

## Commentary

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Professor Stein and Judge Pocar have done well in addressing the issue of coalition warfare and the effect that Protocol I has had on the ability of coalition partners to engage in effective operations. Central to this discussion, of course, has been the fact that the United States—a principal participant in essentially every major coalition enterprise undertaken since the coming into force of Protocol I—is not a party to the Protocol. I would hasten to add that there is no indication that the United States intends to become a party to this instrument at any time in the foreseeable future. Given this fact, I would like to offer my own thoughts concerning three specific questions and in so doing also comment on a number of the observations that have been made.

Let us turn to the first question. Since certain members of NATO are contracting parties to Protocol I, whereas the United States and some others are not, what does this signify in terms of the interoperability of coalition forces like NATO's? Upon the coming into force of Protocol I and the concomitant decision of the United States not to become a party, I can well remember the substantial hand-wringing that occurred. This action on the part of the United States sounded the death knell of the NATO Alliance, it was said. Others believed this US decision, for all intents and purposes, served to negate its Article V collective defense commitment under the North Atlantic Treaty. Why? Because, how would it be possible for the United States to engage in combat operations with its NATO allies absent an obligation to comply fully with the provisions of Protocol I? It would be impossible to mount effective NATO coalition operations when the participating States were bound by different law of armed conflict standards. The means and methods by which warfare could be conducted would vary too substantially. It would be

impossible to achieve consensus even upon a set of command rules of engagement (ROE). In brief, the coalition sky was falling and it was all the result of the US decision to reject Protocol I.

What has become of these dire predictions? Time and experience have shown these concerns to have fallen into the category of “much ado about nothing.” The fact that the United States is not a party to Protocol I has had no adverse effect on the ability of the United States and its coalition partners to engage in numerous effective military operations. There are three principal reasons for this. First, shortly after the United States announced its decision not to become a party to Protocol I—and prior to the time that a number of other NATO States did so—law of armed conflict experts from the United States and several NATO countries conducted a series of meetings to discuss various provisions of the Protocol. As a result of these meetings, a common understanding was reached regarding the manner in which certain of the more vague, subjective, and ill-defined articles would be interpreted and applied. (A number of these agreed interpretations were later reflected in several of the statements of understanding and reservations made by NATO members when they eventually became parties to Protocol I.) These common understandings have assisted the United States and its NATO partners in achieving a broad consensus regarding the law of armed conflict requirements applicable to coalition operations.

Coupled with these earlier meetings between US and NATO law of armed conflict experts is the fact that there has been extensive cooperation between the United States, key NATO allies, and several other countries in the updating of their respective law of war manuals. These countries have included, at various times, Australia, Canada, the United Kingdom, New Zealand, Denmark, and Israel. Again, numerous provisions of Protocol I have been discussed, in detail, and common approaches toward the manner in which these provisions would be applied during military operations have been developed. This process has served to foster a growing consensus among the States concerned that no substantive differences regarding the law of armed conflict applicable to coalition operations currently exist.

The third and perhaps most basic reason why the US decision not to become a party to Protocol I has not adversely affected its ability to engage in effective coalition operations revolves around the process through which coalition ROE are drafted, disseminated, and trained. Of primary importance is the fact that coalition military activities are conducted in accordance with mutually agreed ROE, which are largely unaffected by academic/diplomatic

disagreements over nuanced interpretations of various provisions of Protocol I.

This is not to say that the drafting of coalition ROE is not often a time consuming, frustrating process. This was certainly true in the cases of SFOR (the Stabilization Force in Bosnia-Herzegovina) and KFOR (the Kosovo International Security Force), and was true as well during Operation Allied Force. Of note, however, is the fact that the major ROE issues that arose in the context of these operations—such as those related to targeting—did not result from differing interpretations regarding the law of armed conflict. Invariably, any delay in achieving ROE consensus resulted largely from a highly politicized decision making process driven by a desire on the part of the participating governments to minimize casualties—both military and civilian. This was not a desire mandated by law of armed conflict considerations, but by the perceived need to retain the very thin veneer of public and political support for the operation itself. In a similar vein, Professor Stein has noted that, though KFOR ROE were unquestionably restrictive in nature, these restrictions were the result of domestic law, rather than law of armed conflict concerns. In brief, coalition ROE are the product of a negotiated consensus that reflects a common understanding of coalition law of armed conflict requirements, and then disseminated to and trained on by coalition forces.

It is for these reasons that the US decision not to become a party to Protocol I has had no adverse effect on the interoperability capabilities of coalition forces. Again, experience has shown that when concerns that might affect interoperability do surface, these are driven by political or domestic law considerations, rather than disagreements over the meaning or requirements of specific international law requirements. In such cases, the coalition ROE are drafted and the forces of the participating countries deployed in such a way that such concerns are resolved and the operational capabilities of the coalition are not diminished.

Can there be differing legal standards for various members of a given coalition? This is a question that Professor Stein and Judge Pocar appeared to struggle with, for good reason, in order to arrive at a workable answer. A textbook treaty law response would most likely render effective coalition warfare exceptionally difficult to wage. Allow me to explain what I mean by this statement. The question posed immediately begs another. To what does the term “legal standards” refer in this context? That is, does there exist an international consensus as to the nature of the “legal standards” applicable to a coalition as a whole, or to individual member States of a coalition, when those States are engaged in military operations?

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This question might be answered in one of two ways. First, the textbook approach: within a coalition, the actions of each member State must be dictated by the various international conventions to which it is a party, as well as by the statements of understanding and reservations made by this State to each of these conventions. Under this approach it would seem to follow that a coalition as a whole, when developing its operations plan, must take into account each convention to which any of its members are parties, as well as the statements of understanding and reservations made by these individual members. There is little doubt that such an approach would prove to be exceptionally difficult to apply in a real-world environment. Rather than establishing clear-cut “legal standards” for a coalition as a whole, it would subject the coalition to a potentially vast array of varying interpretations of what these standards should be. Individual coalition members would be forced to function under diverse standards, a fact that would be certain to adversely affect the operational capabilities of the coalition.

In view of these inherent difficulties, might this issue be approached in a more practical way? I would submit that if there are to be uniform legal standards to which a coalition as a whole is to be held, these must be customary law of armed conflict standards. This is a workable approach—a 90% solution, if you will. Adherence to the customary law of armed conflict, of which the four 1949 Geneva Conventions are an integral part, would ensure a disciplined, effective, and lawful coalition operation. Coalition ROE could be drafted accordingly. If within a coalition there arise those situations in which individual members feel as if they are restrained from employing certain means or methods of warfare, these could be dealt with on a case-by-case basis. However, experience has shown that these situations would be few in number, and “work-arounds” could be effected. This is a common sense, legally sustainable approach toward ensuring that all coalition members, as well as the international community, fully understand the law of armed conflict applicable to coalition operations.

There are also other elements of this issue that merit comment. Professor Stein has suggested in seeking to formulate a workable response to this question that perhaps the law of armed conflict standards applicable to coalition operations may be found, in part, in the UN Secretary-General’s 6 August 1999 guidance on the “Observance by United Nations forces of international humanitarian law.”<sup>1</sup> He notes a number of problems associated with this approach, but fails to speak to the principal shortcomings of this document. It is poorly drafted and incomplete, and in a number of instances misleading and inaccurate. It does nothing to advance the development and effective

implementation of the law of armed conflict. If one is searching for coalition standards, they will not be found in this guidance.

On another matter raised by Professor Stein in connection with his discussion of coalition standards, I find myself in complete agreement. He points out the potential for confusion that has resulted from what he refers to as “the re-naming” of the law of war, which has generally been referred to in the post-Charter era as the law of armed conflict. By referring to the law of armed conflict as international humanitarian law, he notes that the distinction between “humanitarian” and “human rights” law has been blurred. I would go further. The apparent attempt to make the law of armed conflict a kinder, more gentle form of jurisprudence has generated a significant degree of confusion in the minds of many.

What does the term “international humanitarian law” actually mean? Even a cursory review of this issue clearly reflects the fact that the term means different things to different people. In discussions with articulate, well-informed individuals who insist upon using this term, I have listened to sometimes passionate explanations of the term and the necessity for its use. Disturbingly, however, these explanations often differ and there appears to be no consensus as to the norms and principles embraced under this terminological umbrella. To some, it is just another “updated” name for the law of armed conflict, indicative of the “humanitarian” emphasis now placed on the regulation of armed conflict. To others it reflects the fact that the body of law applicable to armed conflict now contains many, but not all, of the elements of human rights law. There are also those who view international humanitarian law as the single embodiment of all of the law of armed conflict and human rights law.

How did we reach this point? When was the vote taken as to whether such a name change should occur? I cannot think of a single individual charged with the responsibility of giving real-world advice to military commanders on law of armed conflict issues that would have cast an affirmative vote for embracing a term that would result in blurring the legal obligations for which a commander and his staff would be held accountable in an operational environment. The use of a term that confuses and carries with it such imprecision in an area of the law that imposes so many responsibilities and often calls for life and death decisions, does a disservice to those who constantly strive to comply with this law. I’ll continue to provide advice on the law of armed conflict. I know what it is and, even more importantly, what it is not.

To what extent is Protocol I customary international law, such that it may be binding on non-parties? Perhaps this question might be more accurately

articulated: “can’t we simply declare Protocol I, in its entirety, to be reflective of customary international law and thus declare its provisions to be binding on the United States, despite the fact that the United States has chosen not to become a party to the Protocol?” To this question, Professor Stein has provided an answer. He has expressed substantial doubt as to whether all of the provisions of Protocol I have become “intransgressible” principles of customary international law. He notes specifically that it is “very doubtful” whether many of the undefined provisions of Protocol I can be declared to be of such a nature, specifically those that were of principal concern during the conduct of Operation Allied Force.

In illustrating this point, Professor Stein refers to terms such as “military significance,” “definite military advantage,” “effective contribution to military action,” and “indiscriminate attacks” and notes that they are not defined even by way of non-exhaustive examples. Moreover, he observes, even among those States that have become parties to Protocol I, a number have issued varying statements of understanding regarding their individual interpretations of the meaning of these terms. Given these facts, he concludes that it may be correct to state that the fundamental principles of the law of armed conflict contained within Protocol I and repeatedly referenced by the International Court of Justice—that is, the basic distinction between civilians and combatants, the prohibition against directly attacking civilians, and the rule of proportionality—are customary law of armed conflict concepts. However, he notes, “[i]t is very doubtful whether the same can be said about all of the other provisions of Protocol I. . . .” I am in complete agreement with Professor Stein on that point.

Judge Pocar, on the other hand, would appear to be much more supportive of the view that Protocol I, as a whole, is making steady progress toward becoming customary international law. He observes that in looking at the factors to be considered in making customary law determinations, “customary international humanitarian law should not be determined on the sole basis of the practice of the States that have *not* ratified the Protocol.”<sup>2</sup> In making this statement, Judge Pocar acknowledges, in essence, the primary role played by State practice in the formulation of customary international law. Of this, there can be no doubt. Every criterion set forth for the purpose of making customary law determinations has, at its core, the concept of State practice. The primacy of this concept has been reaffirmed repeatedly by various international tribunals. To this Judge Pocar would seem to say that he agrees that

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2. See Judge Pocar’s paper in this volume (emphasis added).

State practice is the key component of any customary law determination, but that in applying this principle one must not look exclusively at the practice of those States that have chosen to challenge the customary law nature of numerous provisions of Protocol I. Fair enough. Let us take a look at those States that are parties to Protocol I.

I have never been impressed by the number of States that have, over the years, become parties to Protocol I. It is my view that the long list of signatories of this document has very little to do with State practice in the area of the law of armed conflict. The vast majority of the signatories of Protocol I are at best interested observers—bystanders, if you will—when it comes to the actual application of the law of armed conflict in combat situations. These States have not applied the provisions of Protocol I on the battlefield or, for the most part, during any form of military operation. In sum, they have not “practiced” the various provisions of Protocol I. (The same is true of the International Committee of the Red Cross (ICRC) and a host of other non-governmental organizations (NGOs).) As a result, the fact that these States are parties to Protocol I means very little when one examines the practice of such States in the context of determining whether the Protocol constitutes customary international law.

In terms of tangible State practice that substantively affects the evolution of Protocol I as customary law, I have but one thing to say: “show me the players.” Not the signatories; not the observers; not the ICRC or the NGOs; but rather “show me the players.” Which States in the international community actually practice or apply law of armed conflict principles on an ongoing basis in a real-world environment? The answer is very few—of which the United States is one. And the United States as a consistent law of armed conflict practitioner has just as consistently expressed the view that Protocol I, as a whole, does not reflect customary international law.

One might ask “what about those States, though relatively few in number, that have signed Protocol I and have practiced or applied the law of armed conflict in a series of military operations since the times of their signatures? Surely their status as parties to Protocol I evidences a growing acceptance of its provisions as customary law?” Again, another fair observation. However, such a premise fails to hold up under scrutiny. Examine, if you will, the States in issue. Essentially each of these States has qualified its ratification of Protocol I with a series of both reservations and statements of understanding dealing with various articles of the Protocol. Search as you may, you will find no concordant and continuous State practice regarding the application of

numerous provisions of Protocol I—even among that limited number of States that are both parties and players.

Judge Pocar also notes that special importance should be attached to the case law of international tribunals, in terms of evaluating the assessment of such courts as to whether certain treaty provisions have become customary international law. Leaving aside the fact, however, that customary law is not the primary source of international law upon which international tribunals base their decisions, what have such courts looked for when they turn to an examination of whether a particular concept has become a binding principle of customary international law? Once again, these courts have sought to find the existence of concordant and continuous State practice associated with the concept in issue, and the acceptance of or acquiescence in the concept by the State(s) to which the court is being asked to apply this principle. As I have indicated previously, there exists no concordant and continuous State practice with respect to the applicability of Protocol I—and the United States has neither accepted or acquiesced in the view that the Protocol, as a whole, reflects customary international law. I do not believe that any international tribunal would find the more controversial and ill-defined articles of Protocol I to be binding customary law.

Let me speak, very briefly, as well, to Judge Pocar's summary of an opinion of a Trial Chamber of the ICTY that was dealing with law of armed conflict obligations under Articles 57 and 58 of Protocol I. The Court found that "when a rule of international humanitarian law is somewhat imprecise, it must be defined with reference to the laws of humanity and dictates of public conscience espoused in the celebrated 'Martens Clause', which is, itself, customary law." Here, I would simply call your attention to the fact that the "laws of humanity" and "the dictates of public conscience" are but the second and third components of the Martens Clause. The first, omitted component refers to the "usages established among civilized peoples", that is, customary law as established by State practice. The omission of any reference to this aspect of the Martens Clause, even if inadvertent, is certainly a significant one when the Martens Clause has been invoked to "define" the "imprecision" of certain Protocol I provisions.

I'll conclude my comments by leaving you with a quote from Judge Pocar's excellent paper, a quote that very cogently summarizes the issue of whether Protocol I, as a whole, might rightly be viewed as customary international law. Judge Pocar states:

While most of Protocol I can undoubtedly be regarded as essentially reflecting customary international law, there are areas where this conclusion is subject to debate for two reasons. First, Protocol I clearly sets forth new rules. Second, the specificity of Protocol I's provisions add new elements to principles that, while they are well established in customary law, leave margins of discretion to belligerent States. Belligerent States are then free to argue that such provisions will limit or may limit discretion if they are given certain interpretations. The scope and impact of these additions is therefore controversial and may be the basis of the hesitations of some States to ratify Protocol I.<sup>3</sup>

To this, I can add only, "Well said."

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3. See Judge Pocar's paper, *supra*, at 347.