SEVEN

"The Third World Is a Problem"

Arguments about the Laws of War in the United States after the Fall of Saigon

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Following the fall of Saigon in 1975, debates on the laws of war among lawyers serving in the US government shared a common theme: the Third World,[1] which had mostly supported North Vietnam throughout that war, and which had sought to introduce the Soviet doctrine of national liberation wars into the corpus of international law,[2] was a problem. Prominent lawyers in the Carter and Reagan administrations did not like the look and orientation of the United Nations after decolonization, because in their view it had become anti-American and pro-Soviet. Accordingly, the United States refused to ratify the 1977 Additional Protocols to the 1949 Geneva Conventions (API), which is one of the core instruments on the regulation of armed conflict in international law.[3] Moving away from the UN Charter's provisions on the use of force and from lawmaking in multilateral fora, the United States began to advance new rules for employing force in conversations with smaller subgroups of "like-minded states."

In 1985, US Secretary of State George Shultz went so far as to call the UN Charter a "suicide pact."[4] The political discourse on the use of force by Reagan administration officials shifted markedly.[5] It was now argued that international law had to be reformed if it was to remain credible. How did this shift, in which the UN Charter was no longer viewed as fit for

purpose occur? And why did the United States and Israel withdraw their optional clause declarations with the International Court of Justice (ICJ) within weeks of each other in 1985, and refuse to ratify AP1, following the ICJ's decision in the first phase of the *Nicaragua* case?

While most international lawyers tend to produce doctrinal studies that focus on the rules between states, in order to answer these questions it is necessary to look at the diplomatic battles waged within states and the individuals and groups that attempt to influence the foreign policy of a state to obtain a more realistic appreciation of the practice of international law. Accordingly, this chapter explores the ideological connections between the neoconservatives and Vietnam War veterans who opposed the development of International Humanitarian Law (IHL) during the Cold War due to the emergence of a Third World bloc in the UN during decolonization that supported the struggles of the national liberation movements in the Middle East and Southeast Asia. These included neoconservatives like Allan Gerson, Abraham Sofaer, Jeane Kirkpatrick, George Shultz, Frederick Iklé, Eugene Rostow, and Douglas Feith, and Vietnam War veterans like Robert McFarlane, John Poindexter, Oliver North, John W. Vessey, and W. Hays Parks.[6] All these individuals held prominent positions in the Reagan administration at the UN, the Department of State, the Department of Defense, including the Joint Chiefs of Staff, and at the National Security Council, where they helped formulate US foreign policy on countering terrorism.

In 1977, the only state that voted against Article 1 of AP1 was Israel, because it claimed that the provision broadened the scope of IHL to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."[7] At that time, the United States was one of more than 40 states that signed AP1 when it was opened for signature in December 1977. George H. Aldrich, the chairman of the US delegation, had even described their adoption by the Diplomatic Conference as representing "a major advance in international humanitarian law."[8]

Yet a decade later, the United States would espouse the Israeli view and oppose ratifying AP1. This chapter explores the reasons behind this shift, which it attributes to a convergence of interests between the neoconservatives, who had a close relationship to right-wing figures in the Israeli government,[9] and Vietnam War veterans who wanted to overcome the "Vietnam syndrome," which President Richard Nixon argued had "weakened the nation's capacity to meet its responsibilities to the world, not only militarily, but also in terms of its ability to lead."[10] It explains that following the fall of Saigon, much of the UN's activity took on an anti-American tone, and the Carter administration, rather than confront this activity, appeared

to acquiesce to it. In addition, the Soviet Union questioned Washington's resolve by sending troops into Afghanistan and supporting communist insurgencies in Africa and Latin America. For neoconservatives and Vietnam War veterans, it looked like the Carter administration had lost the will to fight the Cold War.

Carter's perceived support for Third World causes at the UN would be sharply reversed by Reagan administration officials, who strongly rejected the idea that American power was dangerous to the world.[11] In their view, the Carter administration had allowed the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict at Geneva (1974–77) to legitimize the Soviet doctrine of national liberation, giving succor to many of the national liberation struggles that were undermining the United States' allies in the Third Word.[12] One of the casualties of this struggle between Carter and Reagan administration officials was the decision by Reagan not to ratify AP1. Another casualty was the decision to withdraw the United States' optional clause declaration with the ICJ.

In this connection, the fallout from *Nicaragua v United States of America* played a major role in the reversal of US policy.[13] This was because the decision was made on the basis of customary international law, which had been shaped by events in the 1970s, which had recognized the legitimacy of national liberation movements and their struggles at the Diplomatic Conference in Geneva. In rejecting the United States' collective self-defense argument the Court had based its reasoning on UN resolutions, declarations, and treaties that had been adopted during the height of decolonization, and which recognized the right of peoples to fight "against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."

In summary, this chapter revisits the critiques of IHL in the years 1977–1987, which, it is argued, influenced the Reagan administration's decision to withdraw from the ICJ and refrain from sending AP1 to the Senate for advice and consent to ratification. It explains that officials in the Reagan administration viewed certain provisions of AP1 as too constraining on US power in the global confrontation with the Soviet Union, and too accommodating to the interests of the national liberation movements that were supported by the Soviet Union in undermining US interests in the Third World. These lawyers rejected the changing structure of international law brought about by the decolonization process, and they rejected the inviolability of the sovereignty of the postcolonial state. To win the Cold War, the United States wanted to go on the offensive, and in order to accomplish this objective international law needed to be interpreted flexibly.

1. Ambassador Aldrich Takes on His Critics

In 1991, after the Cold War had drawn to a close with the dissolution of the Soviet Union, Ambassador Aldrich, who had led the US delegation to the Diplomatic Conference on the Reaffirmation and Development of IHL in Geneva, penned two articles expressing his frustration at the United States' continued refusal to ratify AP1, especially as the Soviet Union had done so. The first article was published in the *American Journal of International Law*[14] and the other article was published in a festschrift in honor of Frits Kalshoven.[15] These articles drew upon similar arguments that Aldrich had advanced in the 1980s when he defended the Carter and Ford administrations' records at the Geneva Conference on Humanitarian Law.[16]

Due to the untimely deaths of his colleagues, professor (later judge) Richard R. Baxter and Waldemar Solf, who had both served in the US Army during the Second World War, and in Solf's case also in the Korean War, Aldrich had, by default, become one of the last lawyers who was still living after the dissolution of the Soviet Union who had been involved in the drafting of the Additional Protocols at the Geneva Conference. Although Aldrich was not alone in voicing criticism of the Reagan administration's stance toward AP1,[17] he was one of the most prominent, persistent, and prolific. It was not so much a question of taking sides, as Aldrich had also represented the United States for the Ford (Republican) administration before Carter and had been a senior advisor to the Nixon administration during the Vietnam War.

1.1. Ratification of AP1 Delayed

In the festschrift, Aldrich explained that when the United States signed the Protocols in 1977, the Carter administration supported the decision as a whole including the Office of the Secretary of Defense and the Joint Chiefs of Staff.[18] Upon signature, the United States even submitted a statement expressing its understanding of certain provisions of AP1, which Aldrich hoped would form the basis for the statement the United States would make when it came to ratifying the Protocol, which he thought would only be a matter of time.[19] The delay, Aldrich explained to the annual meeting of the American Society of International Law in April 1980, was because the executive had not yet finished its preparatory work, which involved an article-by-article analysis, and because he had become preoccupied with work on the law of the sea.[20] Aldrich expressed his hope that "the next Congress would have more time to devote to treaty matters than had the

past several Congresses, which had been preoccupied with a few major treaty issues."[21]

In September 1982, despite opposition from Hays Parks in the Pentagon, who had served as a marine in Vietnam,[22] the J-5 to the Joint Chiefs of Staff for the Secretary of Defense completed their initial review of AP1 and APII.[23] The review was completed without prejudice to a final assessment of the Joint Chiefs, which provided language that could be used in the form of declarations, reservations, and statements of understanding upon ratification—precisely as Aldrich had envisaged. Frederick Iklé, under secretary of defense for policy, had requested the review.[24] (NATO had also completed a review of the Protocols and concluded that they would have no adverse impact on alliance operations.)[25] The initial review by the Joint Chiefs observed that while some states, such as France and Israel, had indicated that they would not accept the protocols, other US allies had indicated that they would accept them with reservations and statements of understanding.[26] The review also observed that Norway had accepted the protocols without any reservations or statements of understanding.[27]

However, when in October 1984 Mike Matheson, the State Department's deputy legal adviser for political-military affairs, was preparing a cable to instruct the US mission to the UN to vote in favor of a UN resolution by which the United States would express its intention to ratify AP1 in the sixth committee of the UN General Assembly, alarm bells started ringing.[28] Douglas Feith, deputy assistant secretary of defense for negotiations policy, called Allan Gerson, acting legal counsel at the US mission to the UN, on the telephone to warn him what was happening, and to oppose the vote in the sixth committee. In addition, Fred Iklé sent a cable to Gerson, explaining that the Pentagon was still considering its position and did not necessarily support ratification of AP1.[29] The alarm bells began to ring even louder when a "top-secret" memorandum favoring US ratification of the Additional Protocols was submitted to President Reagan by Davis Robinson, the State Department legal adviser, in November 1984.[30]

1.2. The Joint Chiefs Oppose Ratification

By May 1985, the Joint Chiefs of Staff had come out against ratification. It was now argued that the military problems created by the Protocol could not be remedied except by taking an unusually large number of reservations and understandings—27 in all.[31] It was also claimed that the problems with AP1 "outweighed any probable military benefit from ratification."[32] The memorandum that made this recommendation was signed by John

W. Vessey, who had been appointed chairman of the Joint Chiefs of Staff by President Reagan in 1982. Vessey had a distinguished career in the US military in Vietnam, where he received the Distinguished Service Cross for heroism during the Battle of Suoi Tre (March 21, 1967).[33]

A comparison between the preliminary review on September 13, 1982, and the final review that rejected ratification on May 3, 1985, is revealing. While the preliminary review had raised concerns about the implications of ratifying AP1 for the ability of the United States to fight in situations of guerrilla warfare, it did not reject AP1 outright or take the view that the Protocol was so problematic that its faults could not be remedied through issuing reservations and statements of understanding. Nor did the initial review take exception with the extension of IHL to cover wars of national liberation. The only concerns expressed in the 1982 review concerned US views on belligerent reprisals, human shields, the status of mercenaries, POW status for guerrilla fighters, strategic bombing of certain kinds of critical infrastructure through the granting of special protection against attack to certain facilities even when the objects concerned were military objectives, and the standards applicable to military commanders in combat situations—which could be addressed with reservations and statements of understandings, drafts of which were provided.[34] While concern was expressed in the 1982 review that an "unscrupulous adversary" could invoke some of the language of AP1 to turn every violation of the laws of war into a war crime—as occurred in Vietnam—this concern was not enough to support an outright rejection of AP1, and the Joint Chiefs reserved their view.[35] It was only in 1985 that the view was taken that AP1 was *so disadvantageous* to the United States that no reservation or statement of understanding could overcome or remedy its intrinsic flaws.

In the 1985 review, it was argued categorically that the Diplomatic Conference had injected "the political concerns of particular blocs of states into the administration of the Geneva Conventions."[36] A rebel group "would gain a degree of international status, prestige, and legitimacy."[37] By linking the legal rights of individual combatants "to the justice of the cause for which they fight," Article 1, paragraph 4, of AP1 created "a very bad precedent and politicize[d] what should be an objective determination and reverses several hundred years of practice."[38] "In the Korean and Southeast Asian conflicts," the review explained, "Communist governments claimed that everyone fighting against them was an 'aggressor,' and, therefore, a war criminal not entitled to prisoner of war status of treatment."[39] It was also asserted that the new standards provided for in Articles 43 and 44 on Armed Forces, Combatants, and POW status favored guerrilla forces.

"There is little military advantage for the United States armed forces in recognizing improved status for guerrilla fighters."[40] With regard to the impact of the new rules on the protection of the civilian population in situations of belligerent occupation, the Joint Chiefs complained that Articles 48–79 of AP1 were framed in such vague and subjective language that they "would oblige governments to give a broad construction to these rules during low-intensity or unpopular conflicts [such as Vietnam], to bring civilians losses to the lowest possible level."[41] The review also raised objections to the presumption of civilian status for objects that were not considered a military objective in Article 50 and 52 of AP1, "since it could adversely impact on American military operations and personnel."[42] It explained that: "'War crimes' accusations have been a principal means used to deny prisoner of war status to Americans in both Korea and Southeast Asia; the existence of a rule that everyone and everything is civilian in case of 'doubt' could be used to prove such charges in the future, or at least lend credence to them for propaganda purposes."[43] Given the many problems with AP1, the review concluded that "as a practical matter, there is a serious question whether the United States can, in good faith, ratify the Protocol with the many reservations and understandings necessary to correct the Protocol's numerous ambiguities and defects."[44] Accordingly, the review did not recommend ratification.

Whereas Hays Parks's concerns appeared not to have been sufficient to overturn the 1982 review, by 1985, when Vessey was in charge, and after Parks had joined forces with neoconservative officials like Iklé, Feith, and Gerson, who were also opposed to US ratification of AP1 (albeit for their own reasons), their concerns won the argument, as explained below. It is also suggested that a spate of high-profile terrorist attacks against US citizens between 1983 and 1985 likely tipped the balance in favor of these arguments in the administration as ratification could now be portrayed as being contrary to the government's policy of countering terrorism.

1.3. President Reagan Refuses to Send AP1 to the Senate

As Aldrich observed, in January 1987, 18 months after the 1985 review of the Joint Chiefs, President Reagan informed the Senate that he would not submit AP1 to the Senate for its advice and consent to ratification.[45] The reason advanced by Reagan for his refusal to send the Protocol to the Senate was because of problems that he described as "so fundamental in character" that they could not be remedied through a reservation or interpretative declaration.[46]

Reagan echoed the 1985 review when he explained that AP1 gave "special status to 'wars of national liberation,'" which he described as "an ill-defined concept expressed in vague, subjective, politicized terminology."[47] This, he said, as well as the extension of combatant status to irregular forces, would "endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."[48] Reagan explained that he would have ratified the Protocol if it were "sound," but, "We cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law."[49]

Instead of ratifying AP1, the Reagan administration explained that the United States would only consider itself legally bound by the rules contained in the Protocol "to the extent that they reflect customary international law, either now or as it may develop in the future."[50]

1.4. The View of the State Department Legal Advisor

In explaining the rationale for the decision not to ratify AP1, Abraham Sofaer, the State Department legal adviser, who had replaced Davis Robinson in 1985, advanced reasons that were strikingly similar to those advanced by Israel at the Diplomatic Conference in 1977.[51] These included the claim that AP1 granted legitimacy to groups like the Palestine Liberation Organization (PLO) by treating "terrorists as soldiers" by conferring upon them "POW status," and by allowing them to make a unilateral declaration under Article 96(3) of AP1 rendering the Protocol applicable to an international armed conflict in which a state was engaged in hostilities with a national liberation movement. In his explanation, Sofaer did not mention that the US delegation had actually voted in favor of this provision at the Diplomatic Conference in 1977.[52] In Sofaer's reading of the diplomatic records of the Geneva Conference, the Third World states (which he emphasized numerically dominated the conference), "were not interested in applying the rules of international armed conflict to ordinary civil wars, but insisted on applying these rules to civil wars that involved causes they favored—the so-called wars of national liberation, specifically those being conducted by the Palestine Liberation Organization and the liberation movements of southern Africa."[53]

A 1986 profile in the *Washington Post* described Sofaer as "far more of an activist and key player on policy decisions than any of his recent predeces-

sors. He is one of those rare people in Washington who has become more important than the post he fills. Sofaer is more controversial at Foggy Bottom and in the legal community than is usual for a State Department lawyer."[54] Before he became legal adviser, Sofaer was a federal judge. In that capacity, he presided over former Israeli defence minister Ariel Sharon's libel case against *Time* magazine regarding his role in the Sabra and Shatila massacres.[55] The *Post* observed that Sofaer was impressed with the Reagan administration, so much so that he followed the path trod by many neoconservatives in switching his allegiance to the Republican Party. The *Post* thought it necessary to mention that "Sofaer, born in India to a Jewish family that originated in Iraq, frequently vacations in Jerusalem, where his wife's family own an apartment."[56]

1.5. Aldrich Responds to the Reagan Administration

In Aldrich's view, the Reagan administration had, "willfully distorted the meaning of several articles in order to declare the Protocol unacceptable."[57] For it was not the case that API automatically extended combatant status to irregulars groups, since they had to submit a declaration stating that they would abide by AP1 and had to assume the same obligations as High Contracting Parties.[58] He thought that it was virtually impossible for an irregular group to assume these obligations if they did not have the appropriate institutions in place, such as a functioning legal system and police force that could enforce the law.[59] While there were concerns regarding some provisions of AP1 from the Pentagon's perspective, such as its prohibition of belligerent reprisals and using nuclear weapons that would damage the environment, Aldrich thought these could be dealt with by way of issuing interpretive declarations[60]—and this is precisely what France and the United Kingdom did when they acceded to AP1.[61] Aldrich argued that "political and ideological considerations were determinative" in the Reagan administration's decision.[62] AP1 did not provide any solace or support for terrorists, in his view, and assertions that ratification of the Protocol by the United States would give aid or enhance the status of any terrorist group was "errant nonsense."[63]

This is strong language coming from a former deputy legal adviser to the State Department who had advised Henry Kissinger during the Vietnam peace negotiations. Although Aldrich was acquainted with the machinations of Washington, he lamented not pressing for ratification sooner, as he had not anticipated or foreseen that "those in both [the US State and Defense] Departments who had negotiated and supported the

Protocols would be replaced by skeptics and individuals with a different political agenda."[64]

1.6. Douglas Feith's Critique Makes the Front Page of the New York Times

Those skeptics and individuals with a different political agenda included Reagan administration officials like Douglas Feith, a longstanding supporter of Israel's settlement policy.[65] Feith, after a short period at the National Security Council in 1980–1981, moved to the Pentagon where he lobbied against US ratification of AP1, disparaging the protocol as "a pro-terrorist treaty that calls itself humanitarian law."[66] Significantly, Feith advanced this view of AP1 when he was deputy assistant secretary of defense for negotiations policy, before Reagan decided not to recommend ratification to the Senate. Feith attacked AP1 in the very first issue of *The National Interest*, an international affairs magazine, which was founded by Irving Kristol, the "godfather of neoconservatism."[67] The inaugural issue also featured articles by foreign policy heavyweights Zbigniew Brzezinski, Peter Rodman, Jeane Kirkpatrick, Richard Perle, Martin Indyk, Michael Ledeen, and Daniel Pipes.[68] Feith's critique of AP1 received widespread press coverage appearing on the front page of the *New York Times*,[69] and on the third page of the *Washington Post*.[70] In his memoir, Feith explained that he and Sofaer brought Caspar Weinberger, the secretary of defense, and George Shultz, the secretary of state, to agreement on not recommending ratification of AP1 to President Reagan in 1987.[71]

What Feith did not say is *how* he and Sofaer were able to persuade President Reagan to oppose AP1. Like many of the neoconservatives who rose to prominence in the Reagan administration, Feith and Sofaer were disturbed by developments at the United Nations in the 1970s when Israel was compared to apartheid South Africa and when Zionism was described as a form of racism. These views were also shared by Vietnam War veterans like Hays Parks, who complained that the Diplomatic Conference was dominated by the Third World and that the PLO was not a national liberation movement but a transnational terrorist organization sponsored by the Soviet Union that had committed terrorist attacks against the West.[72]

2. Why the Third World Was Viewed as a Problem

To appreciate why the influence of the Third World in the United Nations had become a problem in the eyes of the neoconservatives and Vietnam

War veterans, it would be helpful to take a step back at this juncture and remind ourselves of what happened during the course of the debates at the Diplomatic Conference on Humanitarian Law at Geneva (1974–77). The Diplomatic Conference that met to review and modernize the 1949 Geneva Conventions was a motley crew of radical dictatorships, liberal democracies, communist one-party states, oil-producing Arab sheikhdoms, and national liberation movements hailing from all parts of Africa, Asia, and Latin America. That decisions of the conference had to be taken by consensus made it all the more remarkable that these states and liberation movements were able to reach agreement, but their anticolonialism and opposition to the US war in South East Asia united them.[73]

As former US president Richard Nixon recognized, the Soviet Union had taken advantage of the international situation after the Second World War when it "fished assiduously in the troubled waters left in the wake of the dismantlement of the old colonial empires."[74] This included training and subsidizing guerrilla forces in the Third World. Communism's anti-imperialist message was, he explained, "a clever front for totalitarian parties, and many genuine nationalists were hoodwinked by this seemingly legitimate patriotic response to European colonialism."[75] This view would be repeated by General John W. Vessey, chairman of the Joint Chiefs of Staff, in his February 1984 speech to the House Armed Services Committee where he complained that the Soviets sought "to gain from international turmoil. Together with clients and surrogates, the Soviets are attempting to weaken the ties between the United States and its allies and to establish their own patterns of influence throughout much of the Third World."[76]

What incensed neoconservatives and Vietnam War veterans was not only the sympathy that was extended to the communist bloc by well-meaning, albeit naïve, anti-Vietnam war protestors but also the invitations extended to the national liberation movements to participate in the Diplomatic Conference, including a proposal to invite the Vietcong, which had killed thousands of American soldiers; the proposal was only narrowly defeated by 38 votes to 37, with 33 abstentions.[77] From the start of the debate, the Palestinian and Vietnamese struggles had become entwined with liberation struggles elsewhere in Africa and Asia, despite acts of terrorism by the Vietcong against thousands of civilians in South Vietnam during the war,[78] and terror attacks by PLO splinter groups like Black September in Munich (1972), Ma'alot (1974), and Entebbe (1976).[79] As Hays Parks complained, "the effort of the ICRC to develop a new law of war treaty became inextricably intertwined with the Arab war against Israel and of other conflicts supported by the Third World."[80] The demand that IHL

apply equally to "freedom fighters" as well as to conventional forces was viewed by these critics as an attempt to confer legitimacy on these armed groups and to provide an international status for the PLO.[81]

While Israel and South Africa had legitimate concerns with AP1,[82] as the PLO and Umkhonto we Sizwe, the African National Congress's paramilitary wing, had committed numerous acts of terrorism in Israel and South Africa in the 1970s and 1980s, it is not clear why the liberation struggles in Africa and Asia were a specific concern of the Reagan administration, given that the United States was not engaged in such struggles, although, as we shall see, it would become embroiled in a very controversial guerrilla war in central America in the 1980s.[83] Indeed, Charles Lysaght, a member of the Irish delegation to the Diplomatic Conference, commented that most of the Western delegations "knew that no vital interest of theirs was affected. With colonial disengagement almost complete, they were unlikely to be involved in wars of self-determination, as defined, in the future. South Africa and Israel were the last frontiers."[84]

However, for officials in the Reagan administration like Feith who had strong links with the Likud party,[85] Article 85.4(a) of AP1 was of concern, as it had been drafted with a specific case in mind: "the settlement of Israelis on the Golan Heights and on the West Bank of Jordan."[86] In Likud's revisionist ideology, the Palestinians were not a people with a right of self-determination but part of the wider Arab nation that had exercised self-determination in some 20 Arab countries. In the view of Israeli prime minister Menachem Begin, the only genuine national liberation movement in Palestine had been the Irgun that drove the British out of Palestine following a series of spectacular terrorist actions.[87] Begin's view of the PLO was made demonstrably clear in Likud's 1977 election manifesto: "The so-called Palestinian Liberation Organization is not a national liberation movement but a murder organization which serves as a political tool and military arm of the Arab States and as an instrument of Soviet imperialism. The Likud government will take action to exterminate this organization."[88]

Gerson complained that the changes to IHL that had been introduced at the Diplomatic Conference in Geneva had been brought about as a result of the efforts of the Arab bloc at the United Nations that had succeeded in forging an alliance with African states; in exchange for Arab support against apartheid, the African states supported the struggle against Zionism.[89] Writing in the early 1980s, Thomas Franck observed that following the 1967 war, when Israel occupied more Arab lands, many African and Asian states analogized the Jews "to the white European settlers of Rhodesia and South Africa, denying equal economic, social, and political rights to

the inhabitants of the West Bank and Gaza 'Bantustans.'"[90] Daniel Patrick Moynihan, the widely respected academic, diplomat, senator, and author,[91] who was appointed by President Ford as US ambassador to the United Nations in 1975, criticized the naivety of those in the US administration and diplomatic corps like Aldrich who believed they could "moderate" the policies of the UN majority. He pointed to the General Assembly resolution describing "zionism [with a small "z"] as a form of racism and racial discrimination" as emblematic of that body's anti-Americanism.[92] In his view, the United States would have been better off abandoning its attempt to reach out to the new nations of Africa and Asia altogether.

For neoconservatives and Vietnam War veterans, the UN had been transformed into a Third World bloc that espoused a different value system to the UN's original founding members and was changing the structure of international law through majority voting in UN forums. This included furthering the Soviet doctrine of wars of national liberation with the aim of overthrowing "colonialist, racist, and alien regimes" as expressed in AP1.[93] Not only had the Vietcong almost been invited to attend the Diplomatic Conference in Geneva, but the head of the PLO Yasser Arafat was given a standing ovation after a keynote speech to the UN General Assembly, and his organization had been granted observer status in the UN.[94] All the while, the Soviet Union was imprisoning Jewish dissidents and supporting the PLO in international forums against Israel. These developments prompted Leo Gross to express his fear that the "unbridled majoritarianism" of the UN General Assembly might soon have an impact on the work of the Security Council where serious decisions could be made.[95] This concern was echoed by Prosper Weil who complained about the emergence of an "international democracy," in which a majority or a representative proportion of states from the Third World would be able to "speak in the name of all and thus be entitled to impose its will on other states."[96]

To the veteran Israeli diplomat and lawyer Shabtai Rosenne, the 1970s "coincided with the radical change in the very texture of the UN, as a direct result of the decolonization process, and its exploitation by the Arabs as a forum for anti-Israel activities."[97] From his office on Second Avenue, Rosenne observed "intensive Arab efforts, since 1968, in the organs dealing with human rights no less than elsewhere, to create a general association of ideas between Israel and *apartheid* and racial discrimination, however impalpable the association may be, as part of the broader political operation of winning over African support for the Arab thesis and the isolation of Israel at the UN."[98] Indeed, an attempt to expel Israel from the organization preceded the adoption of the infamous "zionism is racism" resolu-

tion.[99] This, in turn, followed the adoption by the General Assembly of a score of resolutions drawing parallels between the struggle against colonialism in Africa and Israel's oppression of the Palestinians.[100]

US president Jimmy Carter had also taken a strong stand against Israel's settlement policy at the UN and had supported several Security Council resolutions describing their construction as a "flagrant violation" of international law.[101] These included voting in favor of Security Council resolution 465 that called on Israel to "dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements."[102] For Moynihan, the Carter administration had committed a mortal sin by voting for this resolution in the Security Council as it had allowed the Security Council "to degenerate to the condition of the General Assembly."[103] Carter's decision to veto a draft Tunisian Security Council resolution calling for the establishment of an independent Palestinian state in the West Bank and Gaza a few weeks later[104] did not placate the neoconservatives. He was never forgiven.[105]

Carter's perceived support for Third World causes made him very unpopular not only with neoconservatives but also Vietnam War veterans. This was because Carter appeared to think that American power was dangerous and needed to be reined in following the Vietnam War—precisely what the neoconservatives and Vietnam War veterans were opposed to.[106] Or, as Moynihan put it, Carter represented "The view that had emerged during the Vietnam War to the effect that the United States, by virtue of its enormous power, and in consequence of policies and perhaps even national characteristics that were anything but virtuous, had become a principal source of instability and injustice in the world."[107] Following a series of setbacks in Afghanistan, Angola, and Iran, the Soviet Union—in the eyes of the neoconservatives and Vietnam War veterans—appeared to be winning the Cold War. It had to be stopped.

3. "Going Rambo": Taking the Battle to the Third World

This offensive found expression in the "Reagan Doctrine," which was described by Kirkpatrick and Gerson as being opposed to the "traditional isolationism and post-Vietnam assumptions about the illegitimacy of US intervention."[108] The doctrine, they claimed, emerged in response to the Soviet Union's quest for a global empire and its support for the national liberation movements in the Third World: "the Reagan administration articulated, in the wake of the Vietnam War, the moral and legal right to

provide aid to indigenous resistance movements in countries around the globe, and justified it in terms of traditional American conceptions of legitimacy," they wrote.[109] They explained that the doctrine was formulated in response to the emergence of "Leninist dictatorships" in South Vietnam, Cambodia, Laos, Mozambique, Angola, Ethiopia, Nicaragua, and Afghanistan in the 1970s and 1980s, which the Reagan administration would roll back by providing anti-Soviet indigenous armed insurgencies with US support and training.[110]

Given the Soviet Union's manipulation, as they saw it, of lawmaking at the UN, Reagan administration officials often disparaged international governmental institutions and widely held assumptions about the sovereign inviolability of the postcolonial state. Following a spate of terrorist attacks in Beirut, Rangoon, Kuwait, London, and Rome, Robert McFarlane, the assistant to President Reagan for national security affairs and a veteran of the Vietnam War, expressed "the chilling feeling that the world [was] somehow at war even though there [were] no formal declarations and no fixed lines of battle."[111] He explained that the Reagan administration was "engaged in a new form of low-intensity conflict against an enemy that [was] hard to find and harder still to fix and destroy in the common military sense."[112] Given this "chilling feeling" and the belief that the Soviet Union was behind these attacks, the Reagan administration adopted what Burns Weston called a "Rambo-style" approach to international affairs (named after the US action film hero John Rambo, a US Army veteran traumatized by the Vietnam War, who used the skills he gained there to fight corrupt police officers, enemy troops, and drug cartels).[113] Weston referred to several actions taken by the Reagan administration that deserved this disparagement; including the Reagan administration's decision to withdraw from UNESCO; the refusal to ratify AP1 and the Law of the Sea Convention; the mining of the harbor in Nicaragua and the announced refusal to comply with the merits of the Nicaragua case, followed by the reversal of a 39-year foreign policy commitment to the ICJ's compulsory jurisdiction; the invasion of Grenada; the "sky jacking" of an Egyptian civilian aircraft following the *Achille Lauro* attack and the dispatching of a Delta force to capture the attackers in Italian territory; the bombing of the Libyan coastal cities of Benghazi and Tripoli; and so on.[114]

The bombing of the Libyan coastal cities of Benghazi and Tripoli represented a paradigm shift. It came on the heels of the *Achille Lauro* affair when members of the Palestine Liberation Front, a PLO splinter group, murdered Leon Klinghoffer, a 69-year-old Jewish American man in a wheelchair and threw him overboard. This notorious event, which was

made into a film and a musical, inspired Sofaer to write an article for *Foreign Affairs* where he complained that the existing laws on counterterrorism were not only flawed but "perverse."[115] (The Italian government had refused to extradite the suspect, Abu Abbas, and let him go, after he and the hijackers had been intercepted by F-14 Tomcat Fighters in an Egyptian airplane over the Mediterranean and forced to land at a NATO airbase in Sicily.) Despite conventions criminalizing acts of terrorism, including hundreds of extradition treaties between states, the law of self-defense, in Sofaer's opinion, was inadequate, because it did not enable armed force to be used against terrorists in self-defense. The UN Charter was effectively handicapping the awesome power of the United States to enforce international law. Sofaer took specific aim at the PLO and complained that AP1 legitimized terrorism.[116] Sofaer's article was published a few weeks before Shultz's speech to the National Defense University on low-intensity warfare in January 1986, where he expressed his opinion that when the law failed, the use of force was necessary to combat terrorism, or else the UN Charter would become nothing more than "a suicide pact."[117]

When Shultz gave this speech, the ICJ was deliberating the merits of a case that Nicaragua had brought before the Court over the United States' support for the Contras, a right-wing paramilitary force of Nicaraguan rebels who were conducting covert actions against the leftist Sandinista regime in Nicaragua. The case was viewed with apprehension by the US government as it provided the ICJ with an opportunity to pass judgment on the laws of war in customary international law that had been transformed as a result of decolonization process that had provoked so much disquiet amongst neoconservatives and Vietnam War veterans.

4. The Vietnam War, the Arab-Israeli Conflict, and the *Nicaragua* Case

Central America may appear far removed from the conflicts in Vietnam and the Middle East, but for neoconservatives and Vietnam War veterans, Nicaragua was a Soviet client aligned to Cuba's fiercely anti-American revolutionary leader Fidel Castro and the PLO. There was also a direct parallel between Israel's support for the Lebanese Forces (founded by the anti-communist *Kataeb* or Phalange party) during the civil war in Lebanon (1975–90), and US support for the Contras (an anti-communist counter-revolutionary group made up of ex-guardsmen that had supported the Somoza dynasty) during the civil war in Nicaragua (1979–90), which were both justified in collective self-defense. And, of course, the US interven-

tion in the Vietnam War had also been justified in collective self-defense.[118] Pillorying the PLO was not difficult to do as it was aligned with United States' enemies in Iran, Cuba, Vietnam, and the Soviet Union. In an article for *Commentary* magazine, the veritable "bible" of neoconservatism,[119] Kirkpatrick alleged that the PLO had made common cause with the Sandinistas in Nicaragua.[120]

The Vietnam and Arab-Israeli conflicts also affected developments in neighboring El Salvador, where the Salvadoran Communist Party leader, Jorge Shafik Handal, the son of Palestinian Arab immigrants from Bethlehem in what was then part of the British Mandate of Palestine, visited Moscow and Hanoi in search of arms. Following his visit, Vietnam agreed to ship 60 tons of weapons left behind by the Americans to Salvadoran guerrilla fighters.[121] Although the Iran-Contra scandal that damaged the careers of McFarlane, Pointdexter, and Oliver North had not yet become known, both Israel and the United States were selling weapons to Iran to fund the Contras in Nicaragua—even though they accused Iran of sponsoring international terrorism. Israel also provided the US government with weapons that Israel had confiscated from the PLO in Lebanon to send to the Contras in Nicaragua.[122]

The stakes were high in the *Nicaragua v United States* case because the ICJ was viewed as an important factor in the court of world public opinion. The Sandinistas were calculating that the United States would not be able to sustain its support for the Contras if American public opinion turned against the government as had happened during the latter stages of the Vietnam War when Congress "pulled the rug" on its contributions to the war effort following an effective political warfare offensive directed by Hanoi among antiwar groups in the US media, college campuses, and church groups.[123] The campaign succeeded in turning public opinion against the war hastening the fall of Saigon that was forever seared in the collective American consciousness by the image of hundreds of southern Vietnamese clamoring to board the last US Marine helicopter evacuating the US embassy.

4.1. The Nicaragua *Case: The First Phase*

Things started badly for the United States at the ICJ, when the Court ruled that it had jurisdiction to examine the merits, even though Shultz had submitted a reservation to the United States' Optional Clause declaration, which sought to prevent the Court from exercising jurisdiction.[124] Despite this reservation, the ICJ decided it had jurisdiction because the

State Department had not observed its own six-month notice period before attempting to modify its optional clause declaration.[125] The decision blindsided State Department lawyers who thought that their arguments had been airtight.[126] The decision was viewed with derision because it meant the ICJ had to decide the case on the basis of customary international law since the US multilateral treaty reservation prevented the Court from applying the UN Charter and other multilateral treaties.[127]

As customary international law on the use of force had been shaped by events in the UN in the previous decade, when the UN had recognized the legitimacy of national liberation movements and their struggles at the Diplomatic Conference in Geneva, even the ICJ's staunchest defenders in the State Department realized that were they to proceed to the merits of the case, they were likely to lose.[128] Reflecting on this moment decades later, Davis Robinson, the State Department's legal adviser, described the ICJ's decision in the first phase of the *Nicaragua* case as the "most disillusioning experience" of his life.[129] "The long love affair between the United States and the Court [had] c[o]me to an end," mused Gerson, then Kirkpatrick's counsel at the UN.[130]

On October 7, 1985, the United States terminated its optional clause declaration with the ICJ.[131] Six weeks later, Benjamin Netanyahu, then Israel's ambassador to the United Nations, followed the US lead, in what appeared to be a carefully calibrated move, by signing Israel's declaration terminating its 1956 acceptance of the compulsory jurisdiction of the ICJ.[132]

In justifying the US government's decision to terminate its optional clause declaration, Sofaer complained that a great many of the states that had emerged from decolonization since 1945 could "not be counted on" to share US views of the "original constitutional conception of the UN Charter," particularly with regard "to the special position of the permanent members of the Security Council in the maintenance of international peace and security."[133] Although the government of Israel provided no explanation for the termination of its optional clause declaration, Robbie Sabel, who was counselor for political affairs in Israel's embassy to the United States in the 1980s, later explained that Israel was wary of submitting disputes to the ICJ as the judges of the Court were appointed by the UN General Assembly that "has an automatic anti-Israeli majority."[134]

4.2. The Nicaragua *Case: The Second Phase*

On June 27, 1986, six months after Shultz had referred to the UN Charter's provision on the use of force as akin to a "suicide pact," the ICJ handed

down its decision on the merits of the *Nicaragua* case. In a lengthy decision, the Court rejected by 12 votes to three the US government's central contention: that its support for the Contras was consistent with its right of collective self-defense under international law. By 12 votes to three, the Court also found that the United States had breached its legal obligations not to interfere in the affairs of another state by training, arming, equipping, financing, and supplying the Contra forces in Nicaragua.[135]

This decision particularly infuriated Eugene Rostow, the highest-ranking Democrat in the Reagan administration, who was also the first chairman of the Committee on the Present Danger and a leading neoconservative.[136] In addition to his directorship of the Arms Control and Disarmament Agency in the Reagan administration, Rostow penned many articles on the Arab-Israeli conflict, always siding with Israel and defending Likud's settlement policy in the Occupied Palestinian Territories.[137] Like Feith and other neoconservatives, Rostow had close connections to leading right-wing figures in Israeli politics.[138] Unsurprisingly, given his hawkish views, which he shared with his brother Walt, who was the first to advise President Kennedy to deploy US combat troops in South Vietnam,[139] Rostow claimed that the ICJ's decision on the merits in *Nicaragua* ranked "in folly with that of the Supreme Court of the United States in *Dred Scott v. Sandford* as an act of hubris and an abuse of power."[140]

What particularly upset the neoconservatives and Vietnam War veterans in the Reagan administration were the implications of the *Nicaragua* judgment for the ability of the United States to *legitimately* project its military power in overseas conflicts in the Third World unless it could demonstrate that its use of armed force was consistent with interpretations of the UN Charter and customary international law, which included the views of Third World states that had joined the UN during decolonization. This was because in rejecting the United States' collective self-defense argument, the Court had based its reasoning on UN resolutions, declarations, and treaties that had been adopted during the height of decolonization, which recognized the right of peoples to fight "against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" as Article 1 (4) of AP1 expressed it. If the United States did not have a right of self-defense in Nicaragua (because attacks on El Salvador and Honduras from the Sandinistas did not reach the level of an "armed attack" triggering a response in collective self-defense), then the PLO and other liberation movements could legitimately make similar arguments to justify attacks on Israel and other US allies that would not have a right of collective self-defense either. As Gerson observed, the ICJ

stipulated that acts of violence by armed bands must "occur on a significant scale before the right of self-defense could properly be invoked."[141] Moreover, the Court excluded from armed attacks, "assistance to rebels in the form of provision of weapons or logistical or other support."[142] This led Gerson to complain that a government targeted by another for low-intensity attack, in the form of supply of weapons or logistical support for guerrillas seeking to topple its regime, was deprived of any means to defend itself. It could not go to the UN, as it would be condemned for acting against groups struggling for political freedom. "The victim therefore became the villain; the state daring to respond to guerrilla attacks became itself the aggressor."[143]

5. Conclusion

Neoconservative and Vietnam War veterans in the Reagan administration—some of whom were also international lawyers—played a crucial role in scuttling US ratification of AP1. The reasons why they opposed ratification of AP1 varied, but in general it was based on the belief that the Soviet Union and its friends in the Third World had succeeded in modifying IHL in a way that was inimical to the policy goals being persuaded by the Reagan administration in the Third World. Many US officials serving in the Reagan administration still felt chastened by the Vietnam War. There was little military advantage for the US armed forces in recognizing an improved position for guerrilla fighters. Many of the neoconservatives had either studied in Israel or were connected to individuals in the Likud party, and were on the record as supporters of Israel's settlement policy, which was classified in AP1 as a "grave breach" of the 1949 Geneva Conventions. They also viewed the PLO as "a murder organization which serves as a political tool and military arm of the Arab States and as an instrument of Soviet imperialism" to quote from Likud's 1977 election manifesto.[144] Accordingly, given these strong views, there was much substance to Aldrich's claim that ideological and political considerations were the primary reasons for the failure of the Reagan administration to ratify AP1 in 1987. This conclusion has been borne out by subsequent events, with the United States' closest allies during the Cold War, including many members of NATO, as well as Australia and New Zealand, having ratified AP1, albeit with reservations and statements of understanding. The United States could have done the same, as Aldrich had suggested in 1977, and the Joint Chiefs had prepared reservations and statements of understanding

in their 1982 review. In 1989, the Soviet Union even ratified AP1 without a reservation or a statement of understanding even though it is a nuclear weapon state. The irony is that the United States, by refusing to ratify AP1, has found itself in the "good company" of states like Turkey, Pakistan, Myanmar, and most glaringly of all Iran—which is still designated by the United States as a state sponsor of terrorism.

An enduring legacy of these debates is that they continue to influence contemporary debates on the law of armed conflict, by redefining traditional understandings of non-intervention and self-defense, whereby the United States and Israel continue to espouse a very broad right of self-defense in top-secret conversations among smaller groups of likeminded states.[145] In their attempts to reinterpret the *jus ad bellum* in this way, these states continue to privilege the *opinio juris* of the most technologically advanced and powerful of states and ignore the views of the Third World, even though they represent the largest bloc of states at the UN, thereby undermining the development of customary international law.[146] Sofaer, for example, continued to espouse a very broad notion of self-defense even before the attacks on the United States on 9/11.[147] After the Clinton administration (in the midst of the Monica Lewinsky scandal) bombed Afghanistan and Sudan in retaliation for attacks on US embassies in Kenya and Tanzania in 1998 in "Operation Infinite Reach," (the attacks did not emanate from those countries—the Al-Shifa plant, which produced over half of Sudan's pharmaceuticals, did not produce chemical weapons, as alleged, and bin Laden was not in the camps that were attacked), Sofaer claimed that "[a]rmed attacks permitting self-defense can occur anywhere, not just on US territory."[148] This was an argument that legitimized the US practice of targeted killings globally that became a central feature of America's endless wars.[149] Sofaer also claimed that the United States, as a permanent member of the UN Security Council, had the power "to block adoption of any measure aimed at forcing it to abide by any standard whatever, or even the enforcement of any decision of the international court that concludes the United States has behaved illegally or attempts to impose any sanction on the United States concerning its use of force."[150] It had apparently not occurred to lawyers, like Sofaer, that these arguments could be used by the other permanent members of the UN Security Council. And this is precisely what happened in February 2022, when Russian president Vladimir Putin took advantage of American arguments in formulating the Russian Federation's rationale for invading Ukraine, by referring to "precedents," such as NATO's aerial bombardment of Serbia in 1999 and US support for regime change in Iraq, Libya, Syria, and so on (states that—

coincidentally—happened to all be close allies of the Soviet Union during the Cold War, and that maintained close ties to Russia).[151]

Ultimately, however, it was Aldrich, Matheson, Robinson, and the other veteran lawyers who served in the State Department and the Pentagon during the Carter and Reagan administrations who had the last laugh. For they understood that bringing the United States into compliance with the provisions of the *jus in bello* pioneered in the 1970s was more legitimating for American war than constraining—as Amanda Alexander shows in her chapter in this volume. So while the neoconservatives won the political battle in the 1980s, it was the old school liberals long employed in government service who understood that the United States could still become bound by the consensus provisions of API, even without ratifying the protocols, through the development of customary international law.[152]

NOTES

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1. During the Cold War, references to the "Third World" referred to those states that became members of the Non-Aligned Movement that were not aligned with either the capitalist or communist blocs. Many of these states were non-European societies that had been colonized from the sixteenth century by the European Empires, and which gradually acquired political independence since the 1940s. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004, 2007 ed.), 3.

2. See Edwin Brown Firmage, "The 'War of National Liberation' and the Third World," in John Norton Moore, ed., *Law and Civil War in the Modern World* (Baltimore: Johns Hopkins University Press, 1974), 304–47.

3. The focus of this article is on AP1, rather than APII, because the Reagan administration did not oppose ratification of APII, although it appears that no deci-

sion was taken in the Senate on ratification of APII because it had become too closely associated with AP1. See Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010), 133.

4. George Shultz, *Turmoil and Triumph: My Years as Secretary of State* (New York: Charles Scribner's Sons, 1993), 678.

5. See Richard Falk, "The Decline of Normative Restraint in International Relations," *Yale Journal of International Law* 10 (1984–85): 263–70.

6. These individuals have been identified as neoconservatives either because they were members of the Committee on the Present Danger or because they have identified themselves as such in their own writings and in interviews. While many of the names on the list are uncontroversial, some might baulk at the inclusion of Shultz. However, see his interview with Daniel Henninger, "George Shultz, Father of the Bush Doctrine," *Wall Street Journal*, April 29, 2006, reprinted on the website of the Hoover Institution here: https://www.hoover.org/research/george-shultz-father-bush-doctrine. On how the neoconservatives shaped American politics in the 1970s–2000s, see Peter Steinfels, *The Neoconservatives: The Men Who Are Changing America's Politics* (New York: Simon and Schuster, 1979). Stefan Halper and Jonathan Clarke, *America Alone: The Neoconservatives and the Global Order* (Cambridge: Cambridge University Press, 2004). Gary Dorrien, *Imperial Designs: Neoconservatism and the New Pax Americana* (New York: Routledge, 2004). Murray Friedman, *The Neoconservative Revolution: Jewish Intellectuals and the Shaping of Public Policy* (Cambridge: Cambridge University Press, 2005). Jacob Heilbrunn, *They Knew They Were Right: The Rise of the Neocons* (New York: Doubleday, 2008). Jesús Velasco, *Neoconservatives in US Foreign Policy under Ronald Reagan and George W. Bush: Voices behind the Throne* (Baltimore: Johns Hopkins University Press, 2010). Justin Vaïsse, *Neoconservatism: The Biography of a Movement* (Cambridge, MA: Harvard University Press, 2011). Identifying Vietnam War veterans was much easier as this is a question of fact. For a book that explores the role of Vietnam War veterans in the Reagan administration, see Robert Timberg, *The Nightingale's Song* (New York: Simon & Schuster, 1995).

7. See the statement by Hess (Israel) in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1974–1977), vol. VI, at 39–42, paras. 39–64. The records of the Diplomatic Conference can be accessed at the Library of Congress online at https://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html (last visited February 13, 2020).

8. See the statement by Aldrich (United States), in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1974–1977), vol. VI, at 293, para. 76.

9. See, e.g., the acknowledgments in Benjamin Netanyahu, *A Durable Peace: Israel and Its Place Among the Nations* (New York: Warner Books, 1993, 2000 reprint), 465 (thanking Douglas Feith for reading the manuscript and suggesting important revisions). Allan Gerson knew Yoni Netanyahu and his brother Benjamin when he studied in Israel in the early 1970s, and vacationed with them. Interview with the author, Washington, DC, November 9, 2015. Gerson died from CJD on December 1, 2019. See Katharine Q. Seelye, "Allan Gerson, Who Sought Justice for Terror Victims, Dies at 74," *New York Times*, December 4, 2019.

10. Richard Nixon, *The Real War* (New York: Warner Books, 1980), 5.

11. See Jeane J. Kirkpatrick and Allan Gerson, "The Reagan Doctrine, Human Rights, and International Law," in L. Henkin et al., *Right v Might: International Law and the Use of Force* (Washington, DC: Council on Foreign Relations, 1991, 2nd ed.), 19–36 at 21.

12. Kirkpatrick and Gerson, 30. Carter's perceived unwillingness to confront the Soviet Union in the Third World may be questioned on account of his administration's massive increase in defense spending that preceded the election of Ronald Reagan in 1980, and his support for the Mujahidin in Afghanistan before Moscow's invasion, but it was a perception largely shared by neoconservatives. See Greg Grandin, *Empire's Workshop: Latin America, the United States, and the Rise of the New Imperialism* (New York: Henry Holt & Co. 2010), 66.

13. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports (1984), at 392. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports (1986), at 14.

14. George Aldrich, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions," *American Journal of International Law* 85 (1991): 1–20.

15. George Aldrich, "Why the United States of America Should Ratify Additional Protocol I," in A. J. M. Delissen and G. J. Tanja, eds., *Humanitarian Law of Armed Conflict: Challenges Ahead* (Dordrecht: M. Nijhoff, 1991), 127–44.

16. See George Aldrich, "New Life for the Laws of War," *American Journal of International Law* 75 (1981): 764–83. George Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols," in Christophe Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (The Hague: Martinus Nijhoff and the International Committee of the Red Cross, Geneva, 1984), 129–37. George Aldrich, "Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol 1," *Virginia Journal of International Law* 26 (1986): 693–720.

17. Other scholars and former officials that voiced criticism of the Reagan administration's stance on AP1 included Howard Levie, who held the Stockton Chair at the US Naval War College from 1970–1971, Aldrich's colleague Waldemar A. Solf, and the ICRC's Hans-Peter Gasser. See Waldemar Solf, "A Response to Douglas J. Feith's law in the Service of Terror—The Strange Case of Additional Protocol," *Akron Law Review* 20 (1986): 261–89. Hans-Peter Gasser, "An Appeal for Ratification by the United States," *American Journal of International Law* 81 (1987): 912–25. Howard Levie, "The 1977 Protocol 1 and the United States," *Saint Louis University Law Journal* 38 (1993): 469–84. See also, Theodor Meron, "The Time Has Come for the United States to Ratify Geneva Protocol 1," *American Journal of International Law* 88, no. 4 (1994): 678–86.

18. Aldrich, "Why the United States of America should Ratify Additional Protocol I," 128.

19. Aldrich, "Why the United States of America should Ratify Additional Protocol I," 143–44.

20. See *American Society of International Law Proceedings* 74 (April 17–19, 1980): 208.

21. *American Society of International Law Proceedings* 74 (April 17–19, 1980): 208.

22. W. Hays Parks entered federal service as a commissioned officer in the Marine Corps. His initial service was as a reconnaissance officer. He served in the Republic of Vietnam (1968–1969) as an infantry officer and senior prosecuting attorney for the First Marine Division. His subsequent service included first Marine Corps Representative at the Judge Advocate General's School, US Army; congressional liaison officer for the Secretary of the Navy; and Chief, Law of War Branch, Office of the Judge Advocate General of the Navy. See W. Hays Parks, "Air War and the Law of War," *Air Force Law Review* 32 (1990): 1 at 63–111.

23. See Report by the J-5 to the Joint Chiefs of Staff on JCS Review of the 1977 Protocols Additional to the 1949 Geneva Conventions. Reference: IZ, September 13, 1982 (declassified September 30, 2013). This 45-page report produced for Fred Iklé, under secretary of defense for policy, consists of a memorandum and two annexes with suggested draft language for possible reservations and interpretative declarations in the event President Reagan agreed to send the Protocols to the Senate for advice and consent to ratification. It was signed by James E. Dalton, lieutenant general, USAF, director, Joint Staff. It would appear the Joint Chiefs of Staff, while reserving their final opinion, did not oppose ratification. Their primary concern was to avoid a situation that could lead to differing operational procedures that could adversely affect combined forces operations. They also wanted to consult with allies. The report can be downloaded from the special collections link at the Executive Services Directorate, available at http://www.esd.whs.mil/FOIA/Reading-Room/Reading-Room-List/Special_Collections/

24. Report by the J-5 to the Joint Chiefs of Staff on JCS Review of the 1977 Protocols Additional to the 1949 Geneva Conventions. Reference: IZ, September 13, 1982.

25. See Parks, "Air War and the Law of War," at 89, footnote 283 (criticizing the [undated] NATO review).

26. Report by the J-5 to the Joint Chiefs of Staff on JCS Review of the 1977 Protocols Additional to the 1949 Geneva Conventions (September 13, 1982), Appendix A, para. 4.

27. Report by the J-5 to the Joint Chiefs of Staff on JCS Review of the 1977 Protocols Additional to the 1949 Geneva Conventions (September 13, 1982), Appendix A, para. 4.

28. See Allan Gerson, *The Kirkpatrick Mission: Diplomacy without Apology, America at the United Nations 1981–1985* (New York: The Free Press, 1991), 250–52.

29. The cable dated October 16, 1984, is reproduced in Gerson, 252. One of the reasons why the Pentagon opposed ratification was because it did away with "the distinction between combatants and non-combatants, [and] it would be hard to square ratification of the protocols with our policy of combatting terrorism."

30. The "top-secret" memo was subsequently leaked to the *New York Times* where it was disparaged. See W. Safire, "Rights for Terrorists? A 1977 Treaty would Grant Them," *New York Times*, November 15, 1984, A31. (Criticizing Robinson for producing a memo calling on the administration to "move towards effective international humanitarian protection, consistent with Western military interests.")

31. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), available on the website of the Executive Services Directorate at https://www.esd

.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Joint_Staff/1985_JCSM_152-85_Review_of_GC_AP_I.pdf

32. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949.

33. Vessey also commanded the 3rd Armored Division Artillery from 1967 to 1969, and was the division chief of staff from 1969 to 1970, before being promoted to brigadier general.

34. Report by the J-5 to the Joint Chiefs of Staff on JCS Review of the 1977 Protocols Additional to the 1949 Geneva Conventions (September 13, 1982), Annex B to Appendix A.

35. Strikingly, this complaint about abuse of the laws of war as "war crimes" for propaganda purposes during the anti-Vietnam War protests was very similar to the complaints that appeared in article written by W. Hays Parks a decade later. See W. Hays Parks, "Exaggerated or One-Sided Claims of Law of War Violations," in John Norton Moore, ed., *Deception and Deterrence in "Wars of National Liberation," State-Sponsored Terrorism and Other Forms of Secret Warfare* (Durham: Carolina Academic Press, 1997), 103–26.

36. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), 2.

37. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), 2.

38. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), 3.

39. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), 3.

40. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), 36.

41. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), 44.

42. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), 52.

43. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), 52.

44. Memorandum for the Secretary of Defense: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949. JCSM-152–85 (May 3, 1985), 97.

45. Aldrich, "'Why the United States of America should Ratify Additional Protocol I," at 129–30.

46. See the Letter of Transmittal, The White House, January 29, 1987, *American Journal of International Law* 81 (1987): 911.

47. *American Journal of International Law* 81 (1987): 911.

48. *American Journal of International Law* 81 (1987): 911.

49. *American Journal of International Law* 81 (1987): 911.

50. See Michael Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal of International Law and Policy* 2 (1987): 419–36 at 420.

51. See Abraham Sofaer, "The Rationale for the United States Decision," *American Journal of International Law* 81 (1987), at 784–87. See also, the statement by Hess (Israel) in *Official Records*, *Vol. VI*, at 39–42. See further, the detailed explanations provided by Lapidoth in *Official Records*, *Vol. VI*, at 121–22, paras. 16–19 as to why Israel could not vote for Article 42 (now Article 44) of AP1. See also, the statement by Sabel as to why Israel could not vote for Article 84 (now Article 96(3)) in *Official Records*, *Vol. VI*, at 352–53, paras. 72–74.

52. See *Official Records*, *Vol. VI*, at 353, para. 75.

53. Sofaer, "The Rationale for the United States Decision," at 785. But see Levie's criticisms, "The 1977 Protocol I and the United States," at 475–76.

54. Don Oberdorfer, "Abraham Sofaer: Players State's Legal Adviser Deals with Policy, Then the Law," *Washington Post*, March 10, 1986, A13.

55. See Linda A. Malone, "Sharon vs. Time: The Criminal Responsibility under International Law for Civilian Massacres," *Palestine Yearbook of International Law* 3 (1986): 41–74.

56. Don Oberdorfer, "Abraham Sofaer: Players State's Legal Adviser Deals with Policy, Then the Law," *Washington Post*, March 10, 1986, A13.

57. Aldrich, "Why the United States of America should Ratify Additional Protocol I," at 133.

58. According to Solis, no liberation movement made an application under Art. 96(3). See Solis, *The Law of Armed Conflict* at 128. See also, Meron, "The Time Has Come for the United States to Ratify Geneva Protocol I," at 683.

59. Aldrich, "Why the United States of America should Ratify Additional Protocol I," at 134–37. The United Kingdom submitted the following reservation to ensure that the Provisional IRA could not make such a declaration: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies."

60. Tellingly, with the exception of Israel, the United States' closest allies (such as Canada, Australia, and the United Kingdom) submitted reservations and interpretative declarations when they ratified AP1—in some cases using language that was very similar to the language used by the Joint Chiefs in the J-5 review. For a useful analysis of these reservations, see Julie Gaudreau, "The Reservations to the Protocols additional to the Geneva Conventions for the Protection of War Victims," *International Review of the Red Cross* 849 (2003): 143–84.

61. See the declaration submitted by France upon its accession to AP1 on April 11, 2001. See also the declaration made by the United Kingdom on July 2, 2002, which stated that "It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons."

62. Aldrich, "Why the United States of America should Ratify Additional Protocol I," at 133.

63. Aldrich, "Why the United States of America should Ratify Additional Protocol I," at 141.

64. George Aldrich, "Comments on the Geneva Protocols," 320 *International Review of the Red Cross* (*IRRC*) (October 31, 1997), available at https://www.icrc.org/eng/resources/documents/article/other/57jnv2.htm (last accessed February 24, 2020) (no page numbers provided).

65. In June 1981, Feith drafted a memorandum for Richard Allen, the national security adviser, insisting that Israel's settlements were "legal" despite the views of the State Department's legal adviser. See the advice by the legal adviser Herbert J. Hansell on the illegality of Israeli civilian settlement activity in "United States: Letter of the State Department Legal Adviser Concerning the Legality of Israeli Settlements in the Occupied Territories," *International Legal Materials* 17 (1978): 777–79. Compare this to Douglas J. Feith, "Notes on Legality of Israel's West Bank Settlements," June 16, 1981. Collection: Executive Secretariat, NSC, Near East and South Asia [Middle East]. Contents: Israel/Iraq-Israel. Box: 68. Ronald Reagan Library. Feith continued to argue in favor of the legality of Israel's settlements into the 1990s during the negotiations between Israel and the PLO. See Douglas Feith and Eugene Rostow, *Israel's Legitimacy in Law and History*: *Proceedings of the Conference on International Law and the Arab-Israeli Conflict* (1993). See also, Douglas Feith, "A Mandate for Israel," *National Interest* 33 (1993): 43–58, at 56.

66. See Douglas Feith, "Protocol 1: Moving Humanitarian Law Backwards," *Akron Law Review* 19 (1985–1986): 531–35, at 534.

67. See Douglas Feith, "Law in the Service of Terror—the Strange Case of Additional Protocol I," *National Interest* 1 (Fall 1985): 36–47.

68. Feith, "Law in the Service of Terror," 36–47.

69. See Leslie H. Gelb, "War Law Pact Faces Objection of Joint Chiefs: Joint Chiefs said to Oppose Revisions in War Law," *New York Times*, July 22, 1985, A1.

70. M. Weisskopf, "Geneva Convention Changes Questioned: US Fears Creation of Terrorist Safety Net," *Washington Post*, July 23, 1985, A3. Feith also appears to have influenced the views of administration officials such as Guy Roberts, assistant staff judge advocate and commander-in-chief Pacific Forces, who attended a conference on terrorism and low intensity warfare at the Fletcher School of Law and Diplomacy in 1985 and who cited Feith's article favorably in his work. See Guy B. Roberts, "The New Rules for Waging War: The Case Against Ratification of Additional Protocol 1," *Virginia Journal of International Law* 26, no. 1 (1985): 109–70 (citing half a dozen times the then unpublished copy of Feith's paper "Law in the Service of Terror" that was presented at the Fourteenth Annual Conference on Terrorism and Low Intensity Operations at the Fletcher School of Law and Diplo-

macy in April 1985). Feith's article is also cited by W. Hays Parks, "Air War and the Law of War," at 77.

71. See Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York: HarperCollins, 2008), at 39–40. See also, Gerson, *The Kirkpatrick Mission*, at 246–54.

72. See W. Hays Parks, "Air War and the Law of War," at 79. See also, W. Hays Parks, "Perspective and the Importance of History," *Yearbook of International Humanitarian Law* 14 (2011): 361–82 at 363.

73. As Hays Parks complained, a vote by consensus "permitted delegations to pressure other delegations to accept an article, however imperfect it may have been, rather than break consensus." See W. Hays Parks, "Air War and the Law of War," at 83.

74. R. Nixon, *The Real War*, 4.

75. R. Nixon, *The Real War*, 97.

76. Statement before the House Services Committee, February 2, 1984, in *Selected Works of General John W. Vessey, Jr., USA Tenth Chairman of the Joint Chiefs of Staff 22 June 1982—30 September 1985* (Washington, DC: Joint History Office: Office of the Chairman of the Joint Chiefs of Staff, 2008), 105.

77. See *Official Records of the Diplomatic Conference, Vol. V*, at 52–53 (no paragraph number provided).

78. According to Lewy, the Vietcong assassinated 36,725 persons and abducted 58,499 between 1957–1972. See Gunther Lewy, *America in Vietnam* (Oxford: Oxford University Press, 1987), 272–73 ("80 percent of the terrorist victims were ordinary civilians and only about 20 percent were government officials, policemen, members of the self-defense forces or pacification cadres").

79. On the connections between the PLO and Vietnam, see P. T. Chamberlain, *The Global Offensive: The United States, the Palestine Liberation Organization, and the Making of the Post-Cold War Order* (Oxford: Oxford University Press, 2012), 41–75. On the influence on popular American culture of Israel's raid on Entebbe, see Amy Kaplan, *Our American Israel: The Story of an Entangled Alliance* (Cambridge, MA: Harvard University Press, 2018).

80. See W. Hays Parks, "Air War and the Law of War," at 69.

81. Parks, "Air War and the Law of War," at 69, note 238.

82. South Africa only acceded to AP1 after the fall of apartheid.

83. See Section 5 below.

84. See Charles Lysaght, "The Attitude of Western Countries," in Antonio Cassese, ed., *The New Humanitarian Law of Armed Conflict, Vol. I* (Napoli: Editoriale Scientifica, 1970), 349–85 at 354.

85. As explained to me by Nicholas Veliotis who was assistant secretary of state from January 1981 until the end of 1983 when he was replaced by Richard Murphy. Interview with author, Metropolitan Club, Washington DC, November 19, 2015.

86. See Michael Bothe et al., eds., *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff, 1982), at 518.

87. See Menachem Begin, *The Revolt: Story of the Irgun* (Steimatzky, 1952, 2007 reprint), 212–30 (describing the attack on the King David Hotel).

88. Quoted in Avi Shlaim, "The Likud in Power: The Histiography of Revision-

ist Zionism," *Israel Studies* 1 (1996): 283. For a slightly different rendering of the Hebrew translation, see Walter Laqueur and Dan Schueftan, eds., *The Israel-Arab Reader: A Documentary History of the Middle East Conflict* (London: Penguin, 2016 edition), 207.

89. Interview between Allan Gerson and the author, Washington, DC, November 9, 2015.

90. Thomas M. Franck, *Nation Against Nation: What Happened to the UN Dream and What the US Can Do about It* (Oxford: Oxford University Press, 1985), 214.

91. Including, Daniel Patrick Moynihan, *On the Law of Nations* (Cambridge, MA: Harvard University Press, 1990).

92. See Moynihan, "Abiotrophy in Turtle Bay: The United Nations in 1975," *Harvard International Law Journal* 17, no. 3 (1976): 465–502. Regarding the UN debate on "Zionism is racism" resolution, see Franck, *Nation Against Nation*, 205–9.

93. See Jeane J. Kirkpatrick and Allan Gerson, "The Reagan Doctrine, Human Rights, and International Law," in Henkin et al., ed., *Right v Might*, 19–36 at 32.

94. For Yasser Arafat's keynote address, see Question of Palestine. UN doc. A/PV.2282 and Corr.1, November 13, 1974. The PLO was granted observer status in GA Res 3237, November 22, 1974.

95. See Leo Gross, "Voting in the Security Council and the PLO," *American Journal of International Law* 70, no. 3 (1976): 470–91, at 471.

96. Prosper Weil, "Toward Relative Normativity in International Law?" *American Journal of International Law* 77 (1983): 413–42, at 420. Daphné Richemond-Barak, Senior Researcher at the International Institute for Counter-Terrorism at the Lauder School of Government, Diplomacy and Strategy at the IDC Herzliya, in Israel, is the granddaughter of Prosper Weil. See W. Michael Reisman, "In Memoriam: Prosper Weil (1926–2018)," *Proceedings of the ASIL Annual Meeting* 113 (2019): 401–2.

97. See Shabtai Rosenne, "Israel and the United Nations: Changed Perspectives, 1945–1976," in Morris Fine and Milton Himmelfarb, eds., *American Jewish Yearbook 1978* (1977): 49.

98. Rosenne, "Israel and the United Nations: Changed Perspectives, 1945–1976" (emphasis in original).

99. On the decredentialization of South Africa, see GA Resolution 3207, September 30, 1974. On the attempts to expel Israel from the UN in the early 1980s, see Franck, *Nation Against Nation*, 216–18.

100. See, e.g., GA Res. A/3070, November 30, 1973.

101. See SC Res 446, March 22, 1979, SC Res 452, July 20, 1979, SC Res 465, March 1, 1980, SC Res 476, June 30, 1980. SC Res 478, August 20, 1980.

102. See SC Res 465, para 6 (adopted unanimously).

103. D. P. Moynihan, "Joining the Jackals: The US at the UN 1977–1980," *Commentary* 72, no. 2 (February 1981), available at https://www.commentarymagazine.com/articles/joining-the-jackals/ (last accessed February 24, 2020) (no page numbers given).

104. See Tunisia: draft resolution UN doc. S/13911, April 28, 1980.

105. The US vote in favor of Resolution 465 was mentioned as one reason (among others) for Carter's failure to win reelection, as it affected the New York primary in which the presidential candidate lost to his Democratic rival Ted Kennedy. See

Jack W. Germond and Jules Witcover, *Blue Smoke and Mirrors: How Reagan Won and Why Carter Lost the Election of 1980* (New York: Viking Press, 1981), at 151–56. Consider also the backlash caused by the publication of Jimmy Carter, *Palestine: Peace not Apartheid* (New York: Simon & Schuster, 2006). Even Carter's Jewish supporters in the Democratic Party turned against him. See Alan Dershowitz, *The Case Against Israel's Enemies: Exposing Jimmy Carter and Others Who Stand in the Way of Peace* (Hoboken, NJ: Wiley & Sons, 2008), at 17–48.

106. Dershowitz, *The Case Against Israel's Enemies*. See also Norman Podhoretz, *The Present Danger: Do We Have the Will to Reverse the Decline of American Power?* (New York: Simon & Schuster, 1980). Norman Podhoretz, *Why We Were in Vietnam* (New York: Simon & Schuster, 1980).

107. Moynihan, "Joining the Jackals" (no page number provided).

108. Kirkpatrick and Gerson, "The Reagan Doctrine, Human Rights, and International Law," in Henkin et al., ed., *Right v Might: International Law and the Use of Force* (1991), 19–36 at 21.

109. Kirkpatrick and Gerson, at 24.

110. Kirkpatrick and Gerson, at 23–24.

111. Robert C. McFarlane, "Terrorism and the Future of Free Society," *Studies in Conflict and Terrorism* 8, no. 4 (1986): 315–26 at 315.

112. McFarlane, "Terrorism and the Future of Free Society," 315–16.

113. Burns H. Weston, "The Reagan Administration Versus International Law," *Case Western Reserve Journal of International Law* 19 (1987): 295–302 at 296.

114. Weston, "The Reagan Administration Versus International Law," 296–97.

115. Abraham, Sofaer, "Terrorism and the Law," *Foreign Affairs* 64 (1986): 901–22 at 902.

116. Sofaer, "Terrorism and the Law," at 912–15.

117. Shultz, *Turmoil and Triumph*, at 678.

118. Public Law 88–408, August 10, 1965. See also, US State Department: "The Legality of United States Participation in the Defense of Viet-Nam," *American Journal of International Law* 60 (1966): 565–85.

119. Norman Podhoretz was the longtime editor-in-chief of *Commentary*.

120. Jeane J. Kirkpatrick, "US Security & Latin America," *Commentary* 71 (January 1, 1981), at 29.

121. See N. Rostow, "Nicaragua and the Law of Self-Defense Revisited," *Yale Journal of International Law* 11 (1986): 437–61, at 443, note 23. Rostow cites a State Department publication *"Revolution beyond our Borders" Sandinista Intervention in Central America* (July 19, 1981), at 5–6. See also, Robert F. Turner, *Nicaragua v. United States: A Look at the Facts* (Washington, DC: Institute for Foreign Policy Analysis, 1987), xii., and 55–59.

122. Amir Oren, "The truth about Israel, Iran and the 1980s US arms deals," *Ha'aretz*, November 26, 2010.

123. Turner, *Nicaragua v. United States: A Look at the Facts*, xiii, and 40–41.

124. See the reference to the Shultz letter dated April 6, 1984, in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), *Jurisdiction and Admissibility*, 398, para 13.

125. See *Judgment on Jurisdiction and Admissibility*, 418–21, at paras 59–65.

126. See Gerson, *The Kirkpatrick Mission*, at 265.

127. See *Judgment on Jurisdiction and Admissibility*, at 424, para. 73. See also, *Judgment on the Merits*, at 31–38, paras 42–56. For a neat account of the case see Mary Ellen O'Connell, "The *Nicaragua Case*: Preserving World Peace and the World Court," in John E. Noyes, Laura A. Dickinson, and Mark W. Janis, eds., *International Law Stories* (New York: Foundation Press, 2007), 339–70.

128. Gerson, *The Kirkpatrick Mission*, at 270–71.

129. Michael P. Scharf and Paul R. Williams, eds., *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge: Cambridge University Press, 2010), at 61.

130. Gerson, *The Kirkpatrick Mission*, at 271.

131. See United States: Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, October 7, 1985, 24 *International Legal Materials* (*ILM*) (1985), at 1742.

132. See Israel: Statement Concerning Termination of Acceptance of ICJ Compulsory, November 19, 1985, United Nations Treaty Series, C.N.318.1985.TREATIES-4 (signed by Benjamin Netanyahu). On the 1956 declaration, see Robbie Sabel, *International Law and the Arab-Israeli Conflict* (Cambridge: Cambridge University Press, 2002), 247–48. Prior to his appointment as Israel's UN Ambassador, Netanyahu had served as Israel's acting Ambassador to the United States in Washington, DC, a position he held for six months. Meir Rosenne, who replaced Netanyahu as Ambassador to the United States, was described by Netanyahu as "an expert in international law, [who] was among the best of the traditional diplomatic core." See Benjamin Netanyahu, *Bibi: My Story* (New York: Simon & Schuster, 2022), 170.

133. Sofaer, Schachter, and D'Amato, "The United States and the World Court," *Proceedings of the American Society of International Law* (*ASILPROC*) 80 (1986), at 207.

134. Sabel, *International Law and the Arab-Israeli Conflict*, 248.

135. See *Judgment on the Merits* at 146–50, para. 292.

136. Friedman, *The Neoconservative Revolution*, 142–43. Vaïsse, *Neoconservatism*, 162–63.

137. See Eugene Rostow, "'Palestinian self-determination': Possible Futures for the Unallocated Territories of the Palestine Mandate," *Yale Studies in World Public Order* 5 (1978–1979): 147–72.

138. Benzion Netanyahu, the father of Benjamin Netanyahu, introduced his son to Eugene Rostow in 1974. See Netanyahu, *Bibi*, 106. Feith and Rostow also knew each other and collaborated on a joint publication defending the legality of Israel's settlement project. See Feith and Rostow, *Israel's Legitimacy in Law and History* (1993).

139. Although Rostow was a champion of civil liberties in the United States when he was a young man and opposed the internment of Japanese Americans during the Second World War, he was a hawk when it came to foreign policy, and he was a revisionist when it came to Israel. His brother Walt Rostow, who was deputy national security adviser to McGeorge Bundy, and who was later appointed national security adviser by President Johnson, was also a hawk. Walt Rostow's staunch support for the Vietnam War attracted such infamy that when he left government in 1969, not one of America's elite universities would offer him a job. According to his biographer David Milne, Walt Rostow "was the most hawkish civilian member of the Kennedy and Johnson administrations with respect to the unfolding crisis in Viet-

nam. He was the first to advise Kennedy to deploy US combat troops South Vietnam, and the first to provide a rationale for the bombing campaign against North Vietnam that Lyndon Johnson later implemented." See David Milne, *America's Rasputin: Walt Rostow and the Vietnam War* (New York: Hill and Wang, 2008), 6–7. Like his brother, Eugene Rostow also championed the American war in Vietnam, a stance that he did not soften in his later years. When Eugene Rostow "returned to his beloved Yale after his stint in the Johnson Administration, hushed whispers of 'War Criminal' followed Rostow in the halls," Gerson recalls. "He tried to defuse student anger through teas in the faculty lounge, but was rarely able to find common ground with his detractors." See Gerson, *The Kirkpatrick Mission*, 48.

140. Eugene V. Rostow, "Disputes involving the inherent right of self-defense," in Laurie F. Damrosch, ed., *The International Court of Justice at a Crossroads* (New York: Transnational Publishers, 1987), 264–87, at 278. In *Dred Scott* (1856), the US Supreme Court's infamously decided that an African American could never become a citizen of the US: "The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a Negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States." See *Dred Scott v. John F.A. Sandford in Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, December Term, 1856, ed. Benjamin C. Howard, Vol. XIX (Washington, DC: William Morrison & Co., 1857), 393 at 407–8.

141. Gerson, *The Kirkpatrick Mission*, at 274.

142. Gerson, *The Kirkpatrick Mission*, at 274.

143. Gerson, *The Kirkpatrick Mission*, at 274.

144. Shlaim, "The Likud in Power," at 283.

145. See Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2018), 170–75, 233–37, 248–53. See further Daniel Bethlehem, "Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors," *American Journal of International Law* 106 (2012): 770–77; and the critique in Victor Kattan, "Furthering the 'war on terrorism' through international law: How the United States and the United Kingdom resurrected the Bush doctrine on using preventive military force to combat terrorism," *Journal on the Use of Force and International Law* 5, no. 1: 97–144. On the ideological origins of the Bush doctrine, see Victor Kattan, "'The Netanyahu Doctrine,' the National Security Strategy of the United States of America, and the Invasion of Iraq," in Satvinder Juss, ed., *Human Rights and America's War on Terror* (New York: Routledge, 2019), 1–28.

146. Kattan, "Furthering the 'war on terrorism.'" See also, the US reaction to the ICRC's customary international law study (arguing in favor of privileging the practice of the United States and its allies) in *American Journal of International Law* 101 (2007): 639–41. See further, the letter by Bellinger and Haynes in *International Legal Materials* 46 (2006): 514–31.

147. Abraham D. Sofaer, "US Acted Legally in Foreign Raids/US Acted Legally on Terrorists," *Newsday*, October 19, 1998, A29.

148. Sofaer, "US Acted Legally in Foreign Raids," A29.

149. Sofaer remained close to Shultz after he left government service, when he became a fellow at Stanford University's Hoover Institution, where Sofaer continued to articulate a very broad right of self-defense. See, for example, Abraham D. Sofaer, "On the Necessity of Pre-emption," *European Journal of International Law* 14, no. 2 (2003): 209–26. Abraham D. Sofaer, *The Best Defense? Legitimacy and Preventive Force* (Stanford: Hoover Institution Press, 2010).

150. Sofaer, "US Acted Legally in Foreign Raids."

151. See the Address by the President of the Russian Federation, February 24, 2022, at http://en.kremlin.ru/events/president/news/67843

152. Matheson understood the United States could become bound by the provisions of AP1 by way of restating customary international law, which allowed the United States to accept the main body of substantive provisions of AP1, while rejecting those provisions the Third World had succeeded in including in the Protocol during the Diplomatic Conference. See the statement by Matheson in 1987 in "The United States Position on the Relation of Customary International Law."