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Establishing Legal Norms Through Multilateral Negotiation — The Laws of War

*by George H. Aldrich**

THERE ARE BASICALLY TWO WAYS to codify international law: Through the practice of nations and the consequent development of customary law, or through multilateral negotiation. For the laws of war, we have chosen the latter and have been engaged in the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law since 1974.¹ For everyone involved, there is a growing conviction that the multilateral law-making conference is the least efficient and most difficult machinery ever developed by the art of diplomacy.

A quick glance at the U. N. Law of the Sea Conference will show that the Geneva Conference on the Laws of War is not unique in its glacial progress or in its inefficiency. Can it possibly be worthwhile to put a hundred or more governments through such a laborious exercise? More importantly, will the end product justify the time and effort put into its production? These are the questions I would like to examine in the context of the continuing Conference on the Laws of War.

It should be noted that this Conference has certain advantages not shared by all such conferences. First, it began with a negotiating text prepared by the International Committee of the Red Cross (I.C.R.C.) based on both its own experience and expertise, and on the comments and criticisms obtained from two confer-

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¹ This Conference was convened by the Swiss Government as depository of the Geneva Conventions of 1949 on the Protection of War Victims. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1956] 6 U.S.T. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, [1956] 6 U.S.T. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1956] 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1956] 6 U.S.T. 3516, T.I.A.S. No. 3365.

ences of government experts in 1971 and 1972.² It took the Law of the Sea Conference two sessions to develop a single negotiating text; whereas, the Laws of War Conference began in 1974 with a well thought-out single text. Secondly, the participation in the Laws of War Conference is somewhat limited. Although approximately 120 delegations are technically accredited,³ in fact the active participants number no more than 70; in some of the committees, one is lucky to find more than 40 represented on a consistent basis. Despite these relative advantages, however, the Conference has consumed three annual 2-month sessions, and will return next spring for a fourth, and presumably final, session with a number of difficult issues still unresolved.⁴ If this experience is a useful guide, the Law of the Sea Conference may hope to finish sometime comfortably into the 1980's.

A fundamental decision, with significant implications for speed and efficiency, which must be faced in each multilateral conference, is whether to make decisions by majority vote, by consensus, or by something in between. At the Geneva Conference on the Laws of War we have moved to something in between, but something that approaches consensus.

At the first conference session in 1974, this was not the case. Much time was lost that year on political issues, such as invitations to national liberation movements and to the Provisional Revolutionary Government of South Vietnam, all of these issues being decided by majority vote.⁵ This procedure carried over to one substantive matter — the scope of the protocol on international armed conflicts, where it was also decided by majority vote that wars of national liberation were international armed conflicts to

² These two draft additional protocols were published in Geneva in June 1973 by the International Committee of the Red Cross and have, throughout the Conference, served as the basis for negotiation.

³ All parties to the Geneva Conventions and all members of the United Nations were invited. One hundred and twenty-five governments were represented at the first session, but by the third session this number was reduced to 106.

⁴ The Conference has met from February 20 to March 29, 1974, from February 3 to April 18, 1975, and from April 21 to June 11, 1975. The fourth session is scheduled for March 17 to June 10, 1977.

⁵ See Baxter, *Humanitarian Law or Humanitarian Politics?*, 16 HARV. INT'L L.J. 1 (1975); Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM. J. INT'L L. 77 (1975); Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The First Session of the Diplomatic Conference*, 5 NETH. Y.B. INT'L L. 3 (1974); and Cassese, *Current Trends in the Development of the Law of Armed Conflict*, 24 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO (1974).

which the new protocol and the 1949 Geneva Conventions would apply. The United States and most of its Western friends and allies were in the minority on this question, and it remains a serious threat to our accession to the protocol.

At the second session of the Conference in 1975, many votes were taken but with a difference. Most of the fundamental and significant disagreements were first worked out through negotiated compromises. In particular, careful and successful efforts were made by the United States and the Soviet Union to ensure that any provisions adopted were acceptable to both of them and their allies. For example, we compromised with the Soviet delegation, and thereby settled for less than we wanted in the way of improving the protecting power system. Stung in Vietnam by the refusal of our enemies to agree to the appointment of a protecting power to oversee the treatment of our prisoners, we wanted the Conference to adopt an article that would establish a procedure to ensure the appointment of a protecting power or a substitute organization. We proposed the I.C.R.C. as the automatic fallback in the event agreement could not be reached within a fixed period of time. This was clearly unacceptable to the Soviets. We were faced with a choice of whether to press for our preferred provision, which probably could have won a simple majority vote (although perhaps not the two-thirds vote required for final, plenary adoption), or to strive for the best obtainable compromise. We chose the latter. The result is an article that states clearly the obligation to agree to a protecting power and establishes a procedure designed to make it very embarrassing to refuse one, but that stops short of providing for a required, ultimate fallback.⁶

Such efforts at compromise with the Soviet Union had other, more positive effects. For example, the North Vietnamese were strongly opposed to codifying the customary law rule of proportionality, saying that it had been used to justify the American air attacks against them. Proportionality is the rule of customary law that says that an otherwise lawful attack becomes unlawful if it may be expected to result in injury or damage disproportionate to the military advantage sought. However, we worked out with the Soviets a compromise in which we changed a few phrases, including the key phrase "disproportionate" to "not excessive in relation to," and they induced the Vietnamese to accept it.⁷

⁶ See Forsythe, *Who Guards the Guardians: Third Parties and the Law of Armed Conflict*, 70 AM. J. INT'L L. 41 (1976).

⁷ The relevant text (Article 50) as adopted by Committee III reads as follows:

This effort at compromise on key issues, coupled with voting on lesser issues, continued at the third session of the Conference, though with less success because the Soviets seemed less willing to make an effort to convince their allies. This was particularly noticeable in our efforts to produce a compromise on the vexing question of prisoner-of-war status for guerrillas, where the Soviet delegation repeatedly refused to press the North Vietnamese to accept a compromise and told this author to negotiate the question directly with the Vietnamese. Hopefully, the Soviets will be more willing to be of assistance at the fourth session, since the result on the guerrilla question was highly embarrassing to them — a last-minute compromise which this author worked out with the Vietnamese and which the Soviet delegation was unable to accept.⁸

There are, of course, arguments both for and against a consensus approach. However, with respect to the laws of war, there is an unusually strong need for universality of acceptance — one's enemies in warfare are, perhaps, unlikely to be found among like-minded States, and a rule that is not universally accepted, or nearly so, is easier to ignore when it becomes inconvenient, as most rules eventually do. Also, when a rule is unacceptable to one State or to a group of States, reservations will be made to it if they are permissible.⁹ We have experienced recently in Vietnam the frustration of the law through the misuse

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2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall

- (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

5. No provision of this article may be construed as authorization for any attacks against the civilian population, civilians, or civilian objects.

⁸ The essence of the compromise was to accord prisoner-of-war and legitimate combatant status to most guerrillas who are members of the armed forces of a party to a conflict but to deny it to those who fail during the preparations for an attack to meet certain minimum requirements of distinction from the civilian population. Even these latter guerrillas, however, would be entitled to protections equivalent to those accorded prisoners of war.

⁹ The Conference has not yet decided whether reservations will be prohibited with respect to certain specified articles, as the I.C.R.C. has proposed, but it seems likely that the decision will be against such a prohibition because the list of articles would be virtually impossible to negotiate.

of reservations,¹⁰ and we should endeavor to avoid them in the future.

Although in any multilateral negotiation each participating State arrives with its own positions, which are based upon its understanding of its own national interests, there are bound to be a number of shared precepts, assumptions, and goals. A significant part of the challenge facing the negotiator is to understand and utilize these shared precepts in order to foster broad agreement. In the negotiations on the laws of war, there are at least three major precepts that are widely shared. One may call them the precepts of humanity, military necessity, and sovereignty.

The humanitarian precept has understandably guided the International Committee of the Red Cross in its preparatory work and is the most prominent theme underlying the two draft protocols prepared by the I.C.R.C. as the basis for negotiation at the Conference. This precept is shared, in varying degrees, by all participants in the Conference. For most, it shows itself in a felt need to improve the protections to be accorded civilians, but it also influences, to some degree, the development of all the other provisions of the protocols. It has even affected the heretofore unsuccessful efforts to improve the protections available to the captured guerrilla fighter.

The second shared precept is that of military necessity. This precept means very different things to different people, but there is a general acceptance that it limits the effects of the humanitarian precept in that the rules cannot be accepted and applied if they would reduce military effectiveness *too much*. In other words, some reduced effectiveness is an acceptable price to pay for more humanitarianism, but there is a limit. Simply to state this precept is to reveal its subjective character. It means something very different to the representative of a country that sees itself fighting an offensive war and the representative of a country planning solely defensive activity and underground resistance. Differences are obvious between countries that expect to rely primarily on manpower and those that look to firepower. Thus, although military necessity is undeniably a shared precept of

¹⁰ The North Vietnamese construed improperly their reservation to Article 85 of the Geneva Convention on the Protection of Prisoners of War as permitting them to deny prisoner-of-war status and protection to all captured American soldiers on the grounds that they all were war criminals. See the discussion of this subject in 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 229-234 (1968).

considerable importance, it is not very helpful in the development of broadly acceptable rules of warfare restricting the use of force.

The concept of national sovereignty implies the sovereign equality of States and the inequality of anything other than a State. It has been wondrous to watch this concept prevail over the humanitarian precept in the negotiation of the second protocol — that dealing with non-international armed conflicts. In this Conference of sovereign States, the rebellious group is the least favored of all, unless, of course, it is a national liberation movement, in which case it is the most favored. But that term is defined narrowly in order to limit its application in effect to Southern Africa and Palestine.¹¹ Sovereignty has also limited progress in the improvement of the protecting power system and other law enforcement mechanisms for international armed conflicts. Next year, the United States will try to gain acceptance of an impartial inquiry commission to investigate alleged violations of the protocol on international armed conflict, but past experience does not give us reason to be confident of success, for the sovereign rights of States will most certainly be affronted by such a commission. Yet, if there is any single need that is greatest in the laws of war, it is the need to improve compliance with the law; but this need is sacrificed to the precept of sovereignty.

Looking backward over the last 5 years of effort to develop the laws of war through negotiation, and looking ahead at the uncertain prospects for the 1977 session of the Conference, is it possible to reach any conclusions about the choice between codification and custom as means for the development of the law? Certainly codification has proved to be slow and frustrating work. It may yet produce a generally acceptable protocol on international armed conflicts that will be a force for humanity and moderation in the conduct of hostilities. If so, those of us who have endured the frustrations will feel well rewarded. On the other hand, we may discover that the final product meets the minimum requirements of only a very few countries; perhaps because of a

¹¹ The Conference, at its first session in 1974, decided to invite as observers "the National Liberation Movements which are recognized by the regional intergovernmental organization concerned." It was understood that only the Arab League and the Organization of African Unity recognized liberation movements. Similarly, in its amendment to Article 1 of Protocol I, as adopted by the First Committee of the Conference, international armed conflicts are defined as including "armed conflicts in which peoples are fighting against colonial and alien occupation and racist regimes in the exercise of their right of self-determination. . . ."

perceived imbalance among the precepts, or perhaps because of reaction against extraneous political blemishes, such as Article 1 on wars of national liberation. Despite the clear need for humanitarian law in civil wars, the future of the protocol on non-international armed conflicts would appear bleak in view of the dominance of the precept of sovereignty among the great mass of developing nations.

Yet, this author believes that the decision to make this effort was justified, whatever the result. If we compare the law of combat (the "Hague law"),¹² which has been left to custom since 1907, with the law of the Geneva Conventions, which has gone through several codifications, there is no doubt that the latter has developed more rapidly in this century.¹³ Doubtless there are various reasons why this has happened, but I believe the choice of technique of legal development has been a significant factor. For one thing, a codification conference forces national decisions on limits on the use of force that would otherwise be deferred. A government does not make such difficult decisions unless it is forced to do so. There is, of course, a risk that decisions will be made prematurely before the issue is ripe for decision. But the risk of delay may be greater. If the law of aerial warfare had been codified in a generally acceptable way in the 1920s and '30s, would it have endured under the stress of the Second World War? Would it have deterred the strategic bombing of cities? No one can know, but the example underlines both the risks and the benefits of the codification of combat law. One thing is clear: Leaving the development of that law to custom is to leave the decisions to be made in the heat of battle by those who are fighting wars and that tends to produce the lowest common denominator.

¹² See Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, [1910] 36 STAT. 2259, T.S. No. 538; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annex Thereto, Oct. 18, 1907, [1910] 36 STAT. 2277, T.S. No. 539; Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, [1910] 36 STAT. 2310, T.S. No. 540; and Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, [1910] 36 STAT. 2351, T.S. No. 542.

¹³ Note that the United States Army Field Manual on the Law of Land Warfare, DEPT. OF THE ARMY, FM 27-10 (July 1956), states that "the customary law of war is binding upon all nations" (para. 7) and that Hague Convention No. IV has "been held to be declaratory of the customary law of war" (para. 6). To the extent that this Convention remains declaratory of customary law, it is obvious that the law has not developed significantly since 1907. There have, of course, been some developments in customary law as revealed, for example, in the trials of war criminals during and after the Second World War and in the writings of scholars.

The outcome of the present Geneva negotiations on the laws of war is uncertain. The delegation of the United States remains reasonably optimistic that the results will be positive. Perhaps more importantly, we remain committed to doing all in our power to produce, in Geneva, a general agreement on terms acceptable to our Government, to our allies, to our potential adversaries, and to as many other governments as possible. A more narrowly acceptable agreement would have little value to us.¹⁴ We believe the challenge is worthy of our best efforts.

¹⁴ Secretary of State Kissinger expressed our commitment in a speech to the American Bar Association in Montreal on August 11, 1975. He said: "The United States is committed to the principle that fundamental human rights require legal protection under all circumstances; that some kinds of individual suffering are intolerable no matter what threat nations may face. The American people and Government deeply believe in fundamental standards of humane conduct; we are committed to uphold and promote them; we will fight to vindicate them in international forums."