CORRESPONDENCE

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TO THE EDITOR IN CHIEF:

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The July 1988 issue of the *American Journal of International Law* contained an article (Reisman & Silk, *Which Law Applies to the Afghan Conflict?*, 82 AJIL 459 (1988)) that took me back 25 years to 1963–1965, when I was charged with responsibility for legal matters related to the increasing American involvement in Southeast Asia for the Department of Defense General Counsel's office. Among those few matters about which legal advice was sought from the Defense Department bureaucracy was the question of which body of law applied to our activities in Vietnam. The arguments used by Reisman and Silk to support categorizing the entire Afghanistan situation as an "Article 2," international, armed conflict are very familiar; they have the same weaknesses now when addressed to the Afghanistan situation as they did then when sought to be applied to Vietnam.

A letter is not the place for detailed argumentation, and the copious literature coming out of the Vietnam War can fill the gaps for those who care to review it. But, with great admiration for their factual research, I would point out two basic problems in the Reisman and Silk article. First: The search for a single answer to a complex legal question leads to some strain between the facts and the legal analysis. As in Vietnam, the positive law of the 1949 Geneva Conventions creates a different category for an armed conflict that pits rivals for authority against each other wholly in one country, than for an armed conflict that pits people of acknowledgedly different legal subordination against each other. In practice, what might be perceived politically as parts of a single armed conflict cannot always be reconciled with the positive legal regimes that govern such matters as war crimes and prisoner-of-war entitlements. To avoid international condemnation for violating the law, the parties must treat the conflict as legally several. Following categorizations at least as old as the *McLeod* case of 1841, a Soviet pilot shot down in Pakistan while following Soviet orders would presumably be entitled to prisoner-of-war treatment, while an Afghan Army soldier captured in Afghanistan by some faction of the mujahidin would probably not. Between these two examples lie a host of situations that the positive law does not clearly categorize. The division in the law between armed conflicts wholly within the territory of a single party to the 1949 Conventions and armed conflicts extending beyond that territory is certainly unrealistic, but cannot be ignored if the Conventions are read either literally or in the light of state practice after 1949.

Second: Even if there were a single legal regime applicable to all phases of the Afghan struggle, it is far more likely that a more or less objective view of the intentions of the framers of the 1949 Conventions and state practice ever since would categorize the conflict as internal and not "international." The dominant struggle is one for authority wholly within the body politic of Afghanistan, a single state party, and it is that location that the framers of the Conventions decided should determine the legal regime. Nor does it help to call this a national liberation struggle. Indeed, it is overwhelmingly likely that the reason the framers of the 1949 Conventions chose the "international"–"non-international" criteria for determining the regime that should apply instead of the traditional natural law objective measures of intensity of the conflict, duration, control of territory, degree of organization, etc., was to keep colonial independence struggles out of the regime of the general law of war. It is true that the 1977 Protocol I tries to reverse that implication of 1949 by endowing the leaders of national independence movements with the authority to shift categories, but the United States has not accepted Protocol I, in part for that very reason.

Actually, the reasons the United States has not accepted that shift probably run much deeper than has been officially said, somewhat to the confusion of those who approach these issues as matters of political manipulation. Underlying the American position seems to be the apprehension that reintroducing the motive for the struggle into questions of legal regime confuses the *jus ad bellum* with the humanitarian *jus in bello* and subverts the entire structure built with such difficulty from 1863 onwards. But this raises issues not touched upon by Reisman and Silk, who seem to feel that the humanitarian intentions of some of the negotiators of 1949 and 1977 and the International Committee of the Red Cross (including Pictet, of course) overcome the fact that statesmen refused to accept many implications of a humanitarian approach. In my opinion, the lines drawn in negotiation represent the positive law and, indeed, the natural law far better than the reiteration of the intentions of those whose proposals for further humanitarian rules failed either in the negotiating phase in 1949 or in the ratification phase after 1977.

None of this is to argue that the Reisman and Silk preference for considering the Afghan struggle an Article 2 international conflict is unrealistic, only that their argument is insufficient. The groundwork must first be laid and should have been laid by challenging the credentials of the Karmal "government" when presented to the United Nations many years ago. I made this suggestion in November 1981 in a newspaper column distributed by United Press International and widely ignored. Equally ignored until fairly recently has been the 1980 Report of the International Law Association (American Branch) Committee on Armed Conflict setting out the reasons that, in the opinion of at least a substantial minority of the committee, 1977 Protocol I is built on a false base and its ratification by the United States would have effects that its proponents seem unwilling to discuss.

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