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Symposium on the 1977 Geneva Protocols

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SYMPOSIUM ON THE 1977 GENEVA PROTOCOLS

INTRODUCTION

by

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The Geneva Protocols of 1977 reflect the latest attempt by governments to revise and confirm the law of armed conflict. Their fundamental significance lies in the fact that over one hundred nations considered the subject of such importance that they took the time and expense to participate in the four year long negotiations. The four sessions of the Conferences were periodically convened from 1974 to 1977. The International Committee of the Red Cross (ICRC) in 1971 and 1972 limited experts to Geneva to draft a Model Convention on the Law on Armed Conflicts. It was this draft which provided the impetus for the Swiss Government to convene a diplomatic Conference in Geneva in 1974.

Nations, like individuals, are motivated by self interest when they take on the burden of added constraints freely entered into by agreement. In the case of nations, of course, it is national self interest. It is perhaps startling to realize that nations with such diverse social systems and ideologies as the United States, the U.S.S.R., China, Syria, Israel, North Vietnam, East Germany, and the countries of the European Economic Community could even agree to sit down together at Geneva and hammer out an international agreement on the law of armed conflict. The fact that the representatives from so many states could reach agreement and sign the final Act, on 10 June 1977, is even more amazing. It is true that very few nations have ratified Protocol One or Protocol Two, yet most of the nations which participated in the Conference, including all of the above mentioned countries who did sign the Final Act ad referendum, will attempt to comply with the principal provisions of Protocol One.

There is general agreement that the Hague Conventions of 1899 and 1907, while still technically in force, have been made largely obsolete by technological advance in weapons systems, communications, air power, and the ballistic missile. Yet the fundamental axiom that acts of war should not cause unnecessary or disproportionate suffering with regard to the military advantage to be gained, remains unchanged from those early conventions. What is new in the Protocols of 1977 is the added emphasis placed on the protection of the civilian population, not only in occupied areas held by the enemy, but also for the protection of civilians in the homeland. It cannot be doubted that virtually all nations accept the premise that there are legal restraints on the use of force in time of military engagements. It is in the interests of all belligerents,

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as well as neutral countries, to have these restraints spelled out in a formal and widely accepted agreement.

The dilemma, which was constantly being confronted by the delegates at the four sessions of the Geneva Conference on the Additional Protocols, was how to gain a widespread consensus updating and developing the humanitarian law pertaining to international armed conflict without diluting the efficacy of the rules. For example, how to best protect the civilian population from the devastation of military operations without placing unacceptable limitations on military operations. As in the case of all multilateral negotiations involving a large number of nations with dissimilar and often opposing viewpoints, the drafting process entails compromise and some ambiguity. The end product is not a succinct, unequivocal document with a clarity few could misinterpret. Rather the final agreement reflects a negotiated solution where all of the parties or blocs make adjustments by giving up some demands and making concessions. For example, many western countries objected to any reference to "peoples (who) are fighting against colonial domination and alien occupation and against racist regimes." It was the view of western countries that the concept of just and unjust wars might tend to weaken the rules of conduct which are to apply with equal force to all belligerents. However, the United States and its allies ultimately consented to the inclusion of this phrase in the Protocol.

Prohibitions against attacks upon dams or dikes also generated controversy at the conference as to how this prohibition was to be applied. For example, under what conditions should these targets be immune? Under what conditions could they be considered legal military objectives?

Prohibitions inserted in Protocol One against indiscriminate attacks on the civilian population also required compromises between those countries likely to be the primary users of air power and those who perceived themselves as the object of air attack. Deliberately vague language as to certain provisions was required in order to achieve the ultimate goal of securing a revised and more humanitarian law regulating international armed conflict. Diplomats, who for the most part negotiated these Protocols, are not unlike lawyers. They do not wish to waste their time in fruitless and unsuccessful negotiations. Nor do they wish to cause expense to their clients, the governments to which they are accredited, in unproductive proceedings. Most informed and objective observers believe that the new Protocols do represent a major step in regulating conduct in modern armed conflict. However, there is much less consensus on the issue of their acceptance and ratification as an integral document. Even with the possibility of reservations being annexed, some commentators believe their acceptance as binding on a belligerent could impose too great a limitation on a belligerent's armed forces.

The ratification process can pose a far more formidable obstacle to a treaty's coming into force than the actual negotiation and conclusion of the agreement itself. The United States Senate, which must give its advice and consent before any treaty can come into force in the United States, is well-known for its failure to give its consent to many seemingly meritorious treaties. Moreover there are numerous treaties which have been signed by United States delegates to international conferences which, for one reason or another, have never been submitted to the Senate for their advice and consent. The Geneva Protocols of 1977, at this date, fall into the latter category. They are still being studied by various branches of the government, most especially the Departments of Defense and State, as to whether their submission to the Senate should be recommended to the President. At this time, May 1986, it appears as if no recommendation will be made and that the Protocols will be placed on the bureaucratic shelf.

The purpose of the symposium held at The University of Akron Law School in November 1985 was to elicit a discussion among some of the most knowledgeable scholars and governmental experts on the merits of Protocol One, and the advantages and disadvantages to the United States in becoming a party to that agreement. Each of the participants, whether from offices within the United States, such as the Department of Defense, the Joint Chiefs of Staff, or from international institutions such as the International Committee of the Red Cross, have given their individual views, which are not necessarily representative of their offices or agencies. Nevertheless, it has been my experience, over approximately twenty-eight years of government service, that the views of these individuals generally do not deviate in material detail from the tentative or prospective positions of the offices from which they come. If this hypothesis is correct in this case, and it is only my assumption that it is, then Protocol One may be on the shelf for some time to come.

Even if this be so, unratified international agreements can frequently become part of a new and developing customary law. When nations become belligerents they frequently tacitly accept the rules, or most of them, which have been hammered out with some care at an international conference in which they participated. For example, the 1923 Draft Hague Rules of Aerial Warfare were never formally adopted by states, but they were used as a guide to the Navy in World War II and are frequently cited in the Air Force pamphlet on the Conduct of Armed Conflict and Air Operations. At the minimum, there is tacit acceptance by belligerents to those unratified rules which are generally perceived as creating new and better standards for the reduction of unnecessary suffering and the improved protection of civilians and civilian property as well as military personnel *hors de combat*. The new rules for the protection of medical aircraft, for the search for missing and dead persons, and for the greater restraints on aerial bombing would seem to fall within the category of those rules which will become part of the customary law of war,

even if not formally ratified. Other more specific examples, such as the immunities conferred on descending parachutists who have escaped from aircraft in distress, and rules for the greater protection of the environment, could also be cited as emerging or accepted rules of customary international law.

To the extent that uniformly recognized principles embodied in Protocol One have not already been incorporated into field manuals and instructions of the armed forces of the signatory states, they will undoubtedly be brought into them as new instructions to the field are issued. As belligerents begin to incorporate the updated rules in their new manuals and rules of engagement, the substance of the Protocols themselves will reflect the modern law of armed conflict. Not all its provisions will be accepted as binding on belligerents, but, in essence, it will become the point of reference as to the legal restraints on the use of military force.

On balance, the rules comprise a much needed modernization of the rules for better protection of civilians and civilian objects, for the elimination of unnecessary suffering, and for the conservation of the earth's natural resources and the preservation of the environment. Perhaps it is not too unrealistic to accept the Protocols, whether or not ratified by a significant number of States, as improving the conditions under which armed conflicts take place, while awaiting the day when wars and battles are no longer common occurrences.