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Current Initiatives to Reaffirm and Develop International Humanitarian Law Applicable in Armed Conflict

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The Department of Defense, in conjunction with the Department of State, has actively supported the initiatives of the International Committee of the Red Cross to Reaffirm and Develop International Law Applicable in Armed Conflict. The Department is thoroughly committed to do everything in its power to strengthen in every possible way the law which governs the conduct of hostilities and to accelerate to the extent possible the amelioration of conditions under which armed struggle takes place. The Department representatives supported the resolution of the XXI International Conference of the Red Cross at Istanbul in 1969 which requested the International Committee of the Red Cross to prepare concrete proposals which would supplement (but not replace) existing international humanitarian law. In conjunction with the Department of State, representatives of the Department of Defense participated actively in the preparatory conferences of Government Experts which assisted the International Committee of the Red Cross in the preparation of the drafting of additional Protocols. I was one of those experts. These proposals will be the basis for discussion at the Diplomatic Conference called by the Swiss Government. We have submitted many carefully drafted expert views to the International Committee of the Red Cross and, I am happy to say, at least some of the progress that has been made in this complex and controversial field of negotiation has been in part due to our contributions.

Since we are in an early stage in our preparation for the 1974 Diplomatic Conference, I will not be able to make definitive statements on the positions of the Department of Defense on many of the issues that may be discussed here today. I would, however, like to tell you of our purposes and objectives and why we are so involved and concerned.

We want, of course, to mitigate the terrible scourge of war; to protect noncombatants to the extent possible. We want to improve the lot of prisoners of

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†Extracts from a statement made by Major General Prugh, the Judge Advocate General, Department of the Army, on behalf of the Department of Defense, before the Foreign Affairs Committee of the House of Representatives on September 20, 1973.

war, provide for the free movement of relief supplies, reduce damage to civilian property and better the lot of combatants. This list is long.

I can assure you that, based on past experience, our orientation will be positive. The law of war has been developed by military men who recognize that violence and destruction which is superfluous to actual military necessity is not only immoral, but counterproductive to the attainment of the political objectives of the use of military force. The rule of proportionality, which holds that loss of life and damage to property must not be out of proportion to the military advantage to be gained, is closely related to one of the Classic Principles of War: Economy of Force.

From the beginning of our history as a nation we have developed and respected the principle of humanity in limiting and mitigating the sufferings occasioned by war.

General Orders No. 100 was the first codification of the law of war. J. M. Spaight, the distinguished British Commentator on *War Rights on Land* described it as "not only the first but the best book of regulations on the subject ever issued by an individual nation on its own initiative." It formed the basis of the Hague Convention IV of 1907, the latest international convention comprehensively regulating the conduct of hostilities. (The 1949 Geneva Conventions are limited generally to the protection of the victims of war, the wounded, sick and shipwrecked, prisoners of war, and civilians in the hands of an enemy power).

It is inevitable that the laws of war are based on past experience. The drafters of the Hague Conventions of 1907 looked back on the wars of the 19th Century and the Russo-Japanese War of 1905. The 1929 Geneva Conventions were considered in the context of World War I; and the 1949 Geneva Conventions dealt with issues that arose in World War II. It is not surprising that these rules were not adequate to provide for all of the problems which arose in the armed conflicts of Southeast Asia, Southern Asia, Africa, and the Middle East.

As soldiers we value the principles of the humanitarian rule of law highly. We have benefited from the amelioration the law of war affords to human suffering. Even though these principles may have been imperfectly applied, many of us are alive only because of the humanitarian restraint of the law of war. Enemy prisoners of war have benefited even more from our observance of the law of war. Our own interest motivates our thoughtful participation in the effort to provide more effective protection of war victims through the development of improved norms of international law.

These apparently simple and straightforward humanitarian objectives, however, are difficult to obtain. They cannot be achieved by drafting protocols that will not stand up to the test of the battlefield, they cannot derive from conventions that few nations will sign, fewer ratify, and fewer still adhere to. The articles must be designed and negotiated with the utmost care, and

operational personnel and specialists from many disciplines must be involved in their development.

Among the tests that we try to give new law of war proposals are those of feasibility and clarity. We ask the question, "Is it reasonable to expect that a commander in a desperate struggle in the field will comply with this proposal?" Would, for example, a platoon leader, under intense casualty-producing fire and seeing his own men fall and his mission in jeopardy, refrain from returning that fire because he might damage installations needed to support the civil population? Would a rule of international law change this outlook? We believe that a rigorous test of feasibility is the key to whether such laws as are developed will endure and will affect the course of future conflict or whether utopian and illogical constraints will be introduced which will quickly collapse under the hard test of combat. Simply put, we must test for reasonable likelihood that the wisdom of the law will be apparent to most, and that it can and will be respected by the great majority even in the difficult life-and-death circumstances we can expect in armed conflict. If the laws are simply utopian hopes and impractical restraints, these new protocols would not only be useless, they would be detrimental, for they would lead to a weakening of the already existing body of law that has been so painfully constructed over the years.

Clarity is almost as important. It is essential that the laws that eventually will ensue from our deliberations be comprehensible to national decision makers, senior officers, junior officers, noncommissioned officers and to newly enlisted personnel. They must be clear enough so that they can be understood and interpreted and remembered in the field by men who are under high stress and who will often be unable to obtain advice from legal experts when critical decisions must be made.

Blending the Hague Rules and the Geneva Conventions in one instrument has caused concern to some experts, including ours. The Geneva Conventions are entirely humanitarian in scope. They are designed to aid the victims of war in the hands of their enemy. In concept their implementation is capable of supervision by a protecting power or a substitute organization like the impartial and apolitical International Committee of the Red Cross.

The Hague Regulations also covered these areas until, to this extent, they were superseded by the Geneva Conventions. The unsuperseded portions deal with the methods and means of war, and the protection of civilians behind the enemy's lines. With respect to this aspect of the law of war, outside supervision is neither traditional nor easy to visualize.

There has been wide diversity in the national views on the proposals for extending protection to participants and victims of internal armed conflict. The Resolution of these competing views will be difficult.

With respect to internal armed conflict, we believe that important advances in international protection of the victims of noninternational conflicts can be

made. These include making explicit the general principles for humane treatment in Article 3 common to the 1949 Geneva Conventions. These might include specific rules for the protection of women and children, medical personnel, and all persons captured and detained, as well as better provisions for the passage of food and relief to persons not taking part in the conflict. Beyond humanitarian protection of the victims of internal armed conflict, however, we found that most governments are reluctant to provide any recognition, expressly or by implication, of any legal status for insurgents. Some delegations, on the other hand, were anxious to provide prisoner of war protection to those groups struggling for self determination against colonial or foreign domination. These, they view, as international armed conflicts which should be governed by the full range of the law of war, but it is not always clear that their governments are willing to extend the same protection to their opponents.

With respect to guerrillas—or irregular combatants—in an international armed conflict, it has been the view of the Department of Defense that organized irregular forces should be accorded prisoner of war status when captured in combat, but that they must conform to certain minimum requirements to receive this status. These would ensure that such personnel be distinguishable from the civilian population during the conduct of military operations, have some recognizable system of command, and accept the requirement to conform to existing laws of war. In practice, U.S. Armed Forces have been liberal in extending POW status to guerrillas captured in Indochina and, in fact, the Red Cross noted that U.S. practice here exceeded the requirements of the Geneva Conventions.

Another area mentioned by Chairman Fraser in his letter was restrictions on air warfare affecting civilian population. The U.S. has consistently maintained the position that attacks against civilians as such, not just from the air but by any means, must not be carried out. Intentionally terrorizing civilian noncombatants should be forbidden regardless whether it is done from the air, by ground attack or by any other violent undertaking. We consider that it is not the specific means of conducting the attack nor the delivery means used, but the objective of the attack, and how and where it took place, that is the important element in determining the legitimacy of the action. Thus, we would prohibit a deliberate aerial bombardment of a city containing no military targets and we would equally oppose deliberate rocket attacks on urban population centers.

The question of weapons which could cause unnecessary suffering is a complex issue with many ramifications. All weapons, from bayonets to bombs, cause suffering. The real issue is whether they are used to cause *unnecessary* suffering. Our position has been that the best approach is to prohibit the use of weapons in a manner to cause unnecessary suffering. The standard of the Hague Regulations is to measure the suffering which weapons cause against

military necessity. If it is necessary for the accomplishment of a proper military purpose to employ a particular weapon, it cannot be said that the suffering caused by that weapon is unnecessary. The singling out of particular weapons for prohibition is essentially a complicated arms control matter, which could seriously affect military power relationships. The ICRC, recognizing the political and technical basis of this issue, has approached it with prudent reticence. It has been our position that this subject can best be developed in arms control forums where the prohibition of one entire class of weaponry, biological weapons, has already been negotiated. We would, in particular, urge that weapons issues not be allowed to slow or halt progess on other important aspects of the laws of war, which we may otherwise be able to negotiate into treaty form in two or three years.

With respect to distinguishing between military targets and civilian objects, we are guided by the principle that the civilian population as such must never be the object of attack. The same principle applies to objects used only by the civilian population. Conversely, objects intended exclusively for the enemy's armed forces, including food and crops, are legitimate targets under existing law.

The problems in armed conflict is how to treat the enemy's infrastructure which supports both his war effort and the civilian population. Here the present rule provided in the Hague Regulations is that it is forbidden to destroy or seize the enemy's property, unless such destruction is imperatively demanded by the necessities of war. The interdependence of a modern nation's industrial base with its war effort makes the solution of the problem a very difficult one. It requires the application of the rule that the destruction occasioned must not be disproportionate to the military advantage gained. We are giving our best efforts to the formulation of realistic rules.

There are excellent prospects for making progress in a number of other important areas.

Our highest priority extends to more effective implementation of the existing rules and those which are developed. If States will not compy with the almost universally binding Geneva Conventions of 1949, it will be of little value to negotiate new conventions only to have them disregarded.

The effective application of the Geneva Conventions is dependent on supervision by Protecting Powers. It is the failure of these provisions in the 1949 Geneva Convention on Prisoners of War that has resulted in the mistreatment and suffering of POW's and other victims of war and permitted them to be exploited for political purposes.

A central weakness of the Conventions is that they assume that the parties will accept Protecting Powers; they do not provide a mechanism which insures the appointment of either a Protecting Power or a substitute for a Protecting Power. Moreover, the ICRC, whose traditional humanitarian functions are recognized

by the Conventions, is given no treaty right to operate on the territory of a party unless the party decides to authorize such operations. Various proposals are being studied to remedy this weakness. One proposal seeks to provide a mechanism facilitating appointment of a Protecting Power within a specified time. If the procedure fails, then the ICRC or other impartial humanitarian or organization automatically would be permitted to perform that function as a substitute. The basic aim of these proposals is to make it more likely that there will in fact be some external observations of compliance.

We also support measures intended to provide more awareness of international norms on the part of all levels engaged in armed conflict. This includes increased emphasis on training in the law of war in the armed forces and in programs of instruction for the civilian population, and we support international law recognition of the role of the military lawyer as an adviser to commanders.

In the Conferences of Government Experts substantial progress was made in developing concrete texts for improved protection of the sick, wounded and shipwrecked. A major initiative by U.S. experts resulted in consensus on texts for the development of a new regime for improved identification of medical aircraft and substantial progress toward the formulation of new rules for their protection with particular emphasis on battlefield evacuation.

The issues to be addressed in the forthcoming conference are complex. It is clear that certain improvements in the law applicable to armed conflict are called for, especially now that 20 years of experience in such areas as India, Pakistan, Indo-China, Korea, the Middle East, the Congo, and Nigeria has provided us with additional insight into the problems. In searching for improvements, where the balance of interests in armed conflict is so delicate and opinions run so strongly, there is a real risk that some provisions of international law regarded as advances would actually be setbacks. What is needed is a strenghtening of the spirit that underlies the Hague and Geneva rules. What must be avoided is the development of unrealistic rules which would create only the illusion of protection. These would collapse when tested and hasten the erosion and disregard of the Hague and Geneva rules. We are, however, optimistic and committed to these important negotiations. Certainly, the time is opportune. The humanitarian goals before us make our efforts worthwhile.