

was of course utterly opposed to international Communism which, he said, denies the doctrines of Christianity and the divinely endowed rights of man. In view of the known record of Communist governments as to the breach of treaty engagements, he thought it would be suicidal for the United States to stop the production of any weapon it might need to deter attack. "It would not be feasible to vest non-forceable enforcement powers in an enforcement agency as long as member nations are bent on the use of force to impose their wills upon other members." He deemed it impracticable to endow an enforcement agency with powers of inspection that allowed "hordes of aliens to swarm over the country" and engage in "legalized spying." He thought legal machinery centered on an international court could be devised to deal with violations of an arms control agreement, *if* the signatories abide by the rules of law in their international conduct; otherwise it would be impossible. These thoughts taken from his testimony before the Senate Subcommittee above mentioned are by no means a complete summary of his philosophy (which space forbids) but they show the nature and character of his attitude toward international law and certain questions of the day.

One is at once impressed with the thorough preparation of his papers, the historical setting presented, but most of all with the logic and common sense of his arguments. As I look back on the years of close association with George Finch, I carry away deeply engraved impressions of unbounded energy, dogged determination, unbiased sense of justice, deep sincerity relieved with a vein of benign humor—all inspiring respect and affection in the hearts of those fortunate enough to know and work with him.

LESTER H. WOOLSEY

POLITICAL AND HUMANITARIAN APPROACHES TO LIMITATION OF WARFARE

A point of convergence is reached by two diametrically opposite approaches to the problem of the regulation or limitation of warfare. Henry A. Kissinger has produced an extremely thoughtful and interesting book entitled *Nuclear Weapons and Foreign Policy*. This volume is the product of the author's work with a study group at the Council on Foreign Relations, a group which included a large number of persons with experience in foreign affairs, in military affairs, in science and in government. This is a substantial volume of 455 pages which requires careful reading. The other approach is to be found in a little pamphlet of 168 pages published by the International Committee of the Red Cross in September, 1956, entitled *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*. These Rules, with their compact but lucid commentary, were elaborated as a result of consultation with the National Societies of the Red Cross and with a Committee of Experts. This Committee of Experts was drawn from twelve different countries and, like the Council group, included military men, persons with broad governmental experience, and a number of scholars. The Red Cross Draft Rules represent a revision of an earlier draft published in 1955.

Kissinger approaches the problem from a hard-headed analysis of international politics, the fundamental interests of the United States, and the

potentialities of, and limitations upon, military strategy. The International Committee of the Red Cross (commonly referred to as the ICRC) approaches their problem from the basic humanitarian interest for which it is so well known, stressing its essential neutrality in political matters. Both Kissinger and the ICRC are concerned with the devastating potentialities of nuclear war. Both, with a good deal of realism, suggest possibilities for mitigating the horror of the nuclear holocaust. The ICRC stresses the point that because of its essential neutrality "it cannot take direct action to prevent or stop wars, except by rejecting the very idea of war; but it does at least strive continuously to limit their tragic consequences."¹ Kissinger, in some of his finest chapters, analyzes the constant threat to the non-Communist world from Soviet power driven by consistent adherence to a basic doctrine which preaches the eventual destruction of the non-Communist societies. Given the resulting area of international conflict, Kissinger proceeds to argue for the possibility of limited war as an instrument of policy in the nuclear period. Kissinger explains that a limited war cannot be defined in purely military terms. "Limited war is essentially a political act."²

Limited war reflects an attempt to *affect* the opponent's will, not to *crush* it, to make the conditions to be imposed seem more attractive than continued resistance, to strive for specific goals and not for complete annihilation.³

The ICRC addresses its rules for the protection of the civilian population to declared war "or any other armed conflict" including "armed conflict not of an international character."⁴

Kissinger repeatedly points out that under the concept of limited war, since the decision is not wholly in the military field, there must be constant reliance on political action and on diplomacy. The ICRC in drawing up its draft rules stops short of proposing an international convention by which they might be accepted, constantly observing the proper limits of its own activity and leaving political action to governments.

There is no soft-headed thinking in either study; both take account of hard realities. The ICRC, with its long background of studies in the amelioration of the condition of civilian populations, the wounded, and prisoners of war, is quite aware of the limits on the possible and it has made full use of its very experienced and practical-minded experts. Throughout its Commentary, it calls attention to the fact that the most idealistic will feel its proposals fall short of the ultimate *desiderata* but that it has gone as far as is feasible. It has clearly kept in mind that throughout the history of the various regulations of methods of warfare from the Declaration of St. Petersburg of 1868 down through the Geneva Conventions of 1949 and the latest convention in the field, that of The Hague in 1954 for the Protection of Cultural Property in the event of Armed Conflict, successful or even partly successful limitations on warfare have been

¹ *Op. cit.* 3.

³ *Ibid.* 140.

² *Op. cit.* 141.

⁴ *Op. cit.*, Art. 2, commentary, pp. 40 ff.

characterized by a due regard not only for humanitarian considerations but also for military necessity.⁵

It is not many years since a vigorous and perhaps a dominant scholarly opinion felt that any further attempts to deal with the actual conduct of warfare were undesirable because they would weaken the central drive to eliminate war entirely. But it is clear that fighting even between armies has not been eliminated and that various types of armed struggles will unfortunately still take place. Kissinger refers to four possible categories of limited wars.⁶ The first would be between "secondary powers, such as between Israel and Egypt or between India and Pakistan." The second would be wars involving either the Western Powers or the Soviet bloc against distinctly inferior Powers such as Soviet intervention in the satellites "or United States military action in the Western hemisphere" (*sic*). As a third category he suggests a struggle between a major and a minor Power which might spread as in the case of the Chinese move against South Vietnam "or the Anglo-French 'police action' against Egypt." Fourthly he considers the problem of limited war "which begins explicitly as a war between the major powers" but which remains limited. Kissinger gives a few examples of limited war in history but has not drawn on the literature of international law which is extensive on this subject.⁷ Kissinger's extensive bibliography refers to none of the works familiar to international lawyers, and indeed the only one of the international law fraternity who seems to be mentioned is Quincy Wright, who is cited not for his magisterial study of war but for an article on "World Politics" in *Air Affairs*, Vol. 1 (1947). On the other hand, the ICRC is of course thoroughly familiar with the international law literature in this field.⁸

It is pertinent to note that the *Institut de Droit International* established in 1954 its 25th Commission to consider the question whether a new re-statement should be made of the law of war. This Commission, under the distinguished guidance of Professor François of The Netherlands, published its first report last year.⁹ No member of the Commission dissented from the view that an attempt should be made to restate the law of war, although there were natural differences of opinion as to the exact nature and scope of the task which the *Institut* should undertake. As Professor Kunz says, "The times of ignoring the laws of war are over."¹⁰

It may be remarked that both the ICRC and the *rapporteur* of the

⁵ See Royce, *Aerial Bombardment and the International Regulation of Warfare*, Chs. I, IV (1928).

⁶ *Op. cit.* 137-138.

⁷ See the references in the present writer's editorial comment, "Should International Law Recognize An Intermediate Status Between Peace and War?" 48 A. J. I. L. 98 (1954), and "Intermediacy," 23 *Nordisk Tidsskrift for International Ret* 16 (1953).

⁸ For example, it cites at page 39 Kunz, "The Laws of War," 50 A.J.I.L. 331 (1956), and Lauterpacht, "The Problem of the Revision of the Law of War," in 29 *Brit. Yr. Bk. Int. Law* 360-382 (1952).

⁹ The *rapporteur*, in his Provisional Report, refers to the ICRC draft of 1955 and to Kunz's article cited in the preceding note.

¹⁰ Kunz, "The New U.S. Army Field Manual on the Law of Land Warfare," 51 A.J.I.L. 388 (1957).

Institut agree that the laws governing the conduct of war must equally be applicable in cases where the competent organ of the United Nations has designated one of the parties as an aggressor.¹¹ Kissinger does not use the same vocabulary, but he clearly would not distinguish for these purposes between the "just" and the "unjust."

Kissinger constantly emphasizes the point that the horror of the nuclear holocaust deters the use of these weapons or at least creates a psychological block against their use. He never fails to stress the absolutely essential requirement that the United States should maintain its deterrent force which would be capable of striking the Soviet Union if the Soviet Union should attempt to launch a nuclear attack. However, he then considers the possibilities of lesser struggles and the need to be prepared to fight them. Although he does not touch on this subject at all, it is entirely pertinent to a consideration of his thesis to study the problem to which the ICRC devotes itself, namely the protection of the civilian population. Obviously one must bear in mind that fighting may take place not only in the heart of an enemy country but in some peripheral country, for example, in a Korea, in a Vietnam or in a Hungary. Not only would there be no military advantage in unnecessarily injuring civilian populations under such circumstances, but on the contrary, the military advantage would lie in protecting them to the greatest possible extent.

It is generally asserted, particularly by those who have not devoted much study to the history of the laws of war, that it is quite a futile exercise to seek for any regulation of warfare. Nevertheless, at the moment when this is being written the disarmament subcommission of the United Nations at London is seriously discussing a much more difficult task, namely the limitation of armaments, including a limitation on the production, testing and use of atomic weapons and materials. If this is a feasible exercise in statesmanship so also is the consideration of the limitation of the dangers incurred by the civilian population in time of war. Moreover, President Eisenhower has recently laid great emphasis on the efforts of the United States to produce "clean" atomic bombs which would have little or no radioactivity fall-out.¹² The problem of the "clean" bomb is also mentioned by the ICRC¹³ and by Kissinger.¹⁴

The ICRC makes "every effort to ensure that if violence is used, as is always possible, certain humane rules . . . protect the people who are not taking part in the struggle."¹⁵ Kissinger urges that

The United States should . . . shift the emphasis of disarmament negotiations from the technically almost impossible problem of preventing surprise attack to an effort to mitigate the horror of war.¹⁶

Kissinger would seem to agree with the conclusion of the ICRC experts that from a military appreciation, indiscriminate air bombardment has

¹¹ ICRC, *op. cit.* 45; *Institut*, report, p. 9. The present writer shares this view: see *A Modern Law of Nations*, Ch. VIII (1946).

¹² President Eisenhower's Press Conference July 3, 1957, *N.Y. Times*, July 4, 1957.

¹³ *Op. cit.* 109.

¹⁴ *Op. cit.* 232.

¹⁵ *Op. cit.* 3.

¹⁶ *Op. cit.* 231.

not "paid."¹⁷ The ICRC would no doubt agree with Kissinger's conclusion:

A program which sought to establish some principles of war limitation in advance of hostilities would seem to make fewer demands on rationality than one which attempted to improvise the rules of war in the confusion of battle.¹⁸

It is true that Kissinger is not attempting to lay any stress upon the conclusion of agreements among nations about limited war, and of course he places no reliance on promises, whether in treaties or otherwise, emanating from the Soviet Union.¹⁹ He is concerned to show the self-interest which would induce both sides to recognize the value of limited war. He faces the difficult task of convincing people, particularly military people, that they must change their fundamental conceptions of war. In this respect his problem is not greatly different, it is believed, from that which has been suggested concerning the need for breaking away from the traditional dichotomy in international law between peace and war.²⁰ The rules governing the treatment of prisoners of war, which is one of the accomplishments to which the ICRC has so greatly contributed, rest on self-interest, although the movement for their adoption had a humanitarian motivation. It is true that for this purpose it was necessary to have various detailed provisions partly for the guidance of protecting Powers. But the observance of the conventions—and they have been observed by and large in spite of some violations—results from the fact that they have been drafted realistically by military people, with the urging indeed of humanitarians, but always with an eye to practical self-interest. Kissinger, in effect, argues that an intelligent appreciation of self-interest might well lead to a continued limitation of a war and to a cautious type of military tactics which would obviate the possibility of the limited war developing into the nuclear holocaust.

It is not the purpose here to review the details of Kissinger's book or the details of the rules proposed by the ICRC. What is suggested is that these very different but concurrent studies both reject the idea that it is impossible to achieve some limitation of warfare. The realists would be acting unrealistically if they fail to appreciate the contribution which the moralists and legalists can make to an essentially common objective.

PHILIP C. JESSUP

THE HONDURAS-NICARAGUA BOUNDARY DISPUTE

Students of American Constitutional law, who are familiar with the numerous boundary disputes between the States of the United States and with the principles laid down by the Supreme Court for their solution, will follow with particular interest the long-standing dispute between Honduras and Nicaragua which now happily has been submitted to the

¹⁷ ICRC, *op. cit.* 22.

¹⁹ *Cf. ibid.* 232.

¹⁸ Kissinger, *op. cit.* 230.

²⁰ See the articles cited *supra*, note 7.