Compliance with International Humanitarian Law

by George H. Aldrich

In 1974, the University of Leiden (Netherlands) established a Chair of International Humanitarian Law, whose first incumbent was Professor Frits Kalshoven, a familiar name to readers of the Review. *Mr. George Aldrich, who led the United States delegation at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts from 1974 to 1977, and who since 1981 has been a Judge at the Iran-United States Claims Tribunal in The Hague, was recently appointed as his successor.*

During an official ceremony held at the University of Leiden on 13 November 1990, the new holder of the "Red Cross Chair", as it is sometimes called, made a pressing appeal in his inaugural lecture for compliance with international humanitarian law. In his talk Professor Aldrich described with a large measure of realism the obstacles to implementation of the law but showed cautious optimism in reviewing the means available to the international community to surmount those obstacles.

The Review *is pleased to publish, with the author's agreement, the text of his lecture which brings to a close, on a note of appeal and hope, this series of articles devoted to implementation of international humanitarian law.*

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Rector Magnificus, Your Excellencies,
Ladies and Gentlemen,

It is a signal honor to be appointed as a professor by this renowned university, and I am grateful that so many of my friends and colleagues have found it possible to be present here in Leiden for the occasion. I am particularly appreciative that my distinguished predecessor in the

"Red Cross Chair", Professor Frits Kalshoven, is here. Over the years, I have learned much from Frits, and I admire him for many reasons, among which is his magnanimity in being present today; for when he gave his farewell address in 1989 I was unfortunately unable to attend.

At the outset, I want to acknowledge the presence of those whose support has made it possible for me to accept the offer of the Chair of International Humanitarian Law: first and foremost, my wife Rosemary, whose constant support and encouragement have been absolutely vital; secondly my colleagues at the Iran-United States Claims Tribunal, whose advice and assistance are deeply appreciated; thirdly, the Netherlands Red Cross, particularly its President, Mr. van der Weel, and the members of the Curitorium of the "Red Cross Chair"; and finally, the expert staff of the International Law Department at Leiden University, in particular, Ms. Astrid Delissen, who is my able assistant in presenting the course.

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I have chosen as my topic for this inaugural lecture the issue of compliance with international humanitarian law (IHL) — how Nation States and the members of the armed forces that those States send into combat can be brought to comply with the law throughout the course of military operations. This issue is, unfortunately, not only timely, it is also one of fundamental importance, as disrespect for the law breeds further disrespect. When nations are locked in mortal combat, the normal, peacetime methods of dispute resolution generally are no longer available. If the special methods provided by IHL for monitoring compliance and resolving disputes fail to stop serious and continuing breaches of that law, notions of reciprocity are all too likely to lead those nations into a downward spiral path of expanding noncompliance with the law, thereby vastly increasing the suffering of war victims, both combatants are noncombatants. In the end, widespread noncompliance with the law tends to bring the law itself into disrepute. One respected American news columnist, George F. Will, recently wrote that the phrase international law "often is virtually an oxymoron" and he asserted that, with respect to the use of force, it "often serves the ruthless by inhibiting only the scrupulous".[1] One does not have to be so cynical as Mr. Will to recognize that not merely the law on the legality

[1] George F. Will, "The Perils of Legality", *Newsweek*, 10 September 1990.

of the resort to force (*jus ad bellum*), but also the entire structure of the law governing the conduct of hostilities and the protection of war victims (*jus in bello*) is imperiled by widespread and serious violations, for that law, by definition, is applicable at times and in situations of utmost stress to the international legal order. One of this century's greatest authorities in the field of international law, Sir Hersh Lauterpacht, said:

"(I)f international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law".[2]

IHL is scarcely vanishing in the law books. On the contrary, it is found in many treaties where it is elaborated extensively in hundreds of articles. Moreover, these treaties have achieved very wide acceptance. The four Geneva Conventions of 1949,[3] in particular, have more than 160 Parties, and the newest treaty which codifies and develops customary law, Additional Protocol I of 1977,[4] already has 97 Parties.[5] Thus, the accepted law in the books is indeed robust. Where the law is in peril is in practice. The law in action seems anemic in comparison with the law in the books. Failure to comply with the law has been all too frequent. In some cases this failure clearly has resulted from considered policy decisions by governments that found it easier to agree to be bound by rules than to respect them when they are seen to be inconvenient in the course of an actual armed conflict, but such policy decisions are made easier by the same factors that are responsible

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[2] H. Lauterpacht, "The Problem of the Revision of the Law of War", 29 *British Y.B. Int'l L.*, pp. 360, 382 (1952).

[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

[4] For the text of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, see *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Final Act* (1977), reprinted in 16 ILM, p. 1391 (1977); D. Schindler and J. Toman, *The Laws of Armed Conflict*, Martinus Nijhoff Publishers, Dordrecht, Henry Dunant Institute, Geneva, 1988, (3rd edition), pp. 621-688; A. Roberts & R. Guelff, *Documents on the Laws of War*, Clarendon Press, Oxford, 1989, 2nd ed., pp. 389-446.

[5] Information concerning the numbers of States party is taken from publications by the ICRC.

for most other instances of failure to comply. I suggest that these factors are, first, ignorance of the law, secondly, skepticism and cynicism engendered by the belief that compliance with the law cannot effectively be obtained through coercion and that violations cannot effectively be punished, and thirdly, the absence of effective monitoring, fact-finding, and dispute settlement mechanisms. These factors, I suspect, often interact with each other to increase noncompliance. Let us examine them one by one with a view to discovering where action may best be taken to improve the future prospects for compliance with the law.

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First, ignorance. IHL, as it has developed to our day, is reasonably extensive and considerably complex. The four Geneva Conventions of 1949 comprise more than 450 treaty articles, and the two Additional Protocols of 1977 add another 130. Beyond these core treaty texts, there are various other relevant treaty provisions[6] and a corpus of customary international law, particularly on the means and methods of combat. Faced with such an abundance of rules, one can readily understand why the average person, particularly in peacetime, would be likely to opt for ignorance. In fact, of course, to dispel ignorance in a population does not require that all citizens be taught everything about these detailed rules. The commander of a prisoner-of-war camp needs to understand both the spirit and the letter of the law relating to the treatment of such prisoners, but the average citizen needs to know only the general principles. The soldier needs to know more than the average citizen, but not so much as his commanders. The fundamental educational task — what the Red Cross calls the duty of dissemination — is thus not so formidable as it may at first appear. Nevertheless, it is my impression that it is not generally being carried out with even minimal success in the western countries with which I am familiar, and I understand that the International Committee of the Red Cross (ICRC) finds inadequate dissemination of IHL to be nearly universal.

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[6] For example, the 1907 Hague Convention No. IV respecting the Laws and Customs of War on Land and its annexed Regulations, the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the 1981 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.

Under each of the relevant treaties, the responsibility for dissemination of knowledge of the law rests with the States party to the treaty. In Additional Protocol I, for example, this responsibility is laid down in the following terms:

"The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.[7]

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programs of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.[8]

Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof."[9]

With respect to the instruction of military personnel, I am confident that most armed forces teach at least some basic knowledge of parts of the law, but I am not at all confident that it is presented in ways that result in its being generally absorbed. It would be most interesting to see the results of a standardized knowledge test of IHL — practical, not academic knowledge — if such a test were given to military personnel in many countries. I suggest that the North Atlantic Treaty Organization consider designing and administering such a test to the allied forces assigned to it.

Insofar as instruction of civilians is concerned, I know of no country that distinguishes itself. Certainly as far as my own country is concerned, I am unaware that either I or any of my children ever heard a word about IHL throughout our years of elementary and secondary education. It was only in law school that I participated in an optional, and small, seminar on the subject. Is the situation substantially better in Europe? I hope so, but what I have heard makes me doubtful. Authorities responsible for public education need to be encouraged to teach the basic principles of IHL, and teachers need appropriate texts and training. National Red Cross Societies have an important role to play here, but governments may well need to provide financial incentives,

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[7] Art. 1, para. 1.

[8] Art. 83, para. 1.

[9] Art. 83, para. 2.

particularly in federal systems, such as the United States, where the federal government is responsible internationally for compliance with the treaties but state and local governments are responsible for public education.

When armed conflicts occur and are widely reported in the news media, useful opportunities are presented to inform the public about the law. People are more likely to note and remember legal rules when they are raised in the context of real and dramatic situations. I am certain, for example, that television and press comments about recent events in the Persian Gulf have taught millions of people that it is illegal to take civilians hostage and to hold them at military objectives in an effort to protect those objectives from attack. Yet, in the same news media comments, I hear speculation that, should hostilities begin, Baghdad will quickly be flattened. Such speculation seems never to recognize that the kind of indiscriminate "flattening" implicit in the suggestion would raise serious legal problems. Governments, scholars, and National Red Cross Societies could all, in my view, do more to inform the news media of the rules of IHL relevant to the stories they report, and the media could doubtless do more as well to ensure that they fully inform the public.

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The second of the factors I have posited as responsible for inadequate compliance with the law is skepticism and cynicism. If a person believes that violations of certain rules of law cannot be prevented or halted by means of coercion and that such violations are unlikely to be punished or redressed, that person is likely to be skeptical about the law, and I am afraid that just such beliefs are widely held today, not only by military officers and civilian government officials, but also by scholars in the field of IHL.[10] Unfortunately, there is a considerable basis in fact for such skepticism.

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[10] Judge Stephen M. Schwebel stated concisely the effects of compliance and of noncompliance. "If experience demonstrates that states may safely violate international law, its credibility suffers. States will not except compliance by others and be the less conscientious about their own. Correspondingly, observance of the law, and enforcement of the law, will generate expectations of future compliance and will thus enhance the present effectiveness of international law." Schwebel, *The Compliance Process and the Future of International Law*, 1981 Proceedings, American Society of International Law, pp. 180-181.

The repression of breaches of the 1949 Geneva Conventions and of the 1977 Protocol I is stated by those treaties to be the responsibility not only of the Parties to the conflict but of all Parties to the treaties.[11] Persons accused of grave breaches of the treaties are required either to be prosecuted by the Party having jurisdiction over them or to be handed over to another Party for criminal prosecution.[12] Experience suggests, however, that, except for wars that end with the total defeat of one Party, such as the Second World War, virtually all punishment for war crimes, as well as repression of lesser violations of the law, rests in the hands of the Nation whose nationals are the accused. It is obvious that the competent authorities of such Nations frequently fail to note or prosecute violations of the law which are apparent to their enemies and that those authorities are, perhaps understandably, concerned with the morale of their personnel to the point where they are reluctant to punish what may be seen from their nationalistic perspectives as excesses of zeal in time of war. It is certainly not irrelevant in this connection that virtually all Nations in this century have been quick to exploit modern means of mass communication for propaganda and to control the flow of information to their people, leading to what Professor Julius Stone called the "nationalization of truth".[13] An enemy quickly becomes demonized in the national consciousness; his war aims are seen as depraved and his soldiers as brutal and bloodthirsty. In such an atmosphere, respect for IHL suffers, and violations by one side, both real and imagined, are echoed by violations by the other side.

While the same restraints do not operate to deter punishment by the captor of prisoners of war who are accused of war crimes, there are other practical restraints which make such punishment rare. First, the captor frequently lacks adequate information during the hostilities to allege the culpability of particular prisoners and generally will find it difficult, if not impossible, to produce the witnesses or other evidence necessary for conviction. In addition, Parties to an armed conflict are understandably reluctant to prosecute and punish prisoners of war for fear that the enemy will see such action as

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[11] Art. 1 common to all four Conventions and to Protocol I.

[12] See, for example, Arts. 146 and 147 of the 1949 Geneva Convention on the protection of civilians.

[13] Julius Stone, *Legal Controls of International Conflict — A treatise on the dynamics of disputes and war law*, Maitland Publications Pty Ltd, Sydney, 1954, pp. 318-323.

unlawful mistreatment of its captured personnel and, as a result, will take reprisals against the prisoners it holds.

This brings me to the question of whether compliance with the law can effectively be obtained through coercion. The traditional means of such coercion is termed "reprisal". To what extent can one Party to a conflict coerce its enemy to comply with IHL by threatening to take or by taking reprisals, that is, actions that are themselves violations of the law but that are justified as measures designed to induce the enemy to cease its violations? At the outset, I must admit that I venture into this subject with some trepidation, as my distinguished predecessor in this Chair remains the world's foremost authority on the question of belligerent reprisals.[14] Among the things that his scholarship in this field teaches are that reprisals are sometimes successful in ending violations of the law but more often are unsuccessful, that a threat of reprisal is more likely to be effective than the actual reprisal itself, that reprisals involve a serious risk of moving the Parties involved further away from compliance with the law — exactly the opposite of their purpose — because reprisals often lead to counter-reprisals, and finally that reprisals almost invariably and unavoidably injure persons who are completely innocent of the violations of law that the reprisals are designed to bring to an end.

Nevertheless, despite the limitations, risks, and unfairness of reprisals, the armed forces of many nations, and particularly the lawyers advising those armed forces, tend to cling tenaciously to the right of reprisal. Given the paucity of other devices to repress or punish war crimes by one's enemies and the general assumption of our era — and perhaps of most eras — that one's enemies are likely to be malevolent and will gladly violate the law if it suits their purposes, it is understandable that military lawyers would be reluctant to lose the only remedial measure which they can advise their commanders may lawfully be used in an effort to coerce the enemy to obey the law. Moreover, they can point out that, as enemy soldiers who commit war crimes and enemy commanders who order the commission of war crimes seem unlikely ever to be punished for their crimes for the reasons previously noted, justice requires that such unpunishable crimes be deterred or ended as

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[14] See, in particular, Frits Kalshoven, *Belligerent Reprisals*, Sijthoff, Leiden, 1971.

quickly as possible, and they can plausibly assert that the right of reprisal is essential to that end.

This point of view was consistently rejected in the negotiation of Additional Protocol I. In fact, as Professor Kalshoven has demonstrated, the right of reprisal, although well established in customary international law, has been rejected every time efforts have been made to recognize it in a humanitarian law treaty.[15] But Protocol I went further and explicitly prohibited reprisals against virtually everyone and everything except the enemy's armed forces.[16] And how, one may ask, can a Party to a conflict take reprisals against the enemy's armed forces whom it is in any event trying to kill or capture? The only answer I have heard to that question is that the Party could use otherwise prohibited weapons of warfare. I suggest that such a reprisal is unlikely to be either useful or desirable except, of course, in the situation where the reprisal is itself taken in response to the use by the enemy of prohibited weapons.

While it is clearly important to maintain the right to use illegal weapons in reprisal in order to deter or stop the use of such weapons, I suggest that it may not be the only reprisal measure that should be permitted. What is a country to do, for example, if its enemy adopts a practice of refusing quarter — that is, refusing to take prisoners of war — or of systematically slaughtering part or all of the population in occupied territory? Can the government of the victim State content itself with threats to try the responsible persons for war crimes should it prevail and be in a position to do so? I very much doubt it. I believe the victim in those admittedly extreme circumstances would be compelled to threaten belligerent reprisals of some kind and, if the threat failed to stop the enemy's practice, then to take reprisal action, regardless of the law. If I am correct, then States contemplating ratification or accession to Protocol I should seriously consider making a reservation to at least one of the prohibitions of reprisal set forth in that Protocol in the

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[15] For example, reprisals against prisoners of war are prohibited by Article 13 of the Third 1949 Geneva Convention, and reprisals against protected persons are prohibited by Article 33 of the Fourth 1949 Geneva Convention.

[16] Sick, wounded, and shipwrecked persons, medical personnel, units, and transports (Art. 20), civilians and the civilian population (Art. 51), civilian objects (Art. 52), certain cultural objects and places of worship (Art. 53), objects indispensable to the survival of the civilian population (Art. 54), the natural environment (Art. 55), and dams, dikes, and nuclear power stations (Art. 56).

event of serious and systematic war crimes.[17] Such a reservation should, of course, be so framed as to respect the traditional conditions of a lawful belligerent reprisal, that is, that prior warning has been given and has failed to stop the unlawful acts, that the decision to resort to reprisal is taken at a responsible political level, that the reprisal action is not disproportionate to the unlawful acts against which it is taken, and that the reprisal ends as soon as the unlawful acts by the enemy cease. A Party that accepts the competence of the International Fact-Finding Commission provided for in Protocol I[18] should also condition its reservation by first according the Commission a reasonable time to investigate the alleged unlawful acts by its enemy in any case where its enemy also accepts the competence of the Commission. In my view, such a reservation by a Party that accepts the competence of the Fact-Finding Commission would not be an impermissible reservation, that is, one contrary to the object and purpose of the Protocol.[19] Whether a reservation of a right of reprisal would be permissible if made by a Party that does not accept in advance the competence of the Commission is a more difficult question.

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By mentioning the International Fact-Finding Commission, I have anticipated the third factor that I suggested was responsible for noncompliance with IHL — the general absence of effective monitoring, fact-finding, and dispute settlement mechanisms.

The 1949 Geneva Conventions rely primarily upon the traditional mechanism of the protecting power to verify compliance during armed conflicts.[20] Each Party to the conflict is obliged to designate as a protecting power a neutral State or a substitute international organization which must be acceptable to the opposing Party in whose territory it is to act. The task of the protecting power is to safeguard the interests of the Party that designated it by scrutinizing

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[17] The only Party to Protocol I that has made such a reservation, albeit an ambiguous one, is Italy.

[18] Art. 90.

[19] 1969 Vienna Convention on the Law of Treaties, Art. 19.

[20] See, for example, the Third 1949 Geneva Convention on prisoners of war, Arts. 8, 10, 11 and 126.

the application of the Conventions and by carrying out certain specific tasks set forth in the Conventions. Additional humanitarian functions of the ICRC are also envisioned by the Conventions and equally are subject to the consent of the Parties to the conflict.[21]

The practice of Parties to armed conflicts in the years since 1949 has shown that protecting powers have almost never been agreed to, and the monitoring mechanism on which the Conventions relied has thus been frustrated.[22] During the Vietnam War, for example, the United States sought North Vietnam's agreement to a protecting power or to the ICRC as a substitute to observe the treatment of American prisoners held in the north, but Hanoi refused. While the United States and South Vietnam permitted the ICRC to inspect prisoner-of-war camps in the south and to provide relief to the prisoners held there, Hanoi never agreed that the ICRC or any State or other international organization could serve as its protecting power.

With this experience in mind, the negotiation of Additional Protocol I was seen as an opportunity to improve the available monitoring mechanisms. In the end, two significant improvements were made. First, if no protecting powers have been designated and accepted, the Protocol requires the ICRC to offer its good offices to the Parties to the conflict to facilitate designation of a protecting power.[23] Specifically, it authorizes the ICRC to ask each of the Parties to give it lists of at least five acceptable protecting powers and obligates them to provide such lists within two weeks. The ICRC is required to seek the agreement of any State named on both lists. If, despite these procedures, no protecting power can be agreed upon, the Protocol obligates the Parties to the conflict to accept an offer by the ICRC (should it make such an offer) to be a substitute for a protecting power. In the end, a Party cannot effectively be compelled against its will to accept a protecting power or to permit its delegates to scrutinize application of IHL within territory under its control, but these new provisions in the Protocol should at least make it more difficult and politically costly for a Party to the Protocol to refuse to accept a protecting power or substitute in a future armed conflict, thereby making such a refusal less likely.

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[21] See, for example, the Third 1949 Geneva Convention on prisoners of war, Art. 9.

[22] The only significant exception occurred during hostilities between India and Pakistan.

[23] Art. 5.

In addition, the Protocol makes a major new contribution to the promotion of compliance by, as I noted earlier, providing for the establishment of a new permanent International Fact-Finding Commission, with its headquarters in Switzerland, which will be charged with investigating and reporting to the Parties involved on any allegations of grave breaches or other serious violations of the 1949 Conventions or of the Protocol. The Commission is to function whenever both Parties involved (the accuser and the accused) have accepted the competence of the Commission. The Commission will come into existence as soon as 20 Parties have agreed to accept such competence. At present, there are 19, one of which is the Soviet Union.[24] It seems clear that the establishment of the Commission and the acceptance of its competence by as many Parties as possible will greatly facilitate compliance with IHL. The recent ratification of the Protocol by the USSR and its surprising acceptance of the competence of the Commission are extremely promising developments and should cause the major Powers that have not yet done so to realize the potential benefits of taking the same steps at the earliest opportunity.[25]

In conclusion, it is clear that the problems involved in improving compliance with IHL are both serious and urgent, but it is also clear that remedial actions are available and feasible. What is uncertain is whether the will to press for them can be created. Ignorance can be dispelled, but only by much greater efforts to disseminate knowledge of the law. Skepticism and cynicism can be counteracted, but only if violations of the law are seen to be repressed by means of coercion and by the punishment of those responsible for war crimes. And better monitoring, fact-finding, and dispute settlement mechanisms are becoming available for Nations prepared to accept them. It is the duty of all those who care about IHL to bring these issues to public attention and to impress upon people and upon governments the long-term importance of taking the necessary remedial measures that will strengthen respect for the law and improve in practice the protection accorded to victims of armed conflicts. No one should believe this will be an easy task.

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[24] According to the ICRC, as at 31 March 1991 the following Parties have accepted the competence of the Commission: Sweden, Finland, Norway, Switzerland, Denmark, Austria, Italy, Belgium, Iceland, Netherlands, New Zealand, Malta, Spain, Liechtenstein, Algeria, USSR, Bylorussian SSR, Ukranian SSR, Uruguay, Canada and Federal Republic of Germany.

[25] During the Diplomatic Conference that adopted the Protocols, the USSR was a leading opponent of the Fact-Finding Commission.

Official and public skepticism and cynicism are entrenched and difficult to overcome, and we cannot afford to give any less than our best efforts to this endeavour. For my part, I appreciate the opportunity given me by the great university and by the Netherlands Red Cross to contribute to this vital task.

George H. Aldrich

George H. Aldrich received the LL.B. and LL.M. degrees from Harvard Law School. He has been Deputy Legal Adviser of the Department of State (1969-1977), Ambassador and Head of the U.S. Delegation to the Diplomatic Conference on International Humanitarian Law (1974-1977), Ambassador and Deputy Special Representative of the President for the Law of the Sea Conference (1977-1981), Member of the United Nations International Law Commission (1981), and Judge on the Iran-United States Claims Tribunal in The Hague since 1981. Concurrently in 1990 he became the second holder of the "Red Cross" Chair of International Humanitarian Law at Leiden University.