43 of Protocol I does, that their armed forces must “be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict,” if they were not actually bound to respect the law? Of course not; the armed forces of a liberation movement likewise have to comply with the rules. Furthermore, if the armed forces of a state have to respect the rules because that state is party to the treaty in question (*pacta sunt servanda*), armed forces belonging to a liberation movement have to comply with the law because, by making the declaration under Article 96(3) of Protocol I, the authorities of such a movement solemnly undertake to apply the Geneva Conventions and Protocol I. The movement assumes thereby “the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol.”⁹ Since that movement’s armed forces are then bound to respect the law of war to the same degree as government forces, there is no justification for saying that, by virtue of Protocol I, liberation movements “can enjoy many of the benefits of the law of war without fulfilling its duties.”¹⁰ If, however, while filing a declaration under Article 96(3), a liberation movement were simultaneously to reject the very idea of respecting humanitarian law, such a declaration would not have the desired effect and the said movement’s armed forces would not acquire the privileged status.

In his reply Judge Sofaer also decries the “hypocrisy of the regime established by Article I(4),” essentially on the grounds that no liberation movements have “bothered to file declarations with the Swiss Government accepting the obligations of the Protocol.”¹¹ It should be recalled that such a declaration may be made only by a liberation movement engaged in a conflict with a state party to Protocol I. No state involved in a conflict held to be of such a kind has hitherto ratified Protocol I; a declaration under Article 96(3) would therefore have no legal effect. I presume that the depositary state would not even accept such a declaration for notification to parties to the Protocol.

Finally, I want to make it clear that I in no way qualified the United States position as “political” and “partisan,” as Judge Sofaer writes. I did warn, but in general terms, that victims of war might eventually suffer “if humanitarian law treaties were no longer accepted as being above political and partisan controversy.” Humanitarian law is a delicate matter.

HANS-PETER GASSER*

International Conflicts, LAW & CONTEMP. PROBS., Spring 1978, at 4, 20 (“While this article promotes observance of the law, it does not make such observance a requirement for inclusion as ‘armed forces’”).

⁸ Remember the experience of U.S. POWs during the Vietnam War!

⁹ Protocol I, *supra* note 5, Art. 96(3).

¹⁰ Sofaer, *supra* note 2, at 786.

¹¹ *Id.*

* Legal Adviser to the Directorate, International Committee of the Red Cross.