

Establishing Legal Norms Through Multilateral Negotiation—The Laws of War

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There are basically two ways to codify international law—through the practice of nations and the consequent development of customary law, or through a multilateral negotiation. For the laws of war, we have chosen the second and have been engaged in the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law since 1974. 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 United Nations Law of the Sea Conference will show that the Geneva Conference on the Laws of War is not unique in its glacial progress or its inefficiency. Can it possibly be worthwhile to put a hundred or more governments through such a laborious exercise? And, more importantly, will the end product conceivably 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 on the basis both of its own experience and expertise and of the comments and criticisms obtained at two conferences of government experts in 1971 and 1972. It took the Law of the Sea Conference two sessions just to develop a single negotiating text. Second, participation in the Laws of War Conference is somewhat limited. Although approximately 120 delegations are technically accredited, in fact the active participants number no more than 70, and, in some of the committees, no more than 40 are represented on a consistent basis. Despite these relative advantages, however, the Conference has consumed three annual two-month sessions, and will return this spring for a fourth, and presumably final one, with a number of difficult issues still unresolved. If that experience is a useful guide, the Law of the Sea Conference may hope to finish sometime comfortably into the 1980s.

A fundamental decision, with significant implications for speed and efficiency, which must be faced in each multilateral conference is whether to take 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. 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 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 there was a difference—most 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 ICRC 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 either had to press for our preferred provision, which probably could have won a simple majority vote (although perhaps not the two-thirds majority 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.

Such efforts at compromise with the USSR had other, and 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. This 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 the key phrase “disproportionate” to “not excessive in relation to,” and they induced the Vietnamese to accept it.

This effort at compromise on key issues, coupled with voting on lesser issues, continued at the third session of the Conference, though less effectively because the Soviets seemed less willing to push 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 me 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 guerrillas was highly embarrassing to them—a last-minute compromise which I worked out with the Vietnamese but which the USSR was unable to accept.

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. We have experienced recently in Vietnam the frustration of the law through the misuse of reservations, and we should endeavor to avoid them in the future if at all possible.

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 ICRC 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 thus-far unsuccessful efforts to improve the protections available to the captured guerrilla fighter.

A 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 limitation on effectiveness is an acceptable price to pay for more humanitarianism, but not too much. Simply to state this precept is to reveal its subjective character. It means something very different to 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 neces-

sity is undeniably a shared precept of considerable importance, it doesn't get you very far in the development of broadly acceptable rules of warfare restricting the use of force.

National sovereignty as a concept implies the sovereign equality of states and the inequality of anything other than a state. It has been wondrous to watch this precept 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. Sovereignty has also limited progress in the improvement of the protecting power system and other law enforcement mechanisms for international armed conflicts. Next year we shall 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. And 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 five 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 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.

And still, I believe that the decision to make this effort was justified, whatever the result. If we compare the law of combat (the Hague law), 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. Doubtless there is a variety of 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 decision on limits on the use of force that would otherwise be deferred.