

## Comments on the Geneva Protocols

My views concerning the negotiation of the 1977 Protocols were set forth some 13 years ago in my contribution to the book published in honor of Jean Pictet,<sup>1</sup> and I do not want to repeat them here. But perhaps, from the perspective of the intervening years, there may be a few things I could usefully add.

First, although I referred in that earlier article to the possible effects of the news media, particularly television, in sensitizing at least Western public opinion and, through the public, Western governments to the harsh realities of warfare and the desperate need to improve both the relevant law and compliance with it,<sup>2</sup> I now believe that I may have understated the power of television. Certainly the television coverage of the terrible recent events in the former Yugoslavia and in several parts of Africa had a major impact on policy-making in the West, both regarding military intervention and the punishment of non-compliance with the law. The creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda would have been inconceivable without the prior, sustained televised coverage of atrocities. The sensitivities thus created have been sufficient even to spur the United Nations to give serious consideration to setting up a permanent criminal tribunal — a development that, when we were negotiating the Protocols, I would have thought would be unlikely for at least another century.

With the cessation of hostilities in the former Yugoslavia and the consequent reduction in both atrocities and television coverage, pressure to make these tribunals successful and to have the most senior and responsible war criminals punished seems sadly to be evaporating completely.

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<sup>1</sup> George H. Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols", in C. Swinarski (ed), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp. 129-137.

<sup>2</sup> *Ibid.*, p. 131.

Television is a powerful medium, but its effects inevitably fade with the passage of time and the direction of attention to other events.

These reflections give rise to the strange thought that perhaps in the 21st century we may see efforts to improve compliance with international humanitarian law that supplement the past and present emphasis on improving oversight by impartial bodies such as protecting powers and the ICRC. There may also be further demands for the opening of all prisons and other detention facilities to frequent international television coverage during armed conflicts. While the difficulties facing any such proposal appear formidable, one cannot deny that television coverage of such facilities might prove a more effective deterrent to atrocities than the theoretical risk of criminal punishment, and thereby outweigh the consequent intrusion upon the privacy of the prisoners of war and other detainees. Somehow, we need to harness the proven impact of television in order to deter atrocities and other war crimes.<sup>3</sup>

Twenty years after the adoption of the Protocols by the 1974-1977 Geneva Conference, I remain unshaken in my belief that Protocol I represents a significant and responsible progressive development of international humanitarian law. There are presently 148 States party to the Protocol, and I believe that it largely represents customary international law today. The unfortunate fact that my own government seems unable to ratify it (or almost any multilateral treaty for that matter) may be of less importance than I would have thought twenty years ago. I firmly believe that nothing I have done in the whole of my professional career has been of more lasting importance than the contributions I was able to make to the negotiation of Protocol I.

Looking back from 1997, I deeply regret that 20 years ago I did not press, within the executive branch of my government, for prompt submission of the Protocols to the Senate of the United States for advice and consent for their ratification. All but a very few provisions had been adopted in Geneva with the complete support of both the U.S. State and Defense Departments, and I believe President Carter and Secretary Vance would have endorsed them. I failed to realize that, with the passage of time, those in both Departments who had negotiated and supported the Protocols would be replaced by skeptics and individuals with a different

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<sup>3</sup> While strict censorship normally accompanies the outbreak of hostilities, there certainly can be exceptions, particularly in areas away from where military operations are being launched. Both Vietnam and the Gulf War of 1990-91 saw much greater press freedom — at least in places — than most earlier wars.

political agenda.<sup>4</sup> Moreover, my own involvement after late 1977 in the ongoing law of the sea negotiations at the United Nations was, of course, a considerable distraction for me, and led in due course to my assignment by President Reagan in 1981 to the Iran-United States Claims Tribunal and my consequent retirement from the Department of State.

As for Protocol II, I regret that the Diplomatic Conference largely failed. Though of some value, that Protocol has much too high a threshold of application and too little in the way of substantive rules. The Conference allowed this to happen in order not to endanger Protocol I and because of the adverse reaction of many developing countries to the draft Protocol II developed by the three main committees at the Conference. So long as governments worry that they might enhance the status of rebels merely by agreeing to treaties restricting how rebels may be treated, the treaty route may not be the most promising way of developing the law. The International Criminal Tribunals for the former Yugoslavia and Rwanda have mandates that may permit them to do more, and the former has already taken significant steps in that direction.<sup>5</sup> In view of the fact that most modern armed conflicts appear to be largely or wholly non-international, the humanitarian importance of continuing improvement in the law applicable to such conflicts cannot be stressed too strongly.

**George H. Aldrich**

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**George H. Aldrich** was the head of the United States delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva, 1974-1977), with the rank of ambassador. Since 1981, he has been a judge on the Iran-United States Claims Tribunal in The Hague, and from 1990 until 1997 he was Red Cross Professor of International Humanitarian Law at Leiden University (Netherlands).

<sup>4</sup> Clearly the rejection of Protocol I by the Reagan Administration was based primarily upon political, not military, considerations, but the rise to senior rank of those who served as junior officers in Vietnam and chafed at the political restrictions imposed upon them there has increased friction in the process of obtaining the support of the Defense Department for ratification of Protocol I. The loss of some of my most important delegation members — Professor, later Judge Richard R. Baxter and Waldemar Solf to untimely death, and Major Generals George Prugh USA and Walter Reed USAF to retirement — drastically thinned the ranks of those who would have effectively pressed for ratification of the Protocols.

<sup>5</sup> See, for example, the ICTY's decision on jurisdiction in *Prosecutor v. Tadic*, Case IT-94-1-AR72 (October 2, 1995), in which the Tribunal held that serious violations of international humanitarian law committed in non-international armed conflicts are international crimes. On this question, see also my editorial comment in 90 *American Journal of International Law*, January 1996, pp. 64 ss., and Theodor Meron's editorial comment in *ibid.*, April 1996, pp. 238 ss.